Vol. I

TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS,

vs.

MYTINGER & CASSELBERRY, A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED JANUARY 30, 1950.

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1 IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, PLAINTIFF,

vs.

OSCAR R. EWING, ADMINISTRATOR, FEDERAL SECURITY AGENCY, PAUL B. DUNBAR, COMMISSIONER, FOOD AND DRUGS ADMINISTRATION,

CHARLES W. CRAWFORD, ASSOCIATE COMMISSIONER, FOOD AND DRUG ADMINISTRATION,

LOUIS D. ELLIOTT, ASSISTANT COMMISSIONER, FOOD AND DRUG ADMINISTRATION,

GEORGE P. LARRICK, ASSISTANT COMMISSIONER, FOOD AND DRUG ADMINISTRATION, AND

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS.

Reporter's Transcript of Trial Proceedings—Filed January 27, 1950

Washington, D. C.,
Monday, October 17, 1949.

The trial of this case was begun before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit,
2-3 and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a.m.

APPEARANCES:

On behalf of the plaintiff: MR. CHARLES S. RHYNE and MR. LESTER L. LEV.

On behalf of the defendants: MR. VINCENT KLEINFELD, Attorney, Department of Justice, and MR. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

4 PROCEEDINGS

THE CLERK: Mytinger and Casselberry, Inc., *vs.* Oscar R. Ewing, et al.

JUDGE CLARK: There have been a lot of motions here. I suppose you wish to dispose of them?

MR. RHYNE: Yes, your Honor. There are two preliminary motions. The first one is my motion to substitute the new Attorney General, J. Howard McGrath, for Tom C. Clark. Since the defendants have filed no points and authorities in opposition to that motion I take it they concede it.

MR. KLEINFELD: Of course, we have no opposition. I just want to point out to the Court that I think this is another indication that the suit is one really against the United States, suing the Attorney General and, therefore, there is a reason why the Court except for the constitutional questions is without jurisdiction. But we don't object to the motion.

COLLOQUY RE MOTION FOR MODIFICATION OF PRETRIAL ORDER

MR. RHYNE: If your Honor please, the next motion is our motion for modification of the pretrial order so as to be sure that the issue of oppressive action by the defendant is before the Court.

JUDGE GOLDSBOROUGH: The issue of what?

MR. RHYNE: Oppressive abuse of power by the defendants is before the Court. The reason I filed that motion for modification of the pretrial order was that on the 18th of September when
5 we argued the motion for consolidation and removal of the libel actions to Los Angeles, the Government appeared in Newark, New Jersey, and opposed that motion, and in the course of their argument they argued that that was not an issue before this Court at all, that the only thing before the Court was their action in making this determination, and it seemed to be their understanding that we could not show the multiplicity of actions and all the things that flowed from those multiple actions. And I thought that we understood when we went to the Supreme Court of the United States on this writ of prohibition, we stated two issues: One, the constitutional issue, and the other one, which I call to make it short, the issue of oppressive action by multiplicity of action.

So, as I say, the Government opposed the consolidation and removal of those actions to Los Angeles, and in the course of their argument they placed a very narrow interpretation upon the issues before this Court, so I thought that I should raise this point: that under my understanding of the issues and my understanding of the matters that were presented to the Supreme Court of the United States on the defendants' writ of prohibition, that we had those two issues.

So I filed the motion. It came before Judge Goldsborough, and I believe Judge Goldsborough agreed with me and the Government indicated that they wanted to be heard by the three judges,
6 so the matter was held for action at such time as we could get the three judges together.

Again the defendants had failed to comply with rule 9 of our local rules requiring points and authorities in opposition to motions. They filed no opposition, although they did appear in opposition before Judge Goldsborough, and the Court will recall that if you don't file such points and authorities within five days after service of such motion upon you, the motion is taken as conceded.

But as I say, they appeared before Judge Goldsborough and opposed it although they did not file anything.

I thought that I should raise this matter and ask just to be sure that we would have no argument about what the Court was going to consider, that this issue be added, although I first thought that as broadly interpreted the issues formulated by Judge Tamm would be broad enough to allow us to offer this proof, but I wanted to be sure that the government couldn't claim they were surprised or didn't understand the issues, because it was they who filed the motion for a pretrial order. And we both submitted proposed issues and then Judge Tamm and your Honors formulated these issues and sent them to us.

I move that we be allowed to modify the pretrial order by adding this third issue:

Whether the defendants have by oppressive, arbitrary, un-
7 lawful and capricious action inflicted irreparable injury upon plaintiff and threatened further such injury by so planning their actions against plaintiff as to irreparably injure plaintiff and threaten further irreparable injury prior to any possible adjudication in any of the libel actions of the merits of the claims made by the defendants against the pamphlet "How to Get Well and Stay Well."

Without going into it in any more detail because I believe the Court does understand this case rather thoroughly——

JUDGE CLARK: I must say that when I read your motion I was inclined to take that as an abandonment of your theory of unconstitutionality.

MR. RHYNE: No, your Honor. You see, I am adding a third issue. The first issue is constitutionality, as stated by Judge Tamm. The second issue, as construed, I believe, by the Government, is the unconstitutional abuse of power in making the decisions, not the acts that they did, thereby trying to put us out of business you see, and I wanted to add this third issue so as to be sure that the Court could consider this unconstitutional abuse of power and we could prove the acts that they did after they made those decisions without the hearing as well as before. So it is not abandonment of the first issue at all.

I therefore move that this pretrial order be amended by adding this as a third issue, so that we can prove, first, the unconsti-
8 tutionality, second, the acts that they did before in making this determination, and third, the acts that they did in trying to put us out of business before we could get a hearing on the merits of their claims.

JUDGE CLARK: Do you wish to be heard, Mr. Kleinfeld?

STATEMENT ON BEHALF OF DEFENDANTS

MR. KLEINFELD: May it please the Court, first of all, as far as the failure of the Government to serve points and authorities, this motion was made fairly informally. It was called up before Judge Goldsborough on one day's notice. We argued it informally, and we did not believe for a moment that Mr. Rhyne wanted any written points and authorities. It was a very informal thing and, as I say, it was brought up on one day's notice.

We did appear, however, in opposition. From the very beginning of this case, the Government has been honestly in some doubt as to what the issues really were to be tried before this Court. That was the reason, and the only reason, we went to the Supreme Court for a writ of prohibition. We wanted to find out just what the Government was being called upon to litigate.

After the return of this Court to the writ of prohibition, to make the issues quite clear, the Government made a motion for a pretrial order. The Government served the proposed order; counsel for the plaintiff served the proposed order. The Court gave it deliberation and the Court, all three judges signing it, signed a pretrial
9 order.

Now, the question which Mr. Rhyne raises about a week before the trial is not the construction the Government puts upon the order. He quarrels with the pretrial order and the issues.

Here is what the issues are, as directed by this Court:

"(1) The constitutionality, under the due process clause of the Fifth Amendment of the Constitution, as applied to the facts in this case, of that provision of section 304(a) of the Food, Drug and Cosmetic Act under which the defendants have taken the libel and seizure actions, without affording to the plaintiff a hearing, for the purpose of establishing that the plaintiff's labeling was not, in a material sense, misleading, to the injury or damage of the purchaser or consumer."

That is the major constitutional question, to decide why this Court was put in being. We say that still is the major question.

If this Court decides, or if counsel concedes that that is no longer the question, then, of course, this Court has nothing to determine and should send the case back to a one-judge court for decision.

The second issue, put down very clearly, very succinctly, signed by the three judges, was this:

"Whether the defendants in violation of the Fifth Amend-
10 ment to the Constitution, acted arbitrarily, unlawfully, oppressively and capriciously in determining under section 304(a) of the Food, Drug and Cosmetic Act, that the labeling of the plaintiff's product was, in a material respect, misleading, to the injury or damage of the purchaser or consumer, without affording the plaintiff a hearing."

Now, these two issues do boil the case down to what it amounts to. The first issue is the major constitutional issue.

JUDGE GOLDSBOROUGH: This Judge of the Court would like to know two things before you proceed: One is, do you contend that the suggested issue does not raise an issue of law?

MR. KLEINFELD: I contend it does not raise an issue at all.

11 JUDGE GOLDSBOROUGH: All right, go ahead.

MR. KLEINFELD: The second issue is the issue as to whether, assuming the provision of the act which permits multiple seizures to be made upon the basis of an administrative determination—made without hearing—whether assuming that is constitutional, the defendants in making multiple seizures based upon a determination of probable cause, have acted illegally, arbitrarily or capriciously. There is no question but that the statute does provide that multiple seizures may be made if the administration makes a determination of probable cause without a hearing.

Now the issue which we have always understood is this: Assuming that is so, did the administrator, in reaching that administrative determination, upon the basis of which multiple seizures were made, act arbitrarily or illegally, or beyond the scope of his authority? If he did he should be enjoined from doing so but it still boils down to that one issue: in making that administrative determination, permitted by the statute, did he act illegally, and that is what the second issue clearly says.

In that connection I would like to call the Court's attention to the fact that we have always stated—and I think fairly—that all the amended complaint alleges is conclusions. It says: "The de-
fendants acted arbitrarily; the defendants acted illegally;
12 the defendants acted arbitrarily and capriciously."

Those are the words. So we served interrogatories upon them. We said this: "In what way is it claimed by you that these defendants or any of them have abused their power in violation of the due process clause of the Fifth Amendment?"

We also said, "In what way did the defendants act arbitrarily? In what way did they act illegally?" We said, "Construe those

words and conclusions and tell us just how we acted illegally or arbitrarily."

Here are the answers to the written interrogatories. Here is the illegal action taken by the defendants: "1. The rendering of three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading."

Nobody disputes that the findings were made by the plaintiff. Nobody disputes that they were made without a hearing—that is what the statute says—so to say that that is illegal is again begging the question.

2. What is the next illegal and arbitrary action? "The carefully concealed fact from plaintiff that such secret decisions had been unlawfully made by the defendants, such fact being first revealed to plaintiff on 17 January 1949."

Again the only point they make here is that the administrator under the statute made a finding without a hearing. That
13 is what the statute provides. If it is constitutional that is not arbitrary or illegal.

3. What is the next arbitrary action on the part of defendants? "The inflicting of irreparable injury upon plaintiff by such decisions." That is obviously begging the question. Any law suit may cause irreparable injury. The question, however, for the Court to decide is: Was the inflicting of this irreparable injury caused by an illegal and unconstitutional act or not, so that doesn't state any fact at all.

4. What is the next illegal conduct? "The deliberate increase in Plaintiff's irreparable losses by the unreasonable failure to procure the dismissal of all but the first libel for condemnation or seizure action after all but the first thereof had been judicially declared void and illegal."

By that I assume plaintiff is saying that Judge Pine at one time declared that the administrative finding of the statute had to be made by the Federal Security Administrator, not by any subordinate to whom that authority had been delegated.

We say to that that if these suits were illegal, all the plaintiff had to do was move for their dismissal. He didn't do that, so I don't see how it can be claimed that the defendants acted illegally or arbitrarily.

The next illegal conduct: "The denial by the Acting Administrator of the Federal Security Agency of plaintiff's requests
14 for opportunities to be heard upon the question of whether the labeling of plaintiff's product is misleading, in a material respect, to the injury or damage of the purchasers or consumers."

Again he says the illegal conduct is the failure of the Administrator to give him a hearing, but again the statute provides that no hearing may be given, so that is no proof or allegation of any sort. What is the next one? "The further rendering ex parte by the Acting Administrator of the Federal Security Agency of unlawful decisions that the labeling of plaintiff's product is misleading to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact, the case."

That again is just a mere allegation. There isn't the slightest statement of fact. It is merely a conclusion of law that the defendants acted unlawfully in some manner. Not the slightest single proof or allegation even of any substantial claim that defendants did anything other than what they were supposed to do under the law. What is the next one?

JUDGE GOLDSBOROUGH: Is it your contention that arbitrary and capricious conduct is beyond the investigation of the Court?

MR. KLEINFELD: I do not so contend.

JUDGE GOLDSBOROUGH: What do you contend, then?

15 MR. KLEINFELD: Let me go after it again: I claim this: that the statute authorized the Federal Security Administrator to make an administrative determination.

JUDGE GOLDSBOROUGH: Without a hearing?

MR. KLEINFELD: Without a hearing.

JUDGE GOLDSBOROUGH: Suppose his conduct is arbitrary and capricious: Is that beyond the investigation of the Court?

MR. KLEINFELD: His conduct in reaching that determination?

JUDGE GOLDSBOROUGH: Yes.

MR. KLEINFELD: That is before this Court and that is what the issues say. We are satisfied with that. We quite agree that the Court has jurisdiction to decide if the Administrator acted arbitrarily in reaching that determination, that if the Administrator said in reaching that determination, "I just don't like the defendants; I don't like the ties they wear; I don't like the hats they wear," in reaching that determination of probable cause. Certainly this Court has the jurisdiction to decide if the Administrator acted arbitrarily in reaching that determination of probable cause upon the basis of which these multiple seizures were made. We don't dispute that—that is what the pretrial order issues say—but this third issue is some shotgun issue. Did the defendants act arbitrarily or capriciously in some manner? We don't know what they mean. We can't possibly try that. I suppose they

16 mean: Did some local official do something? Did some Assistant U. S. Attorney do something? But that has nothing to do with whether in reaching the determination authorized by statute the Federal Security Administrator acted arbitrarily, illegally or capriciously.

We admit that that issue is before this Court—that is what the pretrial order says—but the third issue is something which we don't understand. It is just a blunderbuss thing saying that somebody or somebodies acted arbitrarily. We don't know that. What does the amended complaint ask of this Court?

JUDGE GOLDSBOROUGH: In this case, according to my understanding of the record, some eight or ten suits have gone in.

MR. KLEINFELD: Yes.

JUDGE GOLDSBOROUGH: Confiscating these products.

MR. KLEINFELD: Not confiscating; putting them under the custody of the Marshal until the suit could be determined.

JUDGE GOLDSBOROUGH: It is your theory, as I understand it, that this Court is without jurisdiction to inquire as to whether or not there was arbitrary and capricious conduct to bring this multiplicity of suits. That is what you contend?

MR. KLEINFELD: No, I say that depends, your Honor.
17 Those suits could only be brought if this administrative determination were made. If the administrative determination were not made these suits could not be brought.

We agree with your Honor that there are two issues before the Court: whether this administrative determination upon the basis of which and only upon the basis of which these ten seizure actions were instituted—whether this administrative determination was reached arbitrarily or capriciously. Any proof to that effect would persuade the Court to hold against defendants.

We admit that. We can only start these multiple seizure actions if the Federal Security Administrator under the statute says, "I determined that I have probable cause to believe, from facts found without hearing, that the labeling of this product is misleading, in a material respect, to the injury or damage of the purchaser or consumer."

If he has made that determination illegally and arbitrarily, and from which flow these multiple seizures, this Court, of course, has jurisdiction to determine that fact. That is what the pretrial order says—we don't dispute that—but the making of the multiple seizures depends 100 per cent upon this administrative determination. If he didn't make the administrative determination the seizures could not be made. He did make the administrative
determination. Nobody disputes that. Nobody disputes
18 that he did it without a hearing.

JUDGE GOLDSBOROUGH: As I understand it, if he were justified originally in making the determination that he did, if the determination was not arbitrary, then he could bring all the suits he wanted and take all the property he wanted under his control, and put the plaintiff out of business before the suits were decided, is that what you mean?

MR. KLEINFELD: Assuming that the law is constitutional.

JUDGE GOLDSBOROUGH: That is what I understand you to say.

MR. KLEINFELD: That is correct, since Congress has clearly given the power to the Administrator. Maybe Congress shouldn't have—I don't know—but that is what the law says. If we say he has the clear power he has, but nevertheless abuses it if the acts are capricious and illegal, then this Court should enjoin the defendants from doing so. But if he hasn't acted arbitrarily, if all he has done is what Congress said he could do, if he took it, if he considered the problem, considered it reasonably, didn't act arbitrarily, illegally or capriciously, then he has done what Congress has said he may do, but if he has abused his power by acting illegally or capriciously then, of course, this Court has the power to enjoin him from doing it. Those are the two issues which this court has built up thoroughly in the pretrial order.

We don't dispute that. I read these interrogatories. Although I admit it is late, I think if the amended complaint and the
19 answers to the defendant's interrogatories are read it will be seen that the plaintiff really states no cause of action here.

JUDGE GOLDSBOROUGH: Is it your view that the Court should entertain testimony concerning the number of suits brought and the circumstances under which they were brought in order to enable it to determine whether the initial action of the Administrator was arbitrary?

MR. KLEINFELD: If there is some showing that the doing of some act after the making of the determination of probable cause reveals that the determination is arbitrary, if it is relevant, then, of course, it should be admitted, but if it isn't relevant to that point, then I say it just isn't relevant and shouldn't be admitted. Still the issue remains: Did the government official who made this statutory determination without hearing act arbitrarily or capriciously when he sat down and said, "I considered this"? When he reached that determination did he act as a reasonable government official in exercising his conscience or did he have some malice toward the plaintiff? If he did that then he ought to be enjoined but still that is the issue which is before this Court and that is the only thing the plaintiff asks in his amended complaint.

What does he ask this Court to do? He asks only one thing and that is the only thing he can ask. He asks this Court
20 to prohibit the defendants from making multiple seizures. Now this Court can only enjoin the defendants from making multiple seizures if the law is unconstitutional or if the administrative determination upon the basis of which these multiple seizures were made—if that administrative determination was made arbitrarily or capriciously. That is all he asks in the amended complaint and I can't think of anything else he can ask.

He wants this Court to stop the government from making multiple seizures, but these multiple seizures were made upon this adminis-

trative determination. Therefore, it must necessarily boil down to this: if he wants the relief he asks—and he can't ask for any more—what did the defendants do that was illegal or arbitrary or capricious in making this determination of probable cause upon the basis of which these multiple seizures which he wants stopped were made? That is the only relief he asks. That is the only relief that the Court could possibly give. He wants us to stop making multiple seizures, since we are making them upon the basis of an administrative determination of probable cause.

We may be stopped and we should be stopped if either the law is unconstitutional, if the Administrator acted beyond his authority or arbitrarily or capriciously in that determination of probable cause. I can't see any other issue that possibly could be tried.

21 We don't know how we could possibly meet this blunderbuss contention that somebody or some people did something which the plaintiff doesn't like. That has nothing to do with this administrative determination. We have done what the law permits us to do. He quarrels with the law or he quarrels with the determinations we have made under the law.

We are willing to have him quarrel with that and we are willing to meet him on that point, but that is all that can possibly be litigated. Not the question of jurisdiction. It just can't be.

There is nothing more the Court can do to prevent us from making multiple seizures. That is all the Court can do—that is all he asks the Court to do—and the Court can only do that if the law is unconstitutional or if the administrative determination, from which necessarily flow these seizures, was made arbitrarily, capriciously, or illegally.

I do urge, however, late as it is, that the Court give consideration to the pleadings and the answers to these interrogatories. I think they will reveal that there is no statement of fact indicated anywhere, and that really judgment on the pleadings should be given to the defendants here.

Response on Behalf of Plaintiff

Mr. Rhyne: I don't believe that I have any response to make except that it seems to me that counsel is trying to confuse rather than clarify the issues, and I had hoped, by this amendment, to leave no doubt about what the Court would consider—at

22 least put them on notice—and he said this was filed at the last minute. It was filed on the 20th of September, immediately after they made their contentions in Newark about the fact that nothing beyond the decision could be shown. I think that by acting on this motion now the Court will put the defendants on notice that they will consider both their action in making this decision and the fact that they made these ten seizures throughout the country and planned to make many, many more.

MR. KLEINFELD: May I submit to the Court a trial brief which we have prepared?

JUDGE CLARK: Yes.

MR. KLEINFELD: Thank you. I have analyzed the complaint on page 21 of our trial brief.

JUDGE CLARK: The Court will stand in recess for ten minutes.

(Whereupon a recess was taken.)

23 JUDGE CLARK: The Court will tentatively sustain the motion of the plaintiff. If the evidence doesn't seem to bear it out, the Court will, of course, have control of the record for the purpose of striking.

MR. KLEINFELD: May I respectfully, for the sake of the record, object on the ground that it is not within the issues here?

JUDGE CLARK: Certainly. Exception may be noted.

COLLOQUY RE DEFENDANTS' OBJECTIONS TO INTERROGATORIES

MR. RHYNE: If the Court please, the other preliminary matter that I believe is before you is certain objections made by the defendants to certain of our interrogatories. I would like to suggest that in the interest of saving time that those objections be passed upon at the time I put some of the defendants on the stand and ask them those questions, which I think, if I need to do that, the questions can be passed on at that time.

If I do not need to put them on the stand, I will simply waive answers and withdraw the questions.

MR. KLEINFELD: Your Honor, I suggest that that would further complicate the case. I urge that the issues be thrashed out and determined now to get it over with so that we know what we are dealing with in the course of the trial. We are willing to argue it now.

JUDGE CLARK: All right. You may proceed, Mr. Rhyne.

MR. RHYNE: Before I call my first witness, if it is per-
24 missible, I would like to make just a short opening statement.

JUDGE CLARK: Mr. Kleinfeld's point which the Court was sustaining was that you better dispose of that matter before you start in with the testimony.

MR. RHYNE: I see. All right. I suppose you want to hear them on their objections before you hear me. I would like to say, though, in order to save time in court: The first two questions that we ask will probably take a very long time to argue, so I withdraw those and they can go to their next one.

MR. GOODRICH: You withdraw one and two?

MR. RHYNE: I do. That will take you to six.

MR. GOODRICH: Interrogatory No. 6 requests of the defendants in this case that they answer, "Upon what specific complaint do

you base your denial in answering No. 38 of plaintiff's first request for admissions that no complaint of injury or damage to any purchaser or consumer has been received by you."

Before going into these interrogatories, I think we should bring the members of the Court up to date on the process of discovery so far in this case.

Judge Tamm has heard most of the preliminary matters dealing with this question, and, briefly, I would like to call to the Court's attention what has happened.

25 First, the plaintiff served upon the defendants notice to take the oral depositions of the Federal Security Administrator, the Commissioner of Food and Drugs, the Associate Commissioner of Food and Drugs, and the Assistant Commissioner of Food and Drugs. These depositions were taken.

Before they were taken a subpoena was served upon the Federal Security Agency, defendants, requesting that they produce all of the records of the agency and that they answer a number of questions.

The defendants appeared before Judge Clark with a motion to quash the subpoenas, alleging in the motion to quash that there was a criminal action pending in the Southern District of California, ready for trial, the action being against Mytinger and Casselberry, a partnership which was the predecessor of the plaintiff in this case.

The defendants objected that discovery in this civil case for the purpose of discovering evidence that was obtained for the criminal case would be improper. Judge Clark there limited discovery in this civil case to matters that relate to the civil case, and excluded from discovery all those matters that relate to the criminal case.

These complaints of injury to the purchaser or consumer referred to in interrogatory No. 6, and the interrogatory No. 6 directed to obtaining those reports, are part of the Government's criminal case in California. For that reason, we object that the discovery

26 of those complaints is improper in this action, and for the further reason that specific complaints have no materiality and are entirely irrelevant to the issues that are before this Court.

It is difficult, I am sure—it is for me—to say at this time, with the force that I could have, had this motion to expand the issues not been sustained, that these issues are irrelevant. We respectfully submit, however, that the complaints of specific injuries have no materiality to the Administrator's determination that the label would be in a material respect misleading, to the damage of the purchaser or consumer.

JUDGE GOLDSBOROUGH: You are referring to Interrogatory No. 6?

MR. GOODRICH: Yes.

JUDGE GOLDSBOROUGH: Is that the specific complaint?

MR. GOODRICH: Yes.

JUDGE CLARK: Isn't that the one Mr. Rhyne withdrew?

MR. GOODRICH: No, sir, he withdraw one and two, your Honor.

MR. RHYNE: If the Court please, since my adversary refers with such great force to the criminal action out on the Pacific Coast, I want to say to the Court that Judge Harrison, who has that matter before him, has stated and we will offer a transcript of
that statement—that that entire case is a waste of Govern-
27 ment money and if he were the District Attorney he would have dismissed it.

JUDGE GOLDSBOROUGH: The Trial Judge in California, you mean?

MR. RHYNE: Yes, the Trial Judge before whom it is, and who has never set it for trial and who keeps putting it off. He made that statement. I have the transcript here. We will offer it at the proper time.

In the second place, I took these people's depositions. Certainly, I did. I used every means open to me under the Federal rules of civil procedure to try to find out what these people had done and why they had acted and what was the basis of their action, and I asked the four men who have made depositions here whether or not they had seen any Complaints from anyone that they had ever been hurt by our product or its labeling. They all said No.

Yet, when I asked them to admit that, in the admissions they denied it.

JUDGE GOLDSBOROUGH: Is it in the record in this case what they said?

MR. RHYNE: They are in the four depositions. Those statements are there. I will offer them.

JUDGE CLARK: I understood the Government to admit in the first hearing of this case that there was nothing dangerous or deleterious
in this product. I may have been mistaken but I certainly
28 thought that the Government clearly admitted that before.

MR. RHYNE: Yes, they did. You see, what they really did was after the ruling by Judge Clark they really stripped their files and they themselves decided what would belong in the criminal case and what would belong here, so we got very little information. And that was the reason why after their four top people who made these decisions said they had seen no complaints, and had no facts before them showing injury or damage. I wanted to know if they had any complaints. And I thought I was entitled to know that.

Therefore, in all sincerity, since they denied that they did have complaints, I wanted to see them, because I think that it certainly goes to their arbitrary action.

JUDGE TAMM: They denied that they did have complaints?

MR. RHYNE: You are right, your Honor.

JUDGE GOLDSBOROUGH: You say they denied they had complaints?

MR. RHYNE: I asked these four people whether they had seen any complaints. They all said No. Then I asked them to admit that so I could use that admission to shorten proof, and they denied that

Now, if they have developed complaints since I took their depositions I think I ought to know about it. I don't believe that the complaints, if they have any, should be taken out of the file and related to this criminal case entirely. All I ask them is: do they have complaints? If they have them, I would like to see them.

MR. GOODRICH: If it please your Honors, the defendants who were interrogated were the individual responsible officers of the Food and Drug Administration.

JUDGE CLARK: They are the ones who issued the order?

MR. GOODRICH: Yes, sir. They were the ones who issued the order. They answered that they had not seen the complaints. The request for admission was: Does the Food and Drug Administration, in any of its files, have any such complaints? We do. Of course, we do, in the criminal action which we were preparing for trial.

Mr. Rhyne said that Judge Harrison says he will throw that case out. It hasn't yet been dismissed and we have never yet failed in a case of that kind which involves serious diseases such as cancer and tuberculosis.

JUDGE CLARK: I understand you are claiming that those fellows, who are responsible heads of this Administration and the Food and Drug Administration, just waded in and started trying to put this concern out of business without having any evidence before it in the shape of complaints?

MR. GOODRICH: The defendants in this case, your Honor, have followed the statutory provisions. The doctors of the Food and Drug Administration found: This product will not cure the common diseases; this product is no good for tuberculosis; this product is no good for diabetes; this product is no good for cancer; and so forth. The doctors said that.

Now, the administrative officials read the book, "How to Get Well and Stay Well," in three editions. They found that the drug was represented as a preventive and a cure for those conditions; it wouldn't be effective for those conditions; therefore, the labeling is in a material respect misleading to the injury or damage of the purchaser or consumer, and whether or not a single person had complained, the decision would have been the same under the normal administration of this statute.

MR. RHYNE: Could I say one more thing, your Honor, since he talks about what they found? I would like to say that we did find in these files the reports compiled by their own investigators saying just the opposite, that they had gone out and talked to users and consumers, and those users and consumers didn't think we had made any such representations, that those users and consumers did not say that we represented it would cure anything.

We have those reports compiled by their own inspectors. I thought, if they had something on the other side, that under the

process of discovery I should look at it. It looked to me like the only thing they had in their files was in our favor. They made these surveys out in Minnesota and Nebraska and they went around and asked the people.

We have got those reports out of their files. What do you think they said? All of them said, "We don't think that the product would cure anything; we don't understand this pamphlet as saying we represented it would cure anything."

Those were compiled by their own inspectors. If they have something on the other side in the nature of complaints, I thought we were entitled to see them under the discovery rules in order to meet them here. What I was afraid of was that they would talk about this criminal action. I have told you what the judge thinks about that—that they would talk about that, that suddenly they would face us with all this stuff in court, and if I had known about these complaints before, we could have gone out and interviewed those people and found out whether they did make them.

So I would like to have an answer to that question.

JUDGE CLARK: The Court will overrule the objection as to that interrogatory.

Mr. GOODRICH: May we have an exception?

JUDGE CLARK: Certainly.

Mr. GOODRICH: Interrogatories No. 7 and 8 are of the same type, and I suppose the Court will rule the same?

JUDGE CLARK: The Court will rule the same.

Mr. KLEINFELD: Same objection, your Honor.

Mr. RHYNE: Thirteen is your next objection.

Mr. GOODRICH: I assume the Court's ruling is the same on No. 13, "Give the names and address of users of Neutrilite who, as indicated in your response to No. 41 of plaintiff's first request for admissions, have been interviewed by you or your employees, agents or servants."

JUDGE CLARK: The objection is overruled.

Mr. GOODRICH: May I inquire, your Honor, does that mean that the Food and Drug Administration is to supply Mr. Rhyne with reports of every interview with every user we have had, criminal case or not?

JUDGE PAYNE: The interrogatory doesn't ask for anything other than the names and addresses.

Mr. GOODRICH: He comes to that in a little bit and asks that we attach all those. This is a preliminary objection.

JUDGE CLARK: I think, under the rules, they are entitled to that information.

Mr. GOODRICH: The same objection to No. 14. The ruling would be the same.

JUDGE CLARK: Yes. Exception will be allowed.

Mr. GOODRICH: The same for No. 16.

JUDGE CLARK: What is No. 16?

MR. GOODRICH: No. 16 is attached copies of all such interviews and reports.

JUDGE CLARK: Yes. All right. It will be the same action.

33 It will be overruled.

MR. GOODRICH: No. 18, "Give the names and addresses of any other persons not included within No. 13 above who were interviewed by you or by your agents, employees or servants with respect to the product, Nutrilite, or the manufacturers or distributors thereof."

This, your Honor, would require considerable compilation of data or correlation of investigative reports. The manufacturer of Nutrilite is Nutrilite Products, Inc.

The Food and Drug Administration has made a very thoroughgoing investigation in this case to require the Government to give the names and addresses of every person interviewed with respect to this product, or with respect to Nutrilite or the manufacturer or the distributor. This would be onerous indeed and could have no possible relationship to this case. We believe it entirely irrelevant and for that reason object.

JUDGE CLARK: That is not according to the rules.

MR. GOODRICH: The rules recognize that as a proper objection of immateriality and irrelevancy.

JUDGE CLARK: We know what the Food and Drug Administration did, but we have never found out yet the basis of it.

MR. GOODRICH: That is the reason we objected at the outset of this trial to expanding the issues. Is the Food and Drug Administration on trial here for all of its actions or are these individual defendants usurpers? We think it is conceded by all that

34 the United States may not be sued without its consent.

If you are trying the actions of the Food and Drug Administration in an official capacity without relation to these individual defendants, then I think we have an entirely different trial.

JUDGE CLARK: Passing on an injunction for alleged illegal action on the part of the Food and Drug Administration.

MR. GOODRICH: The Food and Drug Administration is not a defendant, your Honor. The defendants are the Federal Security Administrator, the Commissioner of Food and Drugs, and his related officials. Those people are being sued because they have exceeded, acted outside of their authority, that they have usurped authority, that their actions become personal actions rather than official actions.

Otherwise, the suit cannot lie, and this interrogatory, as well as the other, opens up the entire scope of activity of the Food and Drug Administration, the same as asking any federal agency to reveal its entire activity on a case under the guise of suing a group of individuals who are alleged to have usurped authority.

JUDGE CLARK: They certainly had no right to act in any sense whatever without something as a basis for investigation by the Food and Drug Administration.

Those fellows individually had no right to step out and
35 just ruin these peoples' business which was the avowed purpose of these multiple seizures.

MR. GOODRICH: We haven't avowed that as the purpose.

JUDGE CLARK: The avowed purpose or any other purpose.

Anybody with two ideas above a Hottentot would know you were trying to run the fellow out of business.

MR. GOODRICH: Congress understood that when they passed those laws.

JUDGE CLARK: Congress didn't understand any such thing. That provision was slipped into the conference report. Very few will take the trouble to read a conference report; but Mr. Campbell, when he was appearing on behalf of the bill, stated openly and repeatedly to the committee that the only justification for multiple seizures was when it was dangerous and deleterious to the public health.

MR. GOODRICH: Your Honor will recall, when the Bailey Amendment was proposed, that your Honor was involved at that time in the legislative history. That undoubtedly is what you refer to, is it not?

JUDGE CLARK: Yes.

MR. GOODRICH: We have reviewed the entire legislative history of this matter in our trial brief.

JUDGE CLARK: I still say it was slipped in in conference, and you are speaking of the intent of Congress. Nobody knew anything about the amendment. The last provision was put in here under the statute.

36 MR. GOODRICH: I have always understood, sir, that the intent, when the words were clear, could be drawn from the statute itself. But be that as it may, the statute does authorize that, whether the provision was slipped in or not; and these defendants have followed that statutory provision.

Getting back to the basic point, however, this interrogatory asked for information that has no relationship to these individual defendants, and for that reason we believe it irrelevant and immaterial.

MR. RHYNE: Your Honor, I hardly believe it is necessary for me to respond because it is so clear that under the rules we are entitled to this information so we can find out the basis for their action.

JUDGE CLARK: The Court holds that this evidence is admissible, and the objection is overruled.

MR. KLEINFELD: Exception please, your Honor.

MR. GOODRICH: The next one we object to, No. 21, is the same: 19, 20, and 21.

JUDGE CLARK: They are clearly supplemental to 18. Same ruling.

Mr. GOODRICH: Thirty-five is our next objection.

Mr. RHYNE: I will withdraw that. We will prove beyond any doubt that we have been honest in our business practices.

JUDGE GOLDSBOROUGH: You withdraw 35?

Mr. RHYNE: I withdraw it.

37 Mr. GOODRICH: Forty-three is our next one. Our objection is it is irrelevant and immaterial whether there was an emergency requiring the institution of multiple action. The emergency is not required by law and has no relationship to the decision made in this case.

JUDGE CLARK: The objection will be overruled.

Mr. KLEINFELD: Exception, please, your Honor.

Mr. GOODRICH: Number 46 is the next one, "Upon what facts do you base your denial of Paragraph 5 in answer to the complaint that a very large percentage of Nutrilite sales consist of sales to unsolicited persons to whom Nutrilite had been recommended by users?" We object to that on the grounds of irrelevancy and immateriality.

Mr. RHYNE: I will withdraw that. We will prove that with the evidence.

Mr. GOODRICH: Fifty-two is the next one, "Attach copies of or set forth in full the complete contents of all press and news releases prepared in the years 1948 and 1949 by you or under your direction or control relating to the product Nutrilite or to the distributors thereof, Mytinger and Casselberry, Inc., or the manufacturer thereof, Carl F. Rehnborg, or to any litigation concerning Nutrilite Food Supplement or its labeling."

Objection on the grounds of immateriality; it has no bearing on the issues in this case.

38 Mr. RHYNE: I think it has a tremendous bearing on the issues in this case because it is one of the means they used to try to put us out of business.

JUDGE GOLDSBOROUGH: Is it your theory, Mr. Rhyne, that that inquiry is relevant in showing the good faith of the original proceeding on the part of the Administrator?

Mr. RHYNE: In showing the good faith?

JUDGE GOLDSBOROUGH: Whether it was arbitrary.

Mr. RHYNE: Yes. I think there are many press releases and inspired stories in the press of the country about us that show just what they had in mind. They were trying by these stories to hurt us just as much as possible by giving one-sided stories about the litigation. I think it goes to their arbitrary action and to their action in trying to put us out of business. This is a part of the thing they did in trying to put us out of business before hearing on the merits.

Mr. GOODRICH: I should like to call your Honor's attention to the

fact that the defendants were indicted in September 1948 in the Southern District of California. This interrogatory calls for all press releases between the first of 1948 through 1948, the decisions of probable cause having been made in September and December 1948 throughout 1949, and during which this litigation has been pending.

We believe the very span of time is enough to show the im-
39 materiality and irrelevance.

JUDGE GOLDSBOROUGH: Is it your theory that it is evidence of a probable cause to propagandize?

Mr. GOODRICH: It is my theory that propagandizing, if there be such in this case—of course we deny that——

JUDGE GOLDSBOROUGH: Of course, I know.

Mr. GOODRICH: —would have no relationship to the decision that the Administrator had probable cause to believe that the labeling would be in a material respect misleading, to the injury or damage of the purchaser or consumer, he having been authorized by law to make that decision.

JUDGE CLARK: One of the questions in issue here is whether that law is constitutional.

Mr. GOODRICH: Oh, yes.

Mr. RHYNE: I think this Court could almost take judicial notice of the tremendous punishing effect of press releases put out by a Federal agency. That is, where those officials are determined to put you out of business, it has a terrific nationwide effect on a company like this, that does business throughout the country. The press really hurts you an awful lot, and I think it will reveal some of the things that they had in mind for us, if they will just give us the press releases that they have prepared. If there are not very many of them, it should be a very easy thing for them to do.

40 JUDGE CLARK: Personally I never saw any justification or necessity for Government agencies trying cases in the newspapers instead of the court. The objection will be overruled.

Mr. GOODRICH: Exception, your Honor. Fifty-three is the same as 52. That asks for attaching copies.

JUDGE CLARK: Same ruling.

Mr. GOODRICH: Sixty is the next one. "What are the names and addresses of any informants for you who have been or are now in the Nutrilite distributing organization?" We object to that on the grounds it is irrelevant, immaterial, forms no part of the issues in this case, on the grounds that the divulging of that information would hamper the enforcement of the Federal Food, Drug, and Cosmetic Act, and is therefore against public policy.

We have cited in the memorandum in support of our objection a very recent case holding that this type of information is privileged and not a proper subject to discover.

JUDGE CLARK: Do you contend that if the Nutrilite Company had an employee and fired him and he was going to file a complaint,

give information to the Food and Drug Commission, that they are not entitled to know that? Certainly anything like that would impeach the validity of the testimony on which the action was taken.

Mr. GOODRICH: If we present a witness of that kind, of
41 course he would be subject to impeachment. But that is not what these people asked. They asked for the names of informants who have supplied us with information about Mytinger and Casselberry.

We, as I have repeatedly pointed out, have a criminal case. It charges a felony. The people are—

JUDGE GOLDSBOROUGH: Excuse me just a minute. Is it your theory that because a criminal case is pending, that a plaintiff in a civil case should not have information which will lead to the production of evidence which may be relevant to the issues in a civil case? Is that your theory? I have never heard it stated before, if it is.

Mr. GOODRICH: No, sir, that is not my theory. My theory is that it is improper and an abuse of the discovery practice under the Federal Rules to use that discovery practice for the purpose of determining evidence which is not available by discovery in the criminal action, and which has no relevancy to the issues before the civil case. That is my position.

JUDGE GOLDSBOROUGH: Of course if it has no relevancy, you don't need to go any further than that.

Mr. GOODRICH: We are unable to determine, your Honor just what is relevant until we finally decide what the issues are. As Mr. Kleinfeld explained, we still don't know. But we will
42 try the case on the basis of the Court's ruling. We do believe, however, that there is ample authority for excluding an interrogatory of this kind even in a civil case. We have cited that authority.

MR. RHYNE: May I say to the Court, one of the amazing things to me in this whole litigation is, I believe, that the Government knew facts about our business before I knew them. I think if they have someone who is in our organization—it is a large organization—who is giving them information about us, we ought to be entitled to know who that is so we can bring him here and disprove what he has been giving the Government.

Of course, we have seen no evidence in their files as to who this person is; but if there is no such person, all they have to do is say they don't have one. But I would think that, even though what he may find out from that person is entirely irrelevant in this case, relevancy as such is not a test under the Federal Rules of Civil Procedure on an interrogatory where discovery lets you go beyond that.

So I would like to have the names and addresses of the informants they have in our organization; very much so, I say, because evi-

dently they can get the Government information before I can get it from my own clients.

Mr. GOODRICH: I call the Court's attention, if I may, to defendant's answer to interrogatory No. 59, which inquired about
43 one of these alleged informers. Douglas C. Hanson is a United States Food and Drug inspector attached to the Seattle, Washington, district; and he did, sometime during the year 1947, answer a Nutrilite advertisement appearing in a periodical asking for salesmen to sell Nutrilite. He ordered the Nutrilite sales kit from the plaintiff herein, sent the material received on such order to his employer, the Food and Drug Administration.

Defendants fail to identify the individual named Wolfsburg, but advise that Elmer T. Wolfsburg is a United States Food and Drug inspector resident in Salt Lake City, Utah, who, in the early part of 1949, answered a similar advertisement and ordered a Nutrilite sales kit from the plaintiff and sent the material received to his employer, the United States Food and Drug Administration.

There is no rule of law which prevents a Government agency from using stratagem to trap alleged violators of the law. This is not an entrapment of this kind. These people have simply answered, conducted themselves as an ordinary person would, who saw the Nutrilite Mytinger and Casselberry advertisement in the want ad columns of a daily newspaper.

It would seriously handicap enforcement of this law against a very misleadingly labeled drug to require that we now open our files and give the plaintiff in this case the names of all the people who
44 have answered those advertisements or who have acquired information. It has no possible relevancy to the issues before this Court. Therefore we seriously object to it.

MR. RHYNE: It seems to me that Mr. Goodrich is now admitting that they had such information and stripped it from the files before they turned it over to me, pursuant to the order of Judge Clark.

JUDGE CLARK: Objection sustained.

MR. GOODRICH: That is all, your Honor. May I inquire, your Honor, as to when we will be expected to supply this information? It is quite voluminous, as you can understand.

JUDGE CLARK: I would suggest, as Judge Goldsborough does, that you confer with plaintiff's counsel and see if you can arrange for a modus vivendi. Nobody wants to impose a lot of unnecessary work upon you.

Mr. RHYNE: I certainly don't; and it may be that when I have seen the information they have taken from the files and haven't shown to me so far, I won't want any of it. I think Mr. Goodrich will see that so far I have been very reasonable, both about their files and about their witnesses. I have taken all their depositions down in their offices, and we have been able to agree

on all such questions without any difficulty and I am sure we will here

Mr. KLEINFELD: Mr. Rhyne is a fine gentlemen.

Mr. RHYNE: Thank you

45 JUDGE CLARK: Very well, Mr. Rhyne. You may proceed.

Mr. RHYNE: If the Court please——

Mr. KLEINFELD: May I suggest to the Court that the veracity and the conduct of the witnesses on the stand may be of some importance in reaching a decision here. May I suggest that as each witness of the plaintiff's is on the stand, the remaining witnesses be excluded. Similarly, as each witness of the defendants' is on the stand, the remaining witnesses of the defendants' be excluded. I think that it will serve the interest of justice to do that.

JUDGE GOLDSBOROUGH: The practice in the District Court—and the reason I am speaking is because I don't know that Judge Clark has had any practice in the District Court—is to exclude all witnesses except the witness who is testifying, and parties to the suit or their representatives. That is the practice.

I don't know where they would go. There is a room here called the witness room. I think there are three chairs there.

Mr. KLEINFELD: Perhaps we had better not then, because it would be mechanically difficult. I thought it might be a little unusual because it would be better if, as each witness testified, the remaining witnesses at that time would be outside.

JUDGE TAMM: There are facilities outside for them.

46 THE CLERK: All witnesses in the case of Mytinger and Casselberry, Inc., versus Oscar R. Ewing will remain outside in the witness room until called.

Mr. RHYNE: If the Court please, I believe that all of the witnesses, except the parties and co-counsel, Mr. Lev, for the plaintiff have gone. I assume that all of yours have?

Mr. KLEINFELD: I would like to inquire as to what the parties are. May I ask Mr. Rhyne whether he intends to call Mr. Mytinger and Mr. Casselberry as witnesses?

Mr. RHYNE: I do.

Mr. KLEINFELD: It is a corporation, and I should think that since the corporation is a party and not these two persons individually, they should be excluded as any other witnesses. They are not parties to this.

JUDGE CLARK: It is your own proposition to exclude everybody except the parties and the recognized representatives.

Mr. KLEINFELD: Yes, but one official certainly may be an official representative of the party. In other words, if Mr. Rhyne wants the president or the vice president or any other officer as a representative of the party, the plaintiff, to be in the court room, that is one thing. But why both? That is two representatives, both of whom are going to be very important witnesses. I don't think

it is quite equitable to have them both present at the same
47 time. One of them, fine. But why two?

JUDGE CLARK: If they are representatives of the parties to the action, it seems to me to be no objection that they be present in court.

Mr. KLEINFELD: Your Honor, there are all sorts of people as representatives. But I think if the president of the corporation here is permitted to stay, he is the representative. I don't know of any requirement why more than one must be here. We could say every official of the Food and Drug Administration, as to that extent, is the representative of the Food and Drug Administration. We are not asking that they be here.

JUDGE CLARK: Some people bring up forty or fifty in our court. They have no opportunity of testifying or being heard. They just come in and create a mob scene in the court house.

Mr. KLEINFELD: Your Honor, may I respectfully say this: If the Court determine that both officers or all officers of the plaintiff may be present, I would respectfully request a withdrawal of the rule. I assumed that just one witness for the plaintiff would be on the stand and one representative of the plaintiff; and one witness for the defendant and one representative of the defendant, that that would be the rule.

But if both or more than one officer of the plaintiff
48 is to be here at all times and all of the witnesses of the Government excluded, I respectfully request the withdrawal of my request for a ruling.

JUDGE CLARK: If there are no objections from the Court, you may bring them back.

Mr. RHYNE: I understand you have withdrawn your rule and all witnesses can be present?

Mr. KLEINFELD: Yes.

Mr. RHYNE: If the Court please, may I make a brief opening statement. I will try to make it very brief.

JUDGE CLARK: We are going to take a recess at twelve o'clock, Mr. Rhyne.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. RHYNE: I can assure you my statement will not last that long, your Honor, because I feel this way about it. I feel that all of the members of the Court have heard so much about this case, both on the original motion and on individual motions that have been heard before you, that the usual long opening statement shouldn't apply here. I will not make any such detailed statement, first of all, because I don't want the Court to be scared by the volume of depositions that we have here.

I may say that I myself propose to offer very little from those voluminous depositions, because I did get a lot of information that

led us to the discovery of relevant evidence. But my whole purpose in securing the depositions and in using interrogatories and
49 admissions was to shorten the actual trial before your Honors. I used the admissions especially for that purpose.

Now, there are many facts in the complaint which are admitted by the answer and which we will, of course, not prove, since there is no necessity for it. Those facts, many of them, relate to the nature and description of our business; so we will give a very short description of our business and its nature, and our contacts with the Food and Drug Administration. Most of those facts are admitted, so we will not prove those.

One thing we will prove, as I said in withdrawing our questioning here a few moments ago, is our good faith. They deny our good faith, and we will prove by facts I believe beyond question that we have acted in entire good faith and that we have used sound and honest business practices throughout our business life. I say they deny this, and we will take at the beginning of our evidence considerable time in proving our good faith.

We will prove from the defendants' own records that we have acted in entire good faith by showing that the only time they have sent their inspectors out, of which we know, and asked them to find out the results of our business practices and what people thought of our literature, they have made reports which prove our good faith beyond any doubt. We will offer those
50 reports compiled by their own inspectors from their own records.

We will also offer from the depositions the statements by each of the defendants who made their decision that they had no facts before them whatever showing injury or damage to any person, purchaser, or consumer at the time they made those decisions.

We will show that Dr. Robert C. Butz, the man upon whom each of those four defendants relied, was totally absolutely unqualified, so much so I am sure the defendants won't call him here as a witness; that they concealed his lack of qualifications until I did take his deposition; that his experience was chiefly in the field of psychiatry; and that he was a very recent graduate from medical school.

We will, of course, show that the first three decisions were illegal under Judge Pine's decision. I think the Court can take judicial notice of that.

We will, as I have already said, show Judge Harrison's statement out in California as a part of our good faith, that he would dismiss this criminal action because he thinks it is a waste of Government money. That is a paraphrase of what he said, but that is the substance of it.

We will show that four days after the Government appeared in Newark, New Jersey, and opposed consolidation and removal of

these libel actions to Los Angeles, California, that they
51. filed an injunction action involving the same issues in California, therefore adding to the multiplicity of actions that are already pending against us.

JUDGE GOLDSBOROUGH: They did what, sir?

Mr. RHYNE: Filed an injunction action in Los Angeles, California.

JUDGE GOLDSBOROUGH: What was their purpose?

Mr. RHYNE: Their purpose was to cover the very same ground that has already been covered in the libel actions, the same issues.

JUDGE CLARK: They sought to enjoin the firm from making this product?

Mr. RHYNE: From shipping it in interstate commerce. We will prove that at the time they made these four decisions, based upon Dr. Butz' opinion, that Dr. Butz himself didn't even know what Nutrilite contained, had made no assay of it. Of course the defendants admit that they have filed these ten actions involving the same issues and that they intend to file more, so we don't need to prove that.

We will prove their other intention is to put us out of business before we could get trial on the merits by showing from their own files such things as memoranda stating that they intended to keep the pressure up on us until either an injunction was granted here or the criminal case was tried out in California.

52. I think if we prove those things, and don't have to prove the facts they have admitted in their answer, we will have shown not only the unconstitutionality of this act, because they admit that they gave us no hearing; they admit that we told them the disastrous effect of such a decision without a hearing on our business, but they went ahead and made the decisions anyway—I think if we prove all of this and prove our honesty and good faith and the disastrous effect of the acts and threatened acts of the defendants on us, that we will be entitled to the injunction which we ask here, not only on the constitutional issue but on the issue of unconstitutional abuse of power.

That concludes my opening statement.

OPENING STATEMENT ON BEHALF OF DEFENDANTS

Mr. KLEINFELD: May it please the Court, I will not discuss the major constitutional question, the question with respect to whether the portion of Section 304(a) of the Federal Food, Drug, and Cosmetic Act, which permits determinations of probable cause to be made without a hearing, is constitutional. That was argued at some length before this Court on defendants' motion to dismiss the amended complaint. Briefs were filed, and I shall not pursue that further, except that I merely wish to say that, as we said in the

brief, there is no substantial constitutional question involved on that point.

The case still boils down, then, to one major factor: What
53 the law provides, and have defendants, in pursuing the authority vested in them by law, gone beyond the law or abused arbitrarily and illegally their authority?

Section 304(a) of the Federal Food, Drug, and Cosmetic Act provides in clear and simple language that the Federal Security Administrator may determine whether he has probable cause to believe from facts found without a hearing by subordinate officials of that agency that he has reasonable cause to believe that the labeling of a drug product is misleading in a material respect to the injury or damage of the purchaser or consumer. That is what the Act clearly and specifically says:

There is no dispute as to the meaning of the language. I doubt very much that the plaintiff can make out a prima facie case. What the plaintiff has to prove, and he has the burden of proof, is that these individual defendants, in following out the clear statutory authorization, acted arbitrarily——

JUDGE GOLDSBOROUGH: You mean establish by a preponderance of the evidence, don't you, when you say prove?

Mr. KLEINFELD: He must prove not merely that the defendants were wrong, assuming that he could that, which I don't believe; he must prove that no reasonable person could have acted that way.

JUDGE GOLDSBOROUGH: Do you believe that the preponder-
54 ance of evidence rule abides in this case?

Mr. KLEINFELD: I don't know what rule applies here, your Honor.

JUDGE CLARK: Do you contend that they have to prove beyond a reasonable doubt? You are applying the strictest rule of criminal law in a civil action.

Mr. KLEINFELD: I didn't say that, your Honor.

JUDGE CLARK: You said so that no reasonable person could arrive at any other conclusion, which is the same way that the criminal boys usually state it, being beyond a reasonable doubt.

Mr. KLEINFELD: The plaintiff has said in his amended complaint not that the defendants were wrong. He says they were acting arbitrarily and illegally. I think it is well established in administrative law that a reviewing court—and apparently this Court is now acting as a reviewing court—will not set aside an administrative determination, even though the court may think the administrative official was wrong and dead wrong. It will set aside that determination if it is proven by the plaintiff here, and the plaintiff here is Mytinger and Casselberry, that there was no rational basis for the administrative determination.

That is what he must prove, that no rational person ——

JUDGE GOLDSBOROUGH: You mean they can't prove that any other way except to offer evidence which is more convincing
55 than the evidence to the contrary?

Mr. KLEINFELD: I believe this burden goes further than that.

JUDGE GOLDSBOROUGH: Proceed, sir.

Mr. KLEINFELD: I think he must prove not merely by a preponderance of the evidence that the defendants were wrong. He must prove that no rational person could have acted, could have reached that determination, on what was before him. This Court, and no reviewing court substitutes its opinion for that of the administrative official. That function has been given to the Federal Security Administrator.

JUDGE GOLDSBOROUGH: I am anxious to get what is in your mind. You say from time to time that they must prove. Now, assuming that the administrative agency has very wide latitude, is it your contention that the plaintiff has to show by more than a preponderance of the evidence that they have exceeded their wide latitude? Is that what you said?

Mr. KLEINFELD: No. If he can prove by a preponderance of the evidence that they have acted arbitrarily, irrationally, illegally and capriciously, that no rational person could have reached that conclusion, then he will succeed by the preponderance of the evidence.

But it is not merely a preponderance of the evidence showing that they may have been wrong. There is much more than that.
56 It will show, let us say, by a preponderance of the evidence that these individuals defendants acted arbitrarily——

JUDGE GOLDSBOROUGH: I just wanted to get what was in your mind; that is all.

Mr. KLEINFELD: They acted arbitrarily, capriciously, and illegally beyond their statutory authority. We urge that the major issue outside the constitutional issue is whether, in following the mandate of Congress, the Acting Federal Security Administrator acted beyond his authority or illegally and capriciously; that most of the proof I think all of the proof which the plaintiff says he is going to offer does not bear on the issue of whether the defendants acted arbitrarily, illegally, or capriciously in making that determination of probable cause; that all that evidence is, therefore, irrelevant and immaterial.

We therefore will object to its admission. If it is admitted and we have to proceed, we will attempt to prove only one thing that the defendants as Government officials, as Government officials for a long and extended period of time, did nothing more than their official duties; that they considered this label, they considered the finding of fact made by a medical officer as authorized by statute, that they deliberated and considered it and reached a mature and

considered deliberation; that, if they did that, there is nothing
57 more for this Court to decide.

JUDGE CLARK: All right, Mr. Rhyne.

Mr. RHYNE: I will call Dr. William S. Casselberry.

JUDGE GOLDSBOROUGH: If the witness could face the Court, it would help.

Mr. RHYNE: Before I interrogate the witness, I would like to read one admission, which has the purpose of limiting proof. In Admission 31 we ask the defendants to admit that "the sole objection of the Food and Drug Administration to the sale of 'Nutrilite' in its present package form is the use of "the booklet 'How To Get Well and Stay Well.'" In their response the defendants admit the statement contained in request "31".

WILLIAM S. CASSELBERRY was called as a witness and, being first duly sworn, testified as follows:

Direct Examination.

By Mr. RHYNE:

Q. Will you please state your name and address?

A. William S. Casselberry; 5404 East Ocean, Long Beach, California.

Q. What is your connection with the plaintiff corporation, Mr. Casselberry?

A. I am the president.

Q. I hand you a pamphlet, which I will ask be marked
58 Exhibit 1, and ask you to state what that is.

(The document referred to was marked as Plaintiff's exhibit 1 for identification.)

A. This is the 58-page edition of our advertising folder.

Mr. RHYNE: I believe we have a stipulation about the authenticity of this, and therefore offer it in evidence as exhibit No. 1 of the plaintiff without further identification.

Mr. KLEINFELD: You are admitting that some of the libel suits tried by the Government were made on the basis of this 58-page pamphlet. Is that correct?

Mr. RHYNE: Oh, yes. I am merely trying to shorten it, what we thought was our stipulation.

Mr. KLEINFELD: No objection.

Mr. RHYNE: May I ask that the same stipulation apply to the 36-page and the 42-page editions of the same pamphlet?

Mr. KLEINFELD: May I see them, please?

Mr. RHYNE: I offer those in evidence, Mr. Kleinfeld.

Mr. KLEINFELD: Just one minute, please. I want to look at them. If the Court please, I should like to withdraw my consent to the ad-

mission of the 58-page pamphlet, because apparently there is at least one change immediately in the front, from a copy which the Government has, which is involved in the case. The copy
59 of the pamphlet involved in this case which we have

Mr. RHYNE: May I ask what the change is?

Mr. KLEINFELD: Well, right in the beginning, our copy involved in this case has "first edition, second edition, third edition."

JUDGE GOLDSBOROUGH: What is that, sir?

Mr. KLEINFELD: The copy that we have of this 58-page pamphlet, on the second page after the first page, which begins "How to Get Well and Stay Well," and has a picture of a person, right before the foreword, the copy that the Government has and which is involved in this case says "first edition, 35,000 copies"; "second edition, 47,000"; "third edition, 20,000"; "fourth edition, first printing, 20,000 copies; second printing, 20,000 copies; third printing, 20,000 copies."

This 58-page pamphlet which they offer now is obviously not the same, because the fourth edition says first printing, 20,000 copies. There is nothing about the second printing or third printing. It says nothing about the second printing and the third printing, which is in the copy that we have.

I may show it to your Honor. It is not the same book as far as we know.

Mr. RHYNE: I was trying to shorten this because of our
60 Mr. KLEINFELD: We are willing to shorten it if you will give us the same book.

JUDGE GOLDSBOROUGH: The last thing I have on that page is "fourth edition, first printing, 20,000 copies."

Mr. KLEINFELD: And the copy we have involved in this case has something additional, your Honor. We just don't know that it is the same book. Therefore, we must object to it.

By Mr. RHYNE:

Q. Dr. Casselberry, you have before you, marked exhibit 1, the 58-page edition of this advertising pamphlet. Can you tell us whether the copies furnished by your office to me has any changes in them from the copy which the Government seizure action was based on?

Mr. KLEINFELD: I will object to that, your Honor. We are willing to have the pamphlet which is the subject of this litigation admitted in evidence. We don't care what changes were made by the plaintiff. He may have made a lot of changes, but the pamphlet involved in this case is the one we have here.

JUDGE TAMM: How many pages are there in that one?

Mr. KLEINFELD: Both have 58; but we pointed out immediately some change. They have no right to admit that.

JUDGE GOLDSBOROUGH: Why don't you just hand the witness the same thing we have, sir, and he can testify from that?

61 MR. RHYNE: All right. I have done that. I have handed it to him. Could I ask if Mr. Kleinfeld would agree to the admission of these three copies, subject to a motion to strike if he finds any difference besides that fourth edition here, any material difference between the copy that he has in the libel actions and this one? You will understand it is rather difficult to secure copies of that edition that you are speaking of now. I believe they are the same thing, Mr. Kleinfeld.

MR. KLEINFELD: I will not stipulate to that. I will suggest this. If there is on file in the records of this court a 58-page pamphlet, I am willing to have that put in evidence.

JUDGE CLARK: This 58-page pamphlet that Mr. Rhyne has offered?

MR. KLEINFELD: There are changes that have been made.

JUDGE CLARK: You say there are changes made because it doesn't have the edition line, the amount of the second printing. That seems to me to be entirely immaterial.

MR. KLEINFELD: We don't know. We know that the Government has spent some time in going through this pamphlet.

JUDGE CLARK: Let him testify about that and cut him off.

MR. KLEINFELD: We do object to the introduction of this as exhibit A. I think the plaintiff must prove his case.

JUDGE CLARK: He doesn't have to put this in evidence to

62 prove his case. This is what you rely on.

MR. KLEINFELD: I am sorry, your Honor. At the pretrial conference it was agreed, since the plaintiff has the burden of proof, that he would introduce these three pamphlets.

MR. RHYNE: I didn't agree I would introduce them.

MR. KLEINFELD: I will let him introduce the three pamphlets which coincide with the same three pamphlets we have before us, which is the subject matter of these three suits. We don't have time here to go through these 58 pages and find out whether they are correct. We noticed immediately one error, one change. We can't, therefore —

JUDGE CLARK: I don't think it will be given any consideration on earth, such as a notation about the number of copies on the first and second printing. That is utterly immaterial and frivolous and trifling with the Court.

MR. KLEINFELD: Your Honor, I don't think it is. In the very foreword, and we think it is pertinent as anything, here is what the plaintiff says: "We have done our best to include only truthful and factual statements in this book."

JUDGE GOLDSBOROUGH: That is in the foreword?

MR. KLEINFELD: In the foreword. "As statements that might be misunderstood and misconstrued are brought to our attention,

they are changed. These changes are made monthly, as
63 a new printing of this book comes off the presses every thirty days."

We don't think that is so, from the pamphlets that we have. We don't think that is true. We think they don't do that.

Mr. RHYNE: Do you say that is not in the edition you have?

Mr. KLEINFELD: Here is the edition we have.

Mr. RHYNE: Doesn't that statement you have just read appear in the edition which you have?

Mr. KLEINFELD: Yes; and apparently to substantiate that you have, "Fourth edition, first printing, 20,000 copies," and you stop there. Now they seek to put into evidence a book. We haven't gone through it. I was willing to let it go in, and this is called to my attention, that there are two additional statements there not in the book we have.

There must be plenty of copies of this around. If they have one, we will be very glad to let them put it in.

Mr. RHYNE: Let me explain that. When the case went to the Supreme Court of the United States, I wired, at the request of the Government, and had them send, I think it was twelve or fifteen copies of each edition, and submitted them to the Supreme Court.

When we were coming in to this Court, I wired out there and asked them to send me so many copies of each edition;
64 the 58 and the 36 and the 42-page editions. I didn't compare them.

I am willing to ask this witness whether there are any changes that he knows of in the 58-page book involved in the libel, and this one. I think that since he wrote the book, he can probably tell us. But I don't believe there is any substantial change.

Mr. KLEINFELD: I don't know whether there is. I can't stipulate to it when I don't know.

Mr. RHYNE: May I ask, then, that they merely be submitted for identification at this very time, and I will offer them later?

JUDGE CLARK: Very well.

(The documents referred to were marked as Plaintiff's exhibits 2 and 3 for identification.)

By Mr. RHYNE:

Q. Dr. Casselberry, you have before you three sales pamphlets that have been marked exhibit 1, the 58-page pamphlet; exhibit 2, the 36-page pamphlet; and exhibit 3, the 42-page pamphlet. Who wrote these pamphlets?

A. I did.

JUDGE CLARK: The Court will take a recess until two o'clock.

Whereupon, at 12:00 noon, the Court recessed until 2:00 p.m.

65 AFTERNOON SESSION

(The trial was resumed at 2:00 p.m., upon the expiration of the recess.)

JUDGE CLARK: All right. Mr. Rhyne, will you proceed?

MR. RHYNE: Thank you, your Honor. Dr. Casselberry, will you take the stand?

Direct examination (resumed).

By Mr. RHYNE:

Q. Doctor, at the adjournment you had just testified that you wrote these three pamphlets which have been marked as Exhibits 1, 2 and 3, isn't that true?

A. That is correct.

Q. Will you give us your educational background, Doctor?

A. I have an A.B. from the University of California, M.A. and Ph. D. from Stanford.

Q. Have you had any teaching experience?

A. Yes. I taught a few months in the Army in the first World War and about five years experience in the public school system of California.

Q. Without going into great detail, will you state the chief business experience you have had?

A. After college my first work was bookkeeper, then after the war I was a credit manager of a department store in Arizona, then real estate salesman and broker, teacher, then research worker for the State of California, then vocational counselor and consulting psychologist, employee counselor in the aircraft
66 factory during the last war and for the last four years, this work in Nutrilite.

Q. Have you made any special study of the scientific literature such as books and articles and other publications on diet, nutrition and vitamins and minerals?

MR. KLEINFELD: I object to that question, if the Court please. He is not qualified to talk about any scientific subject whatsoever.

MR. RHYNE: I am not asking him anything of a scientific character. I am merely asking him if he has made any study of the literature in this field.

JUDGE CLARK: I think he may answer.

MR. KLEINFELD: Objection, please.

The WITNESS: Do you want this in detail?

MR. RHYNE: Yes, give us as briefly as you can the study you have made of the scientific literature in this field.

A. I started in 1910. Due to the fact that my father was ill, my mother became interested in diet and got me started. The

first book she called my attention to was Dr. Tilden's book, "Food and Some Other Things." Dr. Tilden was an M.D., he had a large sanatorium in Denver and I believe he was one of the first M.D.s who was interested in diet.

Mr. KLEINFELD: I object to that. As to what he believes I don't think that is particularly relevant or competent.

67 JUDGE CLARK: He has just testified about the book.

Mr. KLEINFELD: He says he believes this man is something or other. I don't think that is evidence. Besides, he is not qualified to entertain any such belief.

JUDGE CLARK: He is simply giving his opinion.

Mr. KLEINFELD: He is not qualified to give an opinion on it.

JUDGE CLARK: He is qualified to give his opinion about this man, about the author of that book.

Mr. KLEINFELD: I object, your Honor, on the ground he is not qualified.

JUDGE CLARK: Overruled.

A. He was one of the first M.D.s to pay attention to diet. In addition to this book he had a small pocket book on food which he called "The Stuffed Club." He was continually talking about the quantity of food we eat and the combinations of food. That started my interest and from then on to the present time I have continually read in the field, from 1910 to 1920 and 1920 to 1930 and on up to the present time.

By Mr. RHYNE:

Q. Doctor, in your work as psychologist, did you have any occasion to recommend vitamins and minerals to those who consulted you?

Mr. KLEINFELD: I object, your Honor, on the ground that he is not a medical expert or scientific expert. He is not
68 qualified to have made any recommendation to anybody. He is merely a lay person, not a scientific person of any sort.

JUDGE CLARK: I don't think his qualifications go to that.

Mr. KLEINFELD: Exception please.

Mr. RHYNE: May I say one thing? They have denied our good faith.

JUDGE GOLDSBOROUGH: You have been sustained. What are you talking about?

Mr. RHYNE: All right. Judge Goldsborough, you are always right, whether you stop me in your court or over here.

The WITNESS: What was the question, please.

By Mr. RHYNE:

Q. In your work as psychologist do you have any occasion to recommend the use of vitamins or minerals for people who consulted you about their vocational guidance?

A. I found soon after I started my practice that in order to get best results I had to do something about the basic health of the people, because psychological reactions are all done within the body, of course, and if the psychological reactions are to be sound, the body has to be in reasonable health, so I started by sending my patients to a physician in Pasadena, Dr. Beeler.

Mr. KLEINFELD: May I object, your Honor, on the ground
69 that again he is not qualified. He doesn't have any patients.

JUDGE CLARK: He can state that he sent his patients to a certain doctor, can't he?

Mr. KLEINFELD: I don't think he can have patients. He is not a doctor. Objection, your Honor.

JUDGE CLARK: All right. Note all the objections you please.

A. These M.D.s for four years had used medicine and for seven years had used only food.

Mr. KLEINFELD: I object, your Honor, on the ground that that is hearsay.

JUDGE CLARK: He can state what the doctor told him.

Mr. KLEINFELD: Objection please.

JUDGE CLARK: All right. Note the objection.

A. That was very satisfactory if the people would go and if they would follow his diet suggestions, but many people wouldn't go and many people would go and follow the diet suggested for a while and then change, because it is very difficult to get people to change their way of eating, so when along about 1933 or 1934 some of my doctor friends told me about the crystalline vitamins that were available at that time——

Mr. KLEINFELD: May I respectfully object again on the ground that this is hearsay. He is not qualified.

70 JUDGE CLARK: If a qualified physician calls a certain medication to his attention he has a right to tell that.

Mr. KLEINFELD: I think not. That is clearly hearsay. If the doctor told him that, we could have the doctor here to testify.

JUDGE CLARK: I understand that the witness is simply stating the background of this book.

Mr. RHYNE: That is correct.

Mr. KLEINFELD: In so stating the background he is putting in hearsay, your Honor, and I urge that that is not proper evidence.

JUDGE CLARK: I don't see that that is hearsay. Do you?

JUDGE GOLDSBOROUGH: No.

JUDGE CLARK: Do you?
JUDGE TAMM: No.

By Mr. RHYNE:

Q. Will your proceed, doctor?

A. So I used then this first vitamin concentrate that came to my attention, because it was supposedly healthful and it should have been healthful I realize from my study of the field. The doctors told me it was healthful, I could use it without a prescription because it wasn't a drug or anything like that, and it would conceivably help the people without them having to go to a dietitian, so I used this vitamin preparation.

71 Mr. KLEINFELD: May I make the same objection, your Honor, on the ground that again he is apparently testifying as a doctor and also because this is all hearsay.

JUDGE CLARK: He simply stated the fact that he could use it without a prescription. I have got some vitamins that I don't require a doctor's prescription for that I take every day. I know myself of my own knowledge that statement is true. It is not objectionable, even though it is hearsay—if he knows it to be a fact.

Mr. KLEINFELD: Since he is not a doctor or scientist I don't know how he can possibly state that is a fact, but if your Honor believes it is admissible, I will just state my objection.

By Mr. RHYNE:

Q. Will you proceed?

A. I think that answers the question. That was the beginning anyway of my use of vitamins and minerals in connection with my psychological work.

Q. When is the first time that Nutrilite came to your attention?

A. About 1937 or 1938.

Q. How did it come to your attention?

A. I met Mr. Rehnborg in connection with a public speaking course we were both taking and he told me about Nutrilite.

72 Q. When was this first Exhibit 1, this 58 page pamphlet, prepared by you?

A. This was prepared in the latter part of 1947.

Q. Will you describe the circumstances under which it was prepared?

A. We had a previous advertising booklet which we had been using up to that time, and which was criticized in a general way by the Food and Drug Administration in the hearing we had in Los Angeles. Our lawyer thought he knew what they objected to, told them that we would rewrite the book.

Mr. KLEINFELD: I object, your Honor, on the ground that the lawyer is the person to tell, if anybody, what he objected to.

JUDGE CLARK: He can testify to what a lawyer told him in a confidential capacity. If a man can't talk about his lawyer without these continual objections, what is there he can talk about?

Mr. KLEINFELD: I urge that there is very little he can talk about. I object, your Honor.

JUDGE CLARK: Overruled.

A. So I immediately started to rewrite the book. Well, that answers the question, I guess.

By Mr. RHYNE:

73 Q. Doctor, who was this lawyer?

A. Mr. Lee Myers.

Q. Can you tell us about any special qualifications he might have in the field of food and drugs?

A. Yes, he was a lawyer——

Mr. KLEINFELD: I object, your Honor, on the ground that Mr. Myers, if he is going to be a witness here, and I assume he will, is best qualified.

JUDGE CLARK: Is Mr. Myers going to be a witness?

Mr. RHYNE: We will read his deposition and he does recite his qualification there in great detail. I really believe you conceded his qualifications because I have a memorandum signed by you that he is an expert in this field.

Mr. KLEINFELD: Signed by me?

Mr. RHYNE: By your people.

Mr. KLEINFELD: I don't remember having seen it. On the other hand, if you are going to put Mr. Myers on the stand as to his qualifications, that is a different matter. I don't agree that this witness can testify as to Mr. Myers' qualifications.

Mr. RHYNE: His qualifications are facts within this witness' knowledge.

JUDGE CLARK: I don't know why a man's client can't testify as to his standing at the bar and things of that sort. You don't have to be a lawyer to know a lawyer's duties.

74 Mr. KLEINFELD: I don't see how he can possibly know the qualifications. He is not a lawyer or scientist. He just doesn't know what the qualifications are.

JUDGE CLARK: He doesn't have to be a doctor either. He can't testify about anything unless he is a doctor or lawyer both?

Mr. KLEINFELD: I have stated my grounds. I think in this case he is not qualified to testify as to that.

JUDGE CLARK: Overruled.

Mr. KLEINFELD: Exception.

By Mr. RHYNE:

Q. Will you give us the qualification of Lee J. Myers in this field of food and drug?

A. We hired him because we understood that he had had about twelve or thirteen years experience in connection with food and drug work. He was retained by various companies on a monthly retainer basis at the time, and he had made a further study of the field of nutrition, especially in connection with food and drug work.

Q. Doctor, what other assistance did you have other than legal in writing this 58-page book?

A. I derived much assistance from Mr. Rehnborg who is the manufacturer of our product, and of course from other experts like doctors and chemists, other people in the field.

Q. Did you also check the authorities in the field such as text-books and articles?

75 A. I did.

Mr. KLEINFELD: I object, if the Court please, on the ground that he is not qualified to have checked scientific literature.

JUDGE CLARK: Anybody can check scientific literature can't he?

Mr. KLEINFELD: Not unless he is——

JUDGE CLARK: That is all he was asked, whether he had checked.

Mr. KLEINFELD: I object on the ground he is not qualified to check scientific literature any more than I am.

JUDGE CLARK: All of us have read scientific articles at various times without being qualified as a scientist. It is perfectly permissible to state the fact that he had read them.

Mr. KLEINFELD: The witness has said more than that. The witness has said that in writing this book which is in issue in this case, he got information from this scientific literature and I urge that he is not competent to testify as to scientific literature.

JUDGE CLARK: He hasn't undertaken to qualify as an expert.

Mr. KLEINFELD: That is the point I am making, your Honor.

JUDGE CLARK: You don't have to be a doctor to write
76 any sort of article. Some authorities in that field or any other field are not lawyers or doctors either.

Mr. KLEINFELD: I object on the ground that he is not qualified to testify on this score.

JUDGE CLARK: All right. Objection is overruled.

By Mr. RHYNE:

Q. Doctor, would you tell us briefly just how you went about writing this book?

A. The first procedure usually followed, in writing an advertising book of this nature, is to go over the whole field and make sure you have covered the important points in the field.

Q. Doctor, I asked you what you did, not what the first procedure is. What did you do?

A. I had already gone over the field and thought I knew the important points that would be called upon, in the presentation of such a work. Next I made an outline covering the points I wanted to make. Then I started to write. As I wrote, wherever I came to something of a strictly technical nature, where a person couldn't depend on his memory, then I would refer either to an expert or to textbooks—various books in the field—and I continued that way until the book was written.

When it was written I rewrote it, going through to smooth it up, as writers do. Then it was turned over to members of
77 our staff, to Mr. Rehnborg, to Mr. Myers, to various friends of mine, who checked the book for different purposes. The experts checked it for the facts in their field, friends and neighbors for the readability, and various assistants in the office for technical errors, spelling and such things.

Mr. KLEINFELD: May I respectfully object to the entire line of questioning on one further ground: that it is entirely irrelevant to the main issue involved in this case as to whether the labeling of this product is materially misleading to the injury of the purchaser or consumer in the opinion of the Federal Security Administrator.

JUDGE CLARK: This book is the crux of the whole case. He is simply telling the background in which he prepared it.

Mr. KLEINFELD: I urge, your Honor, that it does not bear on the issue as to whether the Administrator, in making his determination of probable cause, acted arbitrarily and illegally. The entire line of questioning I think is irrelevant and I object to it.

JUDGE CLARK: Overruled.

By Mr. RHYNE:

Q. Doctor, for what period of time were you working on this rewriting of this booklet?

A. About five months from July to December—four to five months.

Q. Was it approved by Mr. Myers before you used it?
78 A. It was.

Mr RHYNE: At this point, with reference to Mr. Kleinfeld's statement about what the Food and Drug Administration thought about our pamphlet and what it represented as to cure, I will offer in evidence as our Exhibit No. 4 some papers obtained by us from the files of the Food and Drug Administration relative to their seizure at Clarkfield, Minnesota. I believe that the government will concede the authenticity of these particular papers which are reports compiled by their own inspectors as to what people thought

about this booklet when they read it. I offer this to show our good faith and their arbitrariness.

(The document referred to was marked as Plaintiff's Exhibit No. 4 for identification.)

Mr. KLEINFELD: May we have one minute to look at it, your Honor?

JUDGE CLARK: Certainly.

Mr. KLEINFELD: Thank you. May it please the Court, I think counsel for the plaintiff should make clear for what reason he is offering these letters. We do not, by the way, dispute their authenticity. If Mr. Rhyne is offering these documents, memoranda of interviews with users of Nutrilite to establish that Nutrilite was offered in the cure and treatment of the diseases and conditions mentioned
79 in these papers, and that Nutrilite was purchased for use in the cure and treatment of the diseases and conditions mentioned in these documents, I will not object.

Mr. RHYNE: I am offering it for just the opposite purpose: To show that the people who read this pamphlet which Dr. Casselberry wrote did not gain that impression of it from the report of your own inspector to you, who was instructed to make this survey.

Mr. KLEINFELD: In that case, if the Court please, as pointed out on page 30 of our trial brief, we object to the introduction of these documents on the ground that it is well settled that a lay witness is not competent to testify with respect to medical questions.

JUDGE CLARK: He was enough of an expert to be an inspector for you, wasn't he?

Mr. KLEINFELD: No. These are statements made to an inspector by users of Nutrilite. We say they are not qualified to testify as to any medical questions, besides the fact that whatever they said is hearsay. On both those grounds we object to the introduction of these documents.

JUDGE CLARK: Objection is overruled.

Mr. KLEINFELD: Exception please.

80 Mr. RHYNE: If I may at this time, then I would like to read into the record these reports compiled by the Food and Drug inspectors.

First of all I would like to read their telegram of instructions to this particular inspector. I will just read the body of the telegram, since Mr. Kleinfeld has the full text before him:

> "Mytinger and Casselberry of Longbeach, California, distributes Nutrilite, a dietary supplement, distribution through agents making door to door and club appearances. The firm has several pieces of literature used by agents and loaned to customers, principally booklet entitled 'How to Get Well and Stay Well.'

"Recent seizure and grand jury indictment has led firm to delete pages 37 through 58 from booklet and to caution agents with respect to our activities. Firm shipped yesterday to the F and M Bank, Clarkfield, Minnesota, via REA seven cartons Nutrilite, weight 196 pounds, value $2,600.00, said to be due for delivery at destination Friday. No known literature accompanied shipment.

"An investigation should be undertaken prior to delivery this shipment to determine scope and character of representations made orally, and by accompanying literature, by the
81 dealers. If consignment is to be used to fill orders from regular customers who have contracted for monthly deliveries. A representative number of these users should be contacted for their understanding of the value of the product. If broad representations continue to be made, booklet pages 1 through 37 intact, or other collateral material which misbrands the product employed. Complete facts should be reported immediately for seizure consideration.".

This first paper I will read here is "Memorandum to Accompany 25560K Nutrilite":

"Investigation preceding the collection of this sample was started on November 19, 1948, but as there was a terrific snow storm at that time I was unable to complete the investigation which was requested to be made before sample collection. Attached is the preliminary report that was made.

"On November 30, 1948, the investigation was completed and the sample was collected. Mr. Quale at present has 19 customers. Two of these who live in Clarkfield were interviewed first and these two people signed affidavits; the originals are with the records and copies are attached to all copies of this memo.

"Five farmers were interviewed on 12 1 48 before I collected the sample and these interviews were written up as interviews instead of affidavits. I did not take
82 affidavits from these five as farmers are reluctant to sign affidavits and their testimony was about the same as the two town folk although probably not as strong.

"All people I talked to including Mr. Quale, the distributor, were very friendly and cooperative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type.

"The Farmers and Merchants State Bank finances each shipment for Mr. Quale and this is covered in my report of 11 49 48. The stock of Nutrilite will probably be in the bank

for a month or two. On the invoice are 6 bottles of vitamins B_1 and E. Mr. Quale said that these are for his own use and these were not sampled. The books 'National Malnutrition' shown on the invoice of 5/7/48 are covered in Mr. Quale's affidavit. Also note that the firm has sent out new pages 37 through 42.

"Nutrilite was not 'knocked' to any of the people interviewed or to Mr. Quale. These people were merely told that we investigate drugs to see what results the users have obtained and that was what this investigation was.

"The sample has been split. One kit is being sent
83 to Vitamin Division with the original records and the booklet 'How To Get Well and Stay Well.' One kit is being sent to Los Angeles Station for mineral analysis and copies of all the interviews, report, memo, etc., are being sent to the Administration. Copies of everything except the records are also being sent to Los Angeles.

"None of the people interviewed said that they had received any other literature from Mr. Quale other than the booklet 'How to Get Well and Stay Well.' Mr. Quale said that the only instructions for his sales talk that he had received from the company was to be careful what he said, not to promise any cures and to say only what is in the booklet 'How to Get Well and Stay Well'.

"James E. Anderson, Inspector, 12 1 48."

Attached to this is a "Memorandum of interview between Mrs. Oscar (Anna) West, Rural Clarkfield, Minnesota, and James E. Anderson, Inspector," which reads as follows:

"Mrs. West was interviewed in connection with the collection of 25-560 K, Nutrilite. The reason for the interview was to find out how the dietary preparation was presented to her, and her understanding of the composition and value of the product.

"Mrs. West lives on a farm 5 miles south and $1^1/_4$ miles
84 east of Clarkfield. She is approximately 30 years old. Mrs. West said that she has been suffering from arthritis and anemia. She had been treated by local doctors and part of the treatment consisted of vitamin tablets. She believed these helped her a little but hardly enough to make much difference in her condition. About 6 months ago, from her neighbor, Oscar Sandager, she heard about Nutrilite which had helped Mr. Sandager's arthritis. She told Mr. Sandager to have Mr. E. A. Quale, the Nutrilite distributor, come out and see her.

"Mr. Quale came to see Mrs. West about 4 or 5 months ago. He told her how Nutrilite had helped Mr. Sandager and about other people with arthritis who had used Nutrilite and had

obtained relief. He told her that the preparation wouldn't cure her arthritis, but he thought it would help her arthritis and cut down her anemia by building up the body and blood through the vitamins and minerals which are in Nutrilite.

"Mrs. West said that she is now on her fourth month of taking Nutrilite; in other words, she is on her fourth bottle. She said that at the time she signed up for the course Mr. Quale gave her the booklet, 'How to Get Well and Stay Well,' and she had read this booklet and given it back to him. When she started using the Nutrilite she did not think that she was getting a cure; in fact, she and her husband were both
85 skeptical of the product, but from her treatment under the local doctor she knew that she needed vitamins and so wanted to give Nutrilite a chance.

"Before taking Nutrilite Mrs. West had to take liver shots; after taking Nutrilite for a month she did not have to take any more liver shots. Right now she believes her arthritis is gone in that she does not have any pains or stiffness. She is gaining weight, and is not as tired as she used to be, which leads her to believe that her anemic condition is cleared up.

"I asked Mrs. West if she thought that Nutrilite was a cure-all or something wonderful, and she said that she believes it has helped her very much but does not know if it will cure anything. It would appear that Mr. Quale did not make any wild claims to Mrs. West and that she was not led to believe that the product was anything more than vitamins and minerals which would help to build her body up.

"James E. Anderson, Inspector."

The next is a "Memorandum of Interview," dated December 1, 1948, "Between Mr. Oscar Sandager, Rural Hazel Run, Minnesota, and James E. Anderson, Inspector." It reads as follows:

"This interview was made as a part of the collection of
25-560 K, Nutrilite, to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement
86 and what idea the buyer, Mr. Sandager, had of its value.

"Mr. Sandager lives 5 miles south and 1¾ miles east of Clarkfield, Minnesota. He lives with his mother and his sister, Gladys, on a farm. He is 59 years old.

"Mr. Sandager said that he has had arthritis for several years and was under the treatment of Dr. Houghton in Clarkfield, Minnesota. He was given many different treatments by the doctor, and the last one consisted of shots of strep—, the name of which Mr. Sandager could not remember. About this time, which was in 1947, Mr. Sandager heard from his hired man that the hired man's sister had had arthritis and was not

expected to live as her weight kept going down and she was gradually failing. She started to take Nutrilite and regained her health and is still living.

"Mr. Quale, in 1947, had either been told of Mr. Sandager's condition or heard about it and came out to see him. Mr. Quale said, 'I don't say this will cure or help your arthritis but I think it will.' Mr. Quale then told Mr. Sandager of other people with arthritis who had been helped by Nutrilite.

"Mr. Sandager was given the booklet, 'How to Get Well and Stay Well.' He said he never read the booklet, just looked at the pictures and then returned it to Mr. Quale. Mr.
87 Sandager said he told Mr. Quale he did not think he would use the Nutrilite and kept on taking shots from his doctor. His condition kept getting worse and finally he could hardly walk and was thinking of selling his equipment and quitting farming due to his arthritis.

"The doctor told him the only thing left that he knew of was gold shots, but he did not seem very sure about gold shots so Mr. Sandager did not take them. He then switched over to Nutrilite in September 1947 and has been taking it regularly ever since. His idea of Nutrilite at the start of his treatment was that it contained vitamins and minerals to build him up. He said he was a skeptic in the beginning and did not think it would cure anything, but he had so many medicines and injections that he was ready to try anything. He said that at no time did Mr. Quale say it would cure his arthritis, and he was never led to believe that.

"At present he does all his own farming, walks without a limp or without any slowness in his gait, and he says he is in good health. He does not believe his arthritis is cured for when his feet get wet he can feel a slight pain in his extremities. He is now on his second year of taking the Nutrilite and does not know whether to continue on or not, he is afraid that if he stops taking Nutrilite his pains and arthritic condi-
88 tion will return.

"Mr. Sandager's sister, Gladys, is also a user of Nutrilite. She started using it after Mr. Sandager. He said that he was the reason for Gladys' taking it because he was so enthusiastic about it. She was suffering from headaches and upset stomach. At present he said his sister has pains but they are not so often or hard.

"Mr. Sandager's mother is quite old and has had two strokes and is run down. He talked her into taking Nutrilite although she is still under doctor's care. He believes that the Nutrilite has helped her in that she is stronger now. Mr. Sandager said that Mr. Quale had not told either of these women the Nutrilite

would cure anything they had and that Mr. Quale was not as enthusiastic about Nutrilite as he himself was.

"James E. Anderson, Inspector."

The next is a "Memorandum of Interview Between Mr. Olaus Nyland, Rural Hazel Run, Minnesota, and James E. Anderson, Inspector," dated December 1, 1948. It reads as follows:

"This interview was made as a part of the collection of 25-560 K, Nutrilite, and to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mr. Hyland, had of its value.

"Mr. Nyland is a farmer living about 2 miles outside
89 of Hazel Run, Minnesota and is, I would judge, in his late 50s or early 60s.

"Mr. Hyland said that for a long time he has had rheumatism all over his body and when I said arthritis, he said, 'Yes, it's arthritis.' From Mr. Oscar Sandager, Mr. Nyland heard about Nutrilite and how it had helped Mr. Sandager. Mr. Nyland then went to Mr. Quale's office in Clarkfield, Minnesota, and told Mr. Quale that he had arthritis and was interested in Nutrilite. Mr. Quale gave Mr. Nyland the booklet, 'How to Get Well and Stay Well.' Mr. Quale did not give him any sales talk, just referred him to the book and told him of other customers who had used Nutrilite and had obtained relief from their arthritis. Mr. Quale told him that Nutrilite would not cure arthritis, but he believed it would help him. Mr. Nyland read the booklet and then returned it to Mr. Quale.

"Mr. Nyland said that he believes Nutrilite is a vitamin and mineral preparation which he is taking to build up his body. He is hoping that the vitamins and minerals in it will build up his body and so overcome his arthritis. He does not believe that Nutrilite is a cure but thought that he would try it for at least the prescribed year and see what it would do for him. He has taken Nutrilite regularly for 5 months now.

He is not as stiff as before and the arthritic pains are a
90 little less than when he started taking Nutrilite. However, he volunteered that at this time of year he does not work as hard as in the summer and this may be the reason the pains have decreased.

"James E. Anderson, Inspector."

Now, rather than read the other two I will simply offer them as part of this exhibit. They say practically the same story.

MR. KLEINFELD: If the Court please, may I request that Mr. Rhyne finish his reading. If they are going to be put in at all I suggest that he read them all.

MR. RHYNE: I will read them all.

The last one I had read was the Memorandum of Interview dated December 1, 1948, between Mr. Olaus Nyland and James E. Anderson, Inspector.

The next one is dated December 1, 1948, between Mrs. Alfred (Louise) Hegrin, Rural Clarkfield, Minnesota, and James E. Anderson, Inspector, and it reads as follows:

"This interview was made as a part of the collection of 25-560 K. Nutrilite, and to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mrs. Hegrin, had of its value.

"Mrs. Hegrin is 56 years old and is a farmer's wife living 5 miles south and 1½ miles east of Clarkfield, Minnesota. She said that when she was 23 years old she had an appendectomy, pneumonia, rheumatism and inflamed heart sac. She had a hard time recovering from these afflictions and was anemic and felt run down. Then 6 years ago she had her gall bladder removed. She was anemic and felt run down and was given iron. She gained some weight and felt a little better. She was still not satisfied with her physical condition, feeling that she was still run down and susceptible to colds and other contagious diseases. Her neighbor, Mr. Oscar Sandager, told her about Nutrilite and how it had helped his arthritis. She told him to send Mr. Quale, the Nutrilite distributor, out to see her.

"Mr. Quale came out to see Mrs. Hegrin and she told him that she was run down. Mr. Quale told her that she should try Nutrilite and see if it would build her up. He said it would not cure anything and that Nutrilite had helped some people and had not helped others. She did not order any Nutrilite at this time. Mr. Quale left her the booklet, 'How to Get Well and Stay Well.'

"Right afterwards she caught a cold or had the flu, she did not know which but thought it was the latter, and had to stay in bed. While in bed she read the booklet and decided to try Nutrilite. She has an open mind on Nutrilite and does not know whether it is good or bad, but she has to
.92 take some vitamins, the doctor had prescribed vitamins for her, and so is taking Nutrilite believing that it contains vitamins and minerals which she needs and which she hopes will build her up so that her body will be more resistant to disease, (disease means colds, flu, etc.). She is just finishing her fourth month, her fourth bottle of Nutrilite, and believes she has more pep now and feels better. She also believes her blood is up, but has not had it tested recently and so could not be sure.

"James E. Anderson, Inspector."

The next is a "Memorandum of Interview," dated December 1, 1948, "Between Mr. Leonard Vold, Rural Hazel Run, Minnesota and James E. Anderson, Inspector," which reads as follows:

"This interview was made as a part of the collection of 25-560 K. Nutrilite, to try to determine how the salesman Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mr. Vold, had of its value.

"Mr. Vold is a farmer living outside of Hazel Run, Minnesota. I would judge he is in his late 30s. Mr. Vold was not at his home and so I talked to his wife and she gave me some information. Then I found Mr. Vold on another farm cutting wood and he gave me the rest of the information.

"Mrs. Vold said that her husband has had ulcers for
93 years and goes to sleep when driving or sitting in a chair. Last September he had all his teeth out but the removal did not seem to help his condition too much. From Mr Oscar Sandager, Mr. Vold heard about Nutrilite. He did not make any special inquiry about it, but one day when Mr. E. A. Quale, the Nutrilite distributor, was out selling him hog minerals Mr. Vold mentioned that he was going to sleep at odd times and asked Mr. Quale if Nutrilite would help him. At this point Mrs. Vold said I had better talk to her husband and she located him for me on an adjoining farm where I went and interviewed him.

"Mr. Vold said that in 1939 his ulcer had ruptured and he had come to Minneapolis where he had it sewn up. The ulcer is still active, and in the spring and fall and other times he suffers attacks. The main thing which worries him is that when he is driving or sitting in a chair he falls asleep. He believes this may be due to blood loss from his ulcer although he says he does not think he is anemic.

"When Mr. Quale came out to see him Mr Vold believed that he knew he had ulcers but he was not sure of it. He told Mr. Quale that he wanted something which would make it so that he would not always fall asleep. Mr. Quale told him that Nutrilite would help build him up and thus would help him stay awake if this drowsiness was due to poor blood
94 or loss of blood. The Nutrilite was not represented as an ulcer medicine and was not being taken as such. Mr Quale told Mr. Vold that it would take 6 months before he would notice any results. Mr. Vold thought that Nutrilite contained vitamins and minerals which would help build up his body. He did not think it was a cure, but rather thought it was another medicine he would take to see if it would work. He has taken Nutrilite for 2 months and has not noticed any results yet.

"James E. Anderson, Inspector"

Attached are two other papers. One is a Western Union telegram from Long Beach, California, to Mr. E. A. Quale, signed "Mytinger & Casselberry, and dated December 8, 1948.

"Have just learned FDA disapproves present customers book. Consequently return all your customers books and other sales literature immediately."

The final paper that is attached here is a Report on Seizure Accomplishment. Do you insist I read all that, Mr. Kleinfeld?

MR. KLEINFELD: No.

Again, may I respectfully request the Court to hear me for a moment on these testimonial letters. We urge again that these testimonials of said users are no more admissible when offered by the plaintiff than if they had been offered by the defendants.

95 They obviously and clearly on their face are statements by laymen who testify with respect to everything from falling asleep in a chair to arthritis and ulcers.

We urge, your Honors, that they are in no way qualified to diagnose their own diseases or to testify with respect to them. They are not competent in any way to testify with respect to symptoms, illnesses, diseases or conditions.

Secondly, we object again on the ground that they are hearsay. It may be that the defendants wish to bring these people to court to have them testify. But to just take documents on the basis of what is clearly hearsay, and in some cases hearsay on hearsay—to allow a report to be put in which says that John Doe, a farmer, got relief from his ulcers pains or arthritis, I urge, is absurd. They are not qualified. They are not qualified experts. It is not competent evidence, and it is hearsay. I therefore request most respectfully that the documents be stricken from the record. Objection, please.

JUDGE CLARK: The objection is overruled.

(The document referred to was marked as Plaintiff's exhibit 4 and received in evidence.)

(The document referred to was marked as Plaintiff's exhibit 5 for identification.)

96 By Mr. Rhyne:

Q. I hand you a pamphlet entitled, "Facts you Should Know About Vitamins" and ask you to state what that is.

A. This is a pamphlet put out by the Boston Better Business Bureau telling about vitamins and giving the facts that presumably they thought a person should know about vitamins.

Q. When was the first time that was called to your attention?

A. Mr. Mytinger obtained a copy of this, I believe, from the Better Business Bureau in Los Angeles, and as best I can recall, it was along in the middle of 1947 or maybe toward the end of 1947.

Q. Was it part of the material you relied upon in writing this 58-page pamphlet?

A. Either relied on it for writing or for checking. I couldn't say which.

Mr. RHYNE: I offer this in evidence as Exhibit 5.

Mr. KLEINFELD: I object, your Honor; I on the ground that this is hearsay. This is not a government publication or any official publication of any sort. This is direct examination. I urge also that this booklet and anything in it are not relevant to the issues before this Court as to whether the determination of probable cause made by the Administrator is arbitrary or illegal, but more particularly I urge that on direct examination particularly, this is hearsay and may not be admitted.

97

JUDGE CLARK: If it is a government publication do you think it may be admitted?

Mr. KLEINFELD: No, I think not.

JUDGE CLARK: You stated that one of your objections is that it was not a government publication.

Mr. KLEINFELD: I think some government publications may be admitted.

JUDGE CLARK: There is nothing like that at all according to my understanding.

Mr. KLEINFELD: I urge that this particular publication is hearsay and should not be admitted.

JUDGE CLARK: This whole line of questioning goes to the matter of good faith and as to that I think the documents are admissible.

Mr. KLEINFELD: I urge that the question of good faith is not involved in this at all in any respect. It was never urged in any case, including the Supreme Court, that the question of good faith was material, but whether the government acted arbitrarily or illegally in pursuing the statutory power given them by Congress. We never contemplated for a moment that the good faith of the plaintiff was an issue in deciding whether a booklet is misleading. The government is not interested in good faith.

98

JUDGE CLARK: It seems to me that good faith was the crux of this case from the very beginning.

Mr. KLEINFELD: The good faith of the defendants perhaps, but not the good faith of the plaintiff.

JUDGE CLARK: The Court has ruled.

Mr. KLEINFELD: Exception, your Honor.

(The document referred to as Plaintiff's Exhibit 5 was received in evidence.)

Mr. RHYNE: May I at this time, if the Court please, offer as a part of an admission of the defendants: We called upon them in Request for Admission 109 to admit that the Better Business Bureau

publication referred to was cleared and approved by the Food and Drug Administration. As a part of their answer we have this letter signed by Mr. C. W. Crawford as one of the defendants here, Associate Commissioner of Food and Drug, dated 6 June 1946, addressed to Mr. Allen E. Backman, National Better Business Bureau Incorporated, Chrysler Building, New York 17, New York:

"DEAR MR. BACKMAN:

"We sincerely regret that we have not had an earlier opportunity to reply to your letter of April 12 concerning the bulletin 'Facts You Should Know About Vitamins.' We believe the bulletin as a whole is a simple and informative statement of facts with respect to vitamins. We suggest the deletion of
90 all except the first and last paragraphs on page 3. This suggestion is made because the paragraphs in question contain statements made by various groups under the stress of wartime conditions, and appear to be supported by no clearcut, scientific evidence.

"We make this observation not in any sense to minimize the importance of good nutrition to this country, but because of the possibility that such statements may readily exaggerate the significance of vitamin intake in realizing the objective of good nutrition and lessen the public's concern with the many other important aspects of nutrition and health.

Very truly yours,

C. W. CRAWFORD,
Associate Commissioner of Food and Drug."

MR. KLEINFELD: I further object to the pamphlet, if the Court please, on the ground that the issue in this case is not whether vitamins are good or bad, but merely whether the statements made in the three pamphlets are false and misleading in a material respect. This is not a trial on the beneficent effect of vitamins therefore I urge that it has nothing to do with this case.

JUDGE CLARK: The Court has ruled on that question several
100 times.

MR. KLEINFELD: I am sorry.

JUDGE CLARK: Proceed, Mr. Rhyne.

MR. RHYNE: Thank you, your Honor.

By Mr. Rhyne:

Q Doctor, I believe you have testified that you used information from the various scientific writings that were made available to you or that you had at that time in writing this pamphlet?

A That is correct.

Q. I hand you a paper that has been marked or will be marked Exhibit No. 6 and ask you to state what it is.

(The document referred to was marked as Plaintiff's Exhibit 6 for identification.)

A. This is a list of authorities in the field of nutrition and vitamin mineral supplementation with quoted extracts.

Q. For what purpose was that prepared?

A. This was prepared to obtain a written cross section of the authoritative writings in this field at the present time.

Q. Did you rely upon that material in preparing these pamphlets which have been offered as Exhibits 1 through 3?

A. Not on all of it, of course, because some, like this
101 "Modern Home Medical Advisor" was only printed in 1949.

Q. Why was that included?

A. That was included in this because we wanted a cross section of the present opinion in the field, of the authorities on the subjects about which we were talking in our advertising pamphlet.

Q. Do you think this represents a good sample of the material that you used in preparing these pamphlets?

A. This is the material from the present authoritative works in the field which are along the same lines as some of the aspects of the advertising folder covered and which substantiates what we say in the book.

Mr. RHYNE: At this time I offer this in evidence, not to show the truth of it but to show our entire good faith in that our pamphlets and these books say the same thing.

Mr. KLEINFELD: We respectfully object to the admission of these pamphlets and literature. As pointed out on page 34 of our brief, it is well settled that medical and scientific treatises and literature are not admissible to prove medical facts or scientific facts. We urge that this is hearsay.

JUDGE CLARK: Mr. Rhyne stated that he was not offering them for that purpose.

Mr. KLEINFELD: They are in the record. I would like to object on the ground (1) that they are hearsay and not admissible to prove medical facts particularly on the examination of one's
102 own witness, secondly, that the good faith of the plaintiff is not in issue in this case. I object on both grounds.

JUDGE CLARK: The Court holds and has already held several times that it is an issue.

Mr. KLEINFELD: Is the Court ruling on the second question as to whether or not they are admissible on the grounds of hearsay?

JUDGE CLARK: The Court has already ruled on that similarly.

Mr. KLEINFELD: I respectfully except.

(The document referred to as Plaintiff's Exhibit 6 was received in evidence.)

Mr. RHYNE: At this time, mark Exhibit 7.

(The document referred to was marked as Plaintiff's Exhibit 7 for identification.)

Mr. RHYNE: I merely ask the Court to take judicial notice of the Federal Register of Saturday 22 November 1941, containing findings of the Food and Drug Administration with respect to vitamins and minerals and I would like to ask Dr. Casselberry just one question about it.

By Mr. Rhyne:

Q. Doctor, is that a part of the material that was called to your attention at the time you wrote these pamphlets?

103 A. I believe so but I am not positive about that. I believe this was material that Mr. Myers had in his files and which he used in checking our book.

Mr. RHYNE: It is not offered as an exhibit. I have the right to merely ask that judicial notice be taken of it. I am merely giving it an exhibit number so it may be found in the record.

Mr. KLEINFELD: For what purpose is it being offered?

Mr. RHYNE: To show our good faith and to show that the statements contained in our books are substantially the same as the statements made by these Federal officials in the Federal Register.

Mr. KLEINFELD: I object on the ground that good faith is not an issue in this case.

JUDGE CLARK: Overruled.

Mr. KLEINFELD: And on the ground that the question of the efficacy or lack of efficacy of vitamins is not an issue in this case.

JUDGE CLARK: Overruled.

Mr. KLEINFELD: Exception.

(The document referred to as Plaintiff's Exhibit 7 for identification was received in evidence.)

104 By Mr. Rhyne:

Q. Doctor Casselberry, these pamphlets have been published and corrected from time to time by your company is that true?

A. That is correct.

Q. Is there anything in these editions as corrected from time to time that you, as president of the plaintiff, believe is not true?

Mr. KLEINFELD: I object on the ground that is a leading question.

JUDGE CLARK: Objection is overruled. He has a right to ask his own witness, who is the author of the pamphlet.

Mr. KLEINFELD: Exception.

A. There is nothing in the advertising folder as we use it now, which is incorrect as far as I know.

JUDGE GOLDSBOROUGH: When you say "now" do you mean at the time of the institution of these actions against you?

THE WITNESSS No. I mean our present folder—the present edition of this book that we are using now.

By Mr. Rhyne:

Q. Let me ask you another question, Dr. Casselberry: What is there in the 58-page pamphlet that you have before you which was used by you at the time of the first seizure in New Jersey, which you have changed in the 42-page edition which is now in use by the plaintiff?

105 A. I believe there is a statement in here to the effect that weevils will not live in white flour and we learned subsequently that weevils will live in white flour, so that has been corrected.

Q. You mean the statement was that weevils would not live——

A. We stated here they would not live in white flour.

Q. And that has been changed?

A. That has been changed.

Q. Did that relate to the substance of the book in any way?

A. This was part of an aside, you might say, an illustration, an addition that went in to corroborate a statement. Whether it is there or not doesn't make any difference, whether it is true or not doesn't make any difference, in the final reading of the book. Nobody could possibly be mislead, because the fact that this illustrates is a fact. It is a true fact.

Q. What is that fact?

A. The fact that the refining of wheat or any cereal, taking out vital parts containing vitamins and minerals makes the remaining substance—white flour or polished rice or whatever it is—less valuable as food.

Q. Isn't it true that the Food and Drug Administration has itself prescribed regulations for the enrichment of white flour for that very reason?

106 A. So I understand.

Q. Is there any other change that you can recall that has been made?

A. There was an addition we made—I don't know whether you would call that a change. We made an addition on page 19, where we added the explanation that—I think it was pantothenic acid or

nyacin—we made it conform with our label anyway, in which we make the statement the Food and Drug requires us to make, we made the same statement in the book so it would coincide.

Q. Then the edition that you have before you does not have those changes in it?

A. No. This was the original edition which was subsequently changed.

Q. With those corrections, is there anything in those pamphlets that you and the officers of the corporation don't believe to be true?

Mr. KLEINFELD: I object, your Honor, on the ground that that is irrelevant to this case, what he believes.

JUDGE CLARK: I have already passed on almost that identical question five or six times. The objection is overruled.

A. No.

By Mr. Rhyne:

Q. Has any purchaser or consumer of Nutrilite ever com-
107 plained to you or the plaintiff company that they have been misled or injured or damaged in any way by the 58-, the 42-, or 36-page pamphlets or the product itself?

Mr. KLEINFELD: I object, your Honor, on the ground as stated in our trial brief, that it is well settled that such testimony is hearsay and incompetent and is not admissible.

JUDGE GOLDSBOROUGH: If you will permit me?

JUDGE CLARK: Go ahead.

JUDGE GOLDSBOROUGH: You see, all the plaintiff is trying to show at this particular point, and he has a perfect right to show, is that he is not just a cynical figure. He certainly has a right to establish his good faith. Now that may not be directly in issue, but it is certainly a part of his case. There is no question about that, and that is all there is in this testimony, as to the purpose of it.

Mr. KLEINFELD: Let me put it this way: Let's assume that John Smith is a perfectly honest gentleman and he honestly believes that his product "X" will cure cancer and he puts it out as the cure for cancer and he says it is a cure for cancer and he honestly and firmly believes that. His belief for good faith has nothing to do with the question of whether that product is contraband because its labeling is false and misleading. People would take this product on the
basis of the claims made for it. They are harmed whether or
108 not there is good faith on the part of the seller.

JUDGE GOLDSBOROUGH: But it is a part of his case. He certainly has a right to come up here and show that he has not made up a lot of junk which has no medical properties whatever and he knew it when he did it. I remember the time when I was a boy

that it was considered that the worse medicine tasted the better it was. It certainly is a part of his case.

Mr. KLEINFELD: One of the major changes made in this act——

JUDGE GOLDSBOROUGH: Certainly the government ought not to continue to object to the man trying to prove he is not a crook.

Mr. KLEINFELD: We do, your Honor, because we don't think it is part of his case. I don't want to be offensive, by jumping up and down, but I want to make clear my present objections. The present statute removes the element of fraud or intent which was contained in the prior 1906 act. The element of fraud and good faith was clearly removed but regardless of that, I say that putting into evidence material of this character is hearsay, it is incompetent. I know of no case that permits its admission in evidence. I urge that it be excluded.

JUDGE CLARK: The Court will overrule the objection. The Court will stand in recess for five minutes.

(Whereupon a short recess was taken.)

109 JUDGE CLARK: The witness has not answered the last question.

Mr. RHYNE: To save time I will repeat it.

By Mr. Rhyne:

Q. Dr. Casselberry, has any consumer or purchaser of Nutrilite advised you that they were injured in any way by Nutrilite or the three pamphlets which you have identified as Exhibits 1, 2 and 3?

A. No. Nobody ever made such a claim.

JUDGE GOLDSBOROUGH: Has any claim been made that they have been deceived in any way?

THE WITNESS: No, sir.

By Mr. Rhyne:

Q. Dr. Casselberry, I will hand you a page which will be marked as Exhibit 8 and ask you to state what it is.

(The document referred to was marked as Plaintiff's Exhibit 8 for identification.)

A. This is a box, presumably, since the seal hasn't been broken, containing Nutrilite as shown on the label.

Q. Is this the product of the plaintiff that is involved in all this litigation?

A. Yes.

Mr. RHYNE: I offer this in evidence as Exhibit 8.

110 Mr. KLEINFELD: I respectfully object, your Honor, on the ground that the label on the product, what is on the product

and the constituents thereof is not in issue in this case. The issue is whether the three pamphlets involved in the seizure case have been found by the Federal Security Administrator to be misleading in a material respect. I urge therefore that the box and the label on it are irrelevant to the issues in this case.

JUDGE CLARK: I don't think they are irrelevant, Mr. Kleinfeld. The government has put this product off the market. It is perfectly proper it seems to me for the plaintiff to put the product itself in evidence.

Mr. KLEINFELD: We objected to the product not to the words, this label on the product itself. That is not involved in this case.

JUDGE CLARK: Objection overruled.

(The article referred to as Plaintiff's Exhibit 8 for identification was received in evidence.)

By Mr. Rhyne:

Q. Dr. Casselberry, how has this product Nutrilite, which is contained in Exhibit 8, been prepared, if you know?

A. Do you want the whole story?

Q. No. Very briefly.

A. Very briefly?

111 Q. Yes.

A. The product consists of you might say two different types of material. One is the base or concentrate which is made by Nutrilite Products Incorporated from alfalfa, watercress and parsley. It is the chemist Mr. Rehnborg's own formula, and in a nut shell it is a reduction from the alfalfa, watercress and parsley. Then this is fortified with the crystalline vitamins and minerals as shown on the label.

Q. Doctor, can you tell us approximately how many pounds of this base that you get from a ton of alfalfa, watercress and parsley?

A. It varies according to the time of the year, but it runs from 4, 5 or 6 pounds to about 10 pounds per ton.

Q. Doctor, has any claim been made at any time by Federal, State or other governmental officials, that Nutrilite is adulterated or harmful in any manner whatsoever?

Mr. KLEINFELD: Same objection, if the Court please.

JUDGE CLARK: Overruled.

A. Not that I ever heard of.

By Mr. Rhyne:

Q. When did Mytinger & Casselberry, Inc., take over the sale of Nutrilite?

A. In September 1945.

Q. Will you describe very briefly the development of the business since you took over the sale of Nutrilite in 1945?

112 A. When we started in 1945, the total sale for the first month was around $4,500. That has increased to the point that in August and September of 1948 the total sales volume was something over $500,000 a month. When we took over the sale of Nutrilite we had about six or seven distributors. In August and September of 1948 we had, I think, something like 6,000.

Q. Doctor, what percentage of your sales are made to people through the use of this pamphlet which has been identified as Exhibit 1, 2 and 3?

A. It is very difficult to answer that exactly but the best approximation we can make is about 40 per cent of the sales would come from the use of the pamphlet and about 60 per cent from users telling other people about it—customer recommendations.

Q. Those users who are referred to you never see the pamphlet?

A. That is very difficult to say. The whole question is hard to answer exactly, because we can only go by the evidence that comes to us. We have never made any actual study but we know that there are many agents and distributors who do not use the pamphlet at all and we know of many customers as we heard in these reports here, who buy Nutrilite without ever seeing the folder so it is really impossible to say.

113 Q. When was this product that is now sold under the name of Nutrilite Food Supplement first marketed?

A. About 1933.

Q. Doctor, I hand you a paper that has been marked Exhibit 9 and ask you to state what it is.

(The paper referred to was marked Plaintiff's Exhibit 9 for identification.)

A. This is a notice of a hearing dated June 18, 1947, addressed to Mytinger & Casselberry, Inc., the hearing having to do with the objections the Food and Drug People were making at the time to our labeling, I think—mostly to our labeling.

Mr. RHYNE: I offer this in evidence as Exhibit 9. I will not read it, your Honor, at this time.

JUDGE CLARK: Admitted.

(The paper referred to as Plaintiff's Exhibit 9 for identification was received in evidence.)

By Mr. Rhyne:

Q. I hand you a paper that has been marked Exhibit 10 and ask you to state what that is.

(The paper referred to was marked as Plaintiff's Exhibit 10 for identification.)

114 A. This is the record of the hearing which was mentioned in this other paper.

Mr. RHYNE: I offer this in evidence.

Mr. KLEINFELD: I make the same general objection, Your Honor, on the ground that it is irrelevant.

JUDGE CLARK: Objection is overruled.

(The paper referred to as Plaintiff's Exhibit 10 for identification was received in evidence.)

Mr. RHYNE: I will not read it. It was prepared by the Food and Drug Administration, F. Leslie Hart, Hearing Officer.

By Mr. Rhyne:

Q. Doctor, there is one thing in this record of hearing. It refers to a shortage of vitamin B-1 in the product. Can you tell us what happened to that objection?

Mr. KLEINFELD: Objection, your Honor, on the ground that this is irrelevant.

JUDGE CLARK: Objection is overruled.

A. At the hearing we were informed that they had a sample of this B and E product which we were selling at that time, which the Government claimed, I believe, was 30 per cent short of vitamin B-1. We asked for a sample of this sample that they had. We had it analyzed by laboratory. The laboratory reports showed a slight loss which could be easily accounted for in the time that the product
115 was held by the government. When those facts were presented to the government they we heard nothing more about it.

JUDGE GOODSTOCKER: What hearing was that?

THE WITNESS: This was a hearing July 1947, in Los Angeles.

By Mr. Rhyne:

Q. That hearing was on the booklet that is involved in the criminal case, not the ones that are involved here?

A. That is correct.

Mr. RHYNE: May I say, without reading these exhibits, my purpose in offering them: The government denied our allegation that they didn't specify their objections in the notice, and the summary of the hearing shows that they did not. That was the purpose of it. I don't mean to argue as I go along.

By Mr. Rhyne:

Q. Now, Doctor Casselberry, after this hearing in July 1947, on the pamphlet which is involved in the criminal case and which was

discontinued, did there come a time when you visited the office of the chief of the Los Angeles station of the Food and Drug Administration in the latter part of July 1948 and asked him why they were interrogating your users and distributors?

A. Yes. We made such a visit.

Mr. KLEINFELD: Same objection on the ground of irrelevancy, your Honor.

116 JUDGE CLARK: Overruled.

A. We made such a visit.

By Mr. Rhyne:

Q. Did that chief tell you that the investigation was merely routine in character?

A. He did.

Q. Did he tell you that they had any objection to the labeling of Mytinger and Casselberry, Inc., as it was then being revised?

Mr. KLEINFELD: Same objection, your Honor. This isn't tied up with the defendants here at all.

JUDGE CLARK: Overruled.

A. He did not.

By Mr. Rhyne:

Q. Had the advertising pamphlet involved in the criminal case been withdrawn from circulation 14 months prior to September 15 when that indictment was returned?

Mr. KLEINFELD: Same objection on the ground of irrelevancy, your Honor.

JUDGE CLARK: Overruled.

A. Not the advertising pamphlet. Some of the material to which they objected was withdrawn 14 months prior, but the advertising folder was withdrawn four or five months before the first seizure was made.

117 By Mr. Rhyne:

Q. And you had communicated that fact to the Food and Drug Administration?

A. I believe our attorney gave them that information.

Mr. KLEINFELD: Your Honor, I ask that that question be stricken. He doesn't know. He said he doesn't know.

JUDGE CLARK: Motion sustained.

Mr. RHYNE: If the Court please, I am not reading into evidence the various admissions made by the defendants in their answer to

our complaint, which may make it appear that there are certain phases of our allegations that have not been covered by Dr. Casselberry's testimony. I assume that the defendant does not want me to read those in. I have never done it before, but I just wanted to be sure and make that explanation.

JUDGE GOODSELL: They are in the record. You don't get anything by reading them over to the Court.

Mr. RHYNE: The reason I am stating it now is that I am skipping something that will make it look like there is a big hole in his testimony. For example: I am going now to the time after the first seizures. They admit they made 11 seizures; they admit that they involve the same issue. They admit that they are going to make more seizures in response to paragraph 11 of our complaint. I merely wanted to make that explanation before I started asking Dr.

118 Casselberry what occurred after the seizures.

Mr. KLEINFELD: There were numerous requests for admissions.

Mr. RHYNE: These are the admissions contained in the answer.

Mr. KLEINFELD: The answer to the amended complaint?

Mr. RHYNE: Yes.

By Mr. Rhyne:

Q. Dr. Casselberry, as soon as these seizures were made — the first seizure was made in New Jersey — and you were notified of that seizure in California, what action did the plaintiff take?

A. As soon as we got a copy of the exhibit which shows exactly what the government objected to, we sent out a telegram to our top agents instructing them to tell all their agents and distributors to remove these pages from our advertising folder to which the government had expressed their objection.

Mr. KLEINFELD: May I object to this?

By Mr. Rhyne:

Q. I hand you a paper that has been marked Exhibit 11 and ask you if that is the telegram of which you spoke?

A. Yes. This is a telegram.

(The paper referred to was marked Plaintiff's Exhibit 11 for identification.)

119 Mr. RHYNE. I offer this in evidence as Exhibit No. 11.

Mr. KLEINFELD. Your Honor, I don't know what it is, but as far as the copy we have here is concerned, it is not addressed to anybody.

By Mr. Rhyne:

Q. To whom was this telegram addressed?

A. The telegram was made out that way and then addressed individually to all the top agents.

MR. KLEINFELD: I object to this on the ground that the telegram is the best evidence. It has not been produced.

JUDGE GOLDBOROUGH: On what ground?

MR. KLEINFELD: On the ground that the telegrams are the best evidence of what he sent out in the way of telegrams and they are not before the Court, they haven't been offered. All we have is a copy headed Western Union.

MR. RHYNE: Here is our file copy.

JUDGE CLARK: That is all anybody ever has. The telegram would be over at the telegraph office. He has a copy and the original telegram goes to whoever it is addressed to.

MR. KLEINFELD: The name and address of the addressee is usually on the telegram. It is not on here.

By Mr. Rhyne:

Q. This was sent to a large number of people throughout the United States, was it not?

120 A. That is right.

Q. It is a true and accurate copy of the telegram, is it not?

A. So far as I know.

MR. RHYNE: The telegram reads as follows: "Inform all agents and distributors in your group immediately that pending court ruling pages 37 to 58 inclusive of customer book, and Nutrilite circulars number 1 and 3, must not be used in selling Nutrilite. Remove pages 37 to 58 by cutting along fold with sharp knife. Wrap, seal and place disputed material in third party's hands to be held pending final ruling. Books and circulars in hands of prospects, junior distributors and customers to be treated same way. Full explanation will appear with Nutrilite news, but follow above instructions at once."

The telegram is dated 10-11-48 and signed Mytinger & Casselberry, Inc.

JUDGE GOLDBOROUGH: When was the first seizure?

MR. RHYNE: On the 6th of October.

By Mr. Rhyne:

Q. This telegram was sent immediately upon receipt by you of the papers in the Belleville, New Jersey seizure?

A. As soon as we got the exhibit, the one that shows exactly what the government objected to.

Q. And exactly what they objected to, was pages 37
121 through 58, is that right?

A. That is right.

Mr. Kleinfeld: I object to that, your Honor. There is no evidence as to what the government objected to. It is a mere conclusion of the witness.

Judge Goldsborough: He is under oath and he was just asked what they objected to. That is what was sworn to.

Mr. Kleinfeld: The evidence of that is the label. He doesn't know what the government objected to. The label may be introduced in evidence.

Judge Goldsborough: You may take that up under cross examination.

Mr. Rhyne: May I at this point because of Mr. Kleinfeld's objection, read our request for admission No. 18 in our second request? It is this:

"Question: The material of the 58-page pamphlet of 'How to Get Well and Stay Well', upon which the first Bellville, New Jersey, seizure was based included only pages 37-58 of such booklet and excerpts from Nos. 1 and 3 of Volume 1 of the pamphlet, 'Nutrilite'.

"Answer: Defendants admit the statements contained in request 18 except that defendants deny the inference that pages 1 through 37 of said booklet were free from false and misleading implications."

By Mr. Rhyne:

Q. Now, Doctor, I hand you another paper marked for
122 identification as Exhibit 12 and ask you to state what that is.

(The document referred to was marked Plaintiff's Exhibit 12 for identification.)

A. This is the paper that was sent to every agent and distributor throughout the country with a copy of the weekly paper we get out, and this gives a detailed explanation of the telegram. The telegram went to the top agents who were instructed immediately to get this information to every member of their group. This was sent out to each distributor individually so we would be sure that every salesman in our organization would get this information and follow instructions.

Mr. Rhyne: I offer this in evidence as Exhibit No. 12.

Mr. Kleinfeld: We object, your Honor, on the ground that it is a self-serving declaration.

123 JUDGE CLARK: I am unable to see how you make that out.

MR. KLEINFELD: Let me read part of it to you:

"As you know, we have always endeavored to comply with the regulations of the Food and Drug Administration. We got the best advice we could when we rewrote the customer book," and so on and so on.

We think that is self-serving. Anybody could write this.

JUDGE TAMM: That goes to its probative value, not to its admissibility.

MR. KLEINFELD: I think it is so self-serving in character, your Honor, that it just shouldn't be admitted. It is just the plaintiff here saying: "The Government has started a suit and we have always tried to comply with everything the Government wants; we are very nice people."

I don't see what that has to do with the issue involved in this case as to whether the Administrator was arbitrary in reaching his conclusions, one of which was based on the 58-page booklet.

MR. RHYNE: I don't believe so, your Honor. I think this was something that was done at the time to show our good faith.

JUDGE CLARK: Objection is overruled.

(The document referred to was marked as Plaintiff's exhibit 12 and received in evidence.)

124 MR. RHYNE: This is entitled, "Material taken out of customer book."

"By this time you should have received notice from your Sponsor to take pages 37 to 58 inclusive out of your present Customer Books and to continue to use the Customer Book in your work without these pages.

"Since this word was sent out by telegram to Potentates and top Agents and also relayed to members of their groups, there has been much speculation. The following is the explanation.

"As you know, we have always endeavored to comply with the regulations of the Food and Drug Administration. As soon as we found that part of our original Customer Book was controversial, we made important*ant* changes at once and rewrote the book as fast as we could, so that the old Customer Book has not been published for many months.

"We got the best advice we could when we rewrote the Customer Book but now we find there is a difference of opinion as to what may be said. Anyway, we now have an expression of opinion from the Food and Drug Administration, and they object to the last part of the Customer Book. Regardless of

whether they are right or wrong, we want to comply with their views. Consequently, we are instructing you, as an Agent or Distributor, to remove from all Customer Books in your
125 possession, pages 37 to 58 inclusive.

"We suggest you do this by removing the cover and simply cut along the fold with a sharp knife, removing pages 37 through 58 in this way with one cut. Then the cover may be put back on the book and you may continue to use it.

"As fast as you pick up books from prospective customers, be sure to make this change and if you have any books in the hands of customers, who are assisting you in getting leads, change their books, too.

"At the same time, discontinue the use of Nutrilites Nos. 1 and 3, which are also, rightly or wrongly, criticized by the Food and Drug Administration. Put all you Nutrilite Nos. 1 and 3 and all pages 37 through 58 from the Customer Books in a package, wrap, seal and get into the hands of some person who will keep them for you until the matter is settled.

"In the meantime, we shall send you some additional pages to be put in the back of your revised Customer Books, following page 36, as soon as the material can be written and printed. This material will include a revised epilogue, which will fit the new book."

JUDGE TAMM: Before you leave that exhibit: There is no date on the exhibit. You have asked the witness no question as to the time that this document was sent out.

126 By Mr. Rhyne:

Q. Dr. Casselberry, when was this sent out?

A. This was sent out, as I remember, in the next weekly copy of our newsletter that goes out each week. It usually goes out Wednesday or Thursday, so this should have gone on that next Wednesday or Thursday after this telegram went.

Q. That would be in October 1948?

A. Yes. Certainly in October.

Q. Doctor, I hand you a paper that I have marked for purposes of identification as Exhibit No. 13.

(The document referred to was marked as Plaintiff's exhibit 13 for identification.)

By Mr. Rhyne:

Q. Will you state what that is?

A. This is a letter from Lee J. Myers to the Federal Security Agency, dated October 12, and telling about this telegram having been sent.

Q. You don't need to state the contents of it.

MR. RHYNE: Mr. Kleinfeld, this is a copy of the certified copy that was furnished to me by the Food and Drug Administration. I offer it in evidence. Since you attach all this together I will offer it all as one exhibit, even though it has your memoranda of the way you were going to handle the answer.

127 MR. KLEINFELD: The same objection on the ground of irrelevancy to the issues in this case, your Honor.

JUDGE CLARK: Overruled.

(The document referred to as Plaintiff's exhibit 13 was received in evidence.)

By Mr. Rhyne:

Q. This letter is dated 12 October 1948, addressed to the Federal Security Agency, Food and Drug Administration, Washington 25, D. C.

"GENTLEMEN:

"Yesterday, my clients, Mytinger & Casselberry of Long Beach, California, received a copy of the Libel filed against certain of their products in the United States District Court for the District of New Jersey. I was immediately called into conference and it was decided to immediately discontinue the use of the leaflets entitled 'Nutrilife Vol. 1, No. 3' and 'Nutrilife Vol. 1, No. 1,' and to delete from the booklet 'How to get Well and Stay Well' all pages after page 36. This eliminates all statements and material to which objection was made in the Libel of Information.

"Telegrams were sent to all general agents instructing them accordingly, and urging them to issue similar instructions to all of their sub-agents. Bulletins confirming these telegrams have also been sent to all agents in order that there
128 may be no misunderstanding on their part.

"In this connection I want to say that the filing of this Libel in New Jersey was the first intimation that we had received that any of the literature we are using at present was objectionable to your office. In the future I will appreciate it if you will advise me if you find anything in our literature that you take exceptions to. Mytinger & Casselberry are a reputable firm, and are desirous of cooperating with your agency in every possible way.

"I need not point out that the offense of 'misbranding' is not a well defined one in the light of present day scientific knowledge, and it is very easy for a firm in the nutritional supplement field to make statements in the best of faith which do not 'square' with the views of your office. In this case a letter from your

agency pointing out your objections would bring about a correction without the necessity of court action.

"Nutrilite is an excellent food supplement, and thousands of persons have been benefitted by it. I am sure that it is not the intention of your agency to prevent the public from using it. With mutual cooperation, I believe that much trouble and expense can be saved for all parties concerned.

129 "Very truly yours, Lee J. Myers."

I won't read the next three pages. I will only read the final memo which is entitled "AF 28002, Nutrilite Products, Los Angeles."

"Memo re Lee J. Myers letter October 12, 1948.

"This letter comes up for answer December 28, 1948. Myers is an astute attorney, specialist in F & D cases. He is thoroughly aware of procedure. He well knows the scheme of Nutrilite is not in our opinion a slight matter to be settled by talk or correspondence. He really doesn't say anything in his 10-12-48 letter that requires an answer. Our failure to answer cannot prejudice any finding or future action. The letter may be filed without answer with this memo.

"John P. Harvey, December 28, 1948."

By Mr. Rhyne:

Q. Now, Doctor, can you give us some idea of the effect of the seizures by the Food and Drug Administration, or these libel actions, on the business of the plaintiff?

Mr. KLEINFELD: Objection on the ground that that is irrelevant to the issues in this case.

JUDGE CLARK: Overruled.

A. Yes. The effect of the attack was to frighten agents and distributors so that those who were working would be so concerned about these other things that they would work less. Natu-

130 rally, any law-abiding citizen is perturbed when the organization in which he is employed, or with which he is working, is under fire by the Government. Whether it is right or wrong, he still is upset and bothered and usually suspicious, too.

So the agents and distributors who were working worked less. Some quit entirely. New agents and distributors who were about to start would not start, because they wouldn't want to start with a company under fire by the Food and Drug Administration, and the whole result was a loss of morale, loss in sales volume, and a loss in personnel.

By Mr. Rhyne:

Q. What about the publicity released by the Food and Drug Administration, what effect did it have?

A. To answer that question, I must say that we can't be sure that the publicity was actually released by the Food and Drug, but publicity did follow in many cases where seizures were made, with the result that everybody in the community who was using Nutrilite learned that the product was being seized. They naturally assumed that the Government was right and we were wrong, so that led also to loss of many customers.

Q. Dr. Casselberry, I hand you a paper that has been marked for identification as Exhibit No. 14 and ask you to state what that is?

131 A. This is a statement of comparative sales volume of our organization, from August 1948 to August 1949.

Mr. RHYNE: Mr. Kleinfeld, this is the paper that I furnished you some time ago and I understand you don't object on the ground we don't produce our original books.

Mr. KLEINFELD: No. We object on the ground of relevancy, and if the plaintiff suffered damage we assert that it is legal damage as a result of a lawsuit and the damage he may have suffered is irrelevant to the issues involved in this case and immaterial, of course.

Mr. RHYNE: In response, I say that it shows a drop of $100,000 from August, just after they made their seizures, to December when this action was filed.

Mr. KLEINFELD: We urge that any lawsuit may, of course, cause a drop in volume of the product proceeded against, but the issue involved here is whether the Administrator was arbitrary and illegal in making his determination, not whether or not the plaintiff suffered damage. We claim it is irrelevant and immaterial.

JUDGE CLARK: Overruled.

(The document referred to as Plaintiff's exhibit 14 was received in evidence.)

By Mr. Rhyne:

Q. Dr. Casselberry, I hand you another paper which has been marked for purposes of identification as Exhibit 15 and ask
132 you to state what it is.

(The document referred to was marked as Plaintiff's exhibit 15 for identification.)

A. This is a list of the number of our distributors and the monthly changes in the number, additions or deletions or losses from August 1948 to August 1949.

Mr. RHYNE: I offer this in evidence. This is also a copy of the paper I gave you.

Mr. KLEINFELD: Same objection.

JUDGE CLARK: Overruled.

(The document referred to as Plaintiff's exhibit 15 was received in evidence.)

Mr. RHYNE: At this time I offer as Exhibit No. 16 a memorandum, the authenticity of which the defendants concede, from their own files, dated 3-31-49, entitled "Office Memorandum, United States Government, To: Division of Field Operations, From: Administration (interstate), Subject: Nutrilite, Nytinger & Casselberry, Inc., Long Beach, California (AF 28-002)."

Mr. GOODRICH: May I offer an objection to this memorandum. On its very face it shows it has never been sent, a cancelled memorandum, written by one person in the Administration, cancelled and never sent. For that reason, it is entirely irrelevant.

Mr. RHYNE: We have no evdence it has been cancelled, and
133 I would like for the Court to consider the contents before it passes on the objection, if I may read it.

May I read it and then I will offer it after I read it? The subject is, "Nutrilite."

"As you know, the Administration plans to keep a sustained pressure against this company until an injunction is granted or the criminal case goes to trial. Since we are assuming, for the purposes of the seizure actions we are taking, that the composition of the product is that claimed on the label and are basing our seizures principally on the accompanying labeling, we suggest it will be sufficient in the future to collect documentary samples only.

"We have prepared a set of mimeographed copies of the principal labeling, the booklet 'How to Get Well and Stay Well' for transmitting to the District Attorneys with request for seizure. We have also prepared mimeographed copies of the pertinent portions of the labels on the packages of Nutrilite. Perhaps when you report shipments for sampling, if the plan meets with your approval, you can enclose with the request one of the mimeographed copies of the booklet and package label. The inspector can compare those exhibits with the stock of Nutrilite and its labeling and wire the Administration if they are identical. The seizure recommendation to the General
134 Counsel can then be prepared, on the basis of the wired information as to date of shipment, amount, and so forth.

"We hope such procedures will enable us to effect seizure more quickly and will save the cost of the physical samples, which is $19.50 each."

And there is a signature that I cannot read. It says: "Exhibit A, 'How to Get Well and Stay Well.'"

Mr. GOODRICH: A. G. Murray is the signature.

Mr. RHYNE: Who is Mr. Murray?

Mr. GOODRICH: An administrative officer in the Food and Drug Commission. If this shows anything in this case, it shows that Mr. Murray's superiors canceled this letter.

Obviously, if the Court will look at it, it has no date on it; it was marked through and was never sent. On that basis we respectfully submit that the memorandum has absolutely no bearing in this case.

Mr. RHYNE: Mr. Goodrich is testifying that it was never sent, but I think that is something it is up to them to prove. We found this in their files and it certainly indicated that they—well, I don't like to argue the evidence, but it has a date on it, 3-31-49, and it was such an unusual memorandum, and certainly quite revealing on the issues in this case.

JUDGE CLARK: It certainly goes directly to the question of whether the action of the Food and Drug Administraton was
135 arbtrary and oppressive.

Mr. GOODRICH: Your Honor understands, of course, that Mr. Murray hasn't the final decision. Mr. Murray has made no decision in this case, that Dr. Dunbar, Mr. Crawford, Mr. Larrick and Mr. Elliott are Mr. Murray's superiors, that this letter has been canceled; it was never sent. And, even on that, if it reveals on that basis anything at all in this case, it reveals that the superiors to this man canceled the memorandum.

For that reason I have stated our objection.

JUDGE CLARK: If you prove that that letter was never sent and was canceled, as you call it, a motion to strike would be in order.

For the present time I am going to admit it.

Mr. GOODRICH: If your Honor will permit me, all of these letters are coming in with our agreement that they are out of our files and that they are authentic. I certainly understood when I agreed with Mr. Rhyne on that point, that we would have a right to at this time point out things of this sort rather than wait and have to put a witness on. Otherwise, we should not have agreed to the photostating or certification of these letters and let him prove it. He has the burden of proof, as your Honor will understand.

JUDGE CLARK: He has the burden of proof. The authen-
136 ticity of the letter is not disputed, however.

Mr. GOODRICH: It is no letter at all; it is canceled. It isn't authentic. It is a canceled draft.

137 JUDGE CLARK: I understand it is an interoffice memorandum, but the way to prove that is to put Mr. Murray on the stand and ask him if that letter ever went out. Murray can testify to that.

Mr. GOODRICH: Sure he could, your Honor, but my objection was to save the time and effort of the Court. I think Mr. Rhyne will admit that it never went out.

JUDGE GOLDSBOROUGH: Why are you so disturbed about it? You are giving yourself away.

Mr. GOODRICH: I am not giving myself away, your Honor. I am attempting to simplify this case and hold it within the issues that are legitimately here for trial. The fact that Mr. Murray, an administrative officer, may have written a letter which was subsequently cancelled seems to me to prove nothing, that is the reason I was objecting.

JUDGE GOLDSBOROUGH: "Methinks the lady doth protest too much . . ."

Mr. GOODRICH: Is my objection overruled then?

JUDGE CLARK: Objection overruled.

(The document referred to as Plaintiff's Exhibit 16 for identification was received in evidence.)

138 By Mr. Rhyne:

Q. Doctor Casselberry, did any official of the Food and Drug Administration or any other official threaten further seizures other than those that were made of your product?

A. We were told by Mr. Larrick, when we saw him in October or November, of this first seizure.

JUDGE CLARK: Who was Mr. Larrick?

THE WITNESS: What is he? A deputy commissioner?

Mr. GOODRICH: Associate Commissioner of the Food and Drug Administration under Dr. Dunbar.

By Mr. Rhyne:

Q. And one of the defendants in this case?

A. Yes and he informed us that that morning he had ok'd further seizures and we gathered from him that he was going to continue to do that.

Mr. KLEINFELD: I move that that be stricken, your Honor, because of the fact that whether the seizures were made or further seizures might be made again has no relevancy as to whether the Administrator was arbitrary in reaching the administrative determination involved in this case. He had a perfect legal right to make seizures.

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. If these further seizures had been carried out what would have been the effect on the plaintiff's business?

Mr. KLEINFELD: I object to that question as being conjectural and leading.

MR. RHYNE: I believe it is, your Honor. I will withdraw it.

By Mr. Rhyne:

Q. Dr. Casselberry, were embargoes placed on your product at the request of the Food and Drug Administration by state and local officials?

MR. KLEINFELD: Same objection, if the Court please, on the ground that that is irrelevant to the issues involved in this case.

JUDGE CLARK: It seems to me it is very relevant, Mr. Kleinfeld.

Mr. KLEINFELD: We don't think so. We urge that it isn't relevant because again it doesn't bear on the determination of probable cause reached by the Administrator.

JUDGE CLARK: Overruled.

A. Embargoes were placed on the product by state officials. Our assumption was that they were made at the request of the Food and Drug people because ordinarily——

Mr. KLEINFELD: I object to that, your Honor.

JUDGE CLARK: The assumption may be stricken.

THE WITNESS: We have no evidence to show who ordered the——

Mr. KLEINFELD: If it is an assumption I urge that his entire
140 testimony be stricken, if all he is doing is assuming something. If he knows something that is another matter.

THE WITNESS: I know the embargoes were made by the state officials. I know that in some cases a federal Food and Drug inspector was with the state inspector when he placed the embargo. I know that in some cases it was done at the suggestion, right at the time the federal inspector told the state man what——

Mr. KLEINFELD: I object to that.

Mr. Rhyne: Just a minute. I will just read in their admission on that, then I can ask my next question without any further background. The defendants in answering paragraph 13 of the complaint admit these facts:

> "Plaintiff further alleges that the Food and Drug Administration through its officers and employees has caused embargoes to be placed on plaintiff's products in New York, New Jersey, Washington State, and Florida, and various other localities in the United States, by request to state and local authorities, that such embargoes have generally been instituted prior to the insitution of libel for condemnation proceedings."

By Mr. Rhyne:

Q. What was the effect of those embargoes on your business?

A. The effect of the embargo was to tie the product down.
141 Of course, it frightened the agent and distributor at the time and had very much the same effect as the seizure by the Food and Drug people.

Mr. KLEINFELD: I object, your Honor, on the ground he says it frightened them. I don't know how he knows it frightened the distributors. Maybe the distributors can testify to that. I don't know how he can.

By Mr. Rhyne:

Q. I will ask you. Did the distributors tell you they were frightened?

Mr. KLEINFELD: I object to that on the ground that it is hearsay.
JUDGE CLARK: Overruled.

A. I can't answer that definitely. I can't say positively that any agent actually told us he was frightened. I gathered that he was frightened by the way he acted.

Mr. KLEINFELD: I object to that, your Honor.
JUDGE CLARK: That may be stricken.
THE WITNESS: That is all I can say.

By Mr. Rhyne:

Q. Dr. Casselberry, as a result of the 10 libel actions in nine different federal courts by the defendants were you required to hire counsel in each of those cases?

A. Yes.

Mr. KLEINFELD: Same objection, your Honor, on the
142 ground of irrelevancy.
JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. Were you required to put up bond and court costs?

A. We were.

Mr. KLEINFELD: Same objection.
JUDGE CLARK: Overruled.
Mr. RHYNE: That is all.
JUDGE CLARK: Mr. Kleinfeld, before you start your cross examination, the Court will take a recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:55 p. m., the hearing was recessed to reconvene tomorrow morning at 10:00 a. m., October 18, 1949.)

142a Reporter's Certificate to foregoing transcript omitted in printing.

143 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

Washington, D. C.,
Tuesday, October 18, 1949.

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a. m.

APPEARANCES:

On behalf of the plaintiff.

Mr. CHARLES S. RHYNE and
Mr. LESTER L. LEV.

144-145 On behalf of the defendants:

Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and
Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

146 PROCEEDINGS

JUDGE CLARK: Mr. Rhyne, I understood you had concluded direct examination?

Mr. RHYNE: Direct examination of Dr. Casselberry.

I would like at this time if I could to ask that I be allowed to call a medical doctor from out of town out of order.

JUDGE CLARK: Any objection to that?

Mr. KLEINFELD: No objection.

Mr. RHYNE: I would like to call Dr. John A. Myers. Dr. Myers, will you come forward?

DR. JOHN A. MYERS, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rhyne:

Q. Would you give your name and address, please?

A. Dr. John A. Myers, 104 East Biddle Street, Baltimore, Maryland.

Q. You are a medical doctor?

A. I am.

Q. Would you give your educational background and experience, Doctor?

A. I received my Bachelor of Engineering at The Johns Hopkins University in 1927, a Master of Electrical Engineering in
147 Johns Hopkins University in 1932, a Doctor of Medicine in 1935 at the same university.

I had nine months of student internship at Johns Hopkins Hospital. I served a one-year medical internship at Church Home and Hospital in Baltimore City in 1935 and 1936. I was Resident on the Medical Service of that hospital for the following year, 1936 to 1937.

I was Resident Physician in charge of the Medical Service at the University Hospital, University of Maryland, in Baltimore, from 1937 to 1938. I organized and built the first blood bank in Baltimore at that hospital in 1938.

I taught vitamin deficiency diseases from 1938 until 1946. I gave lectures in graduate——

Q. Where did you do that?

A. University Hospital.

Q. University of Maryland?

A. University of Maryland.

In 1945 and 1946 I lectured before the graduate divisions there on vitamin deficiency diseases.

Do you want my membership? Some societies?

Q. Yes. Give us that now.

A. I am a member, a fellow, of the American Medical Society; a member, of course, of my local chapters; and a member of the American Academy of Applied Nutrition; and I am on the research staff at Hynson, Waescott & Dunning, where I am at present
148 carrying on vitamin deficiency research, experimental.

Q. Could you tell us just a word about this American Academy of Applied Nutrition you referred to?

A. That is an academy incorporated in Los Angeles, of a group of men, dentists, physicians, and laymen, who are primarily interested in disseminating knowledge of better nutrition, applied nutrition as we know it today.

Q. Can you tell us of your private practice as a doctor?

A. My private practice is limited to the specialty of internal medicine, with most interest in vitamin deficiency disease and endocrinology.

Q. Doctor, have you followed the literature in medical and other publications and books on the values of minerals and vitamins?

A. Yes, I have.

Q. Can you from your experience in this literature and these books form an opinion as to whether or not there is a vitamin and mineral deficiency in the diet of many people at the present time?

A. I believe that there is a widespread sub-clinical vitamin deficiency in our entire population, including the well-to-do, the middle class, and the so-called indigent; and I believe that this deficiency accounts for much of the widespread irritability, gastric distress, headache, and minor ailments from which our entire population complains.

Mr. GOODRICH: Pardon me, your Honor. May I have that last question and answer read? He was going too fast.

JUDGE CLARK: Read the question and answer.

(The last question and answer was read by the reporter.)

By Mr. Rhyne:

Q. Dr. Myers, could you explain your answer a little bit by stating some of the reasons for this deficiency?

A. Much of the present deficiency as we see it today actually begins before birth. Many of our children are born of mothers already deficient in vitamins and minerals, so as a consequence, the children are born with structural damage and tissues incapable and unable to utilize the materials that are actually given it.

Hardly is a child born before it is found that the mother cannot feed it, either because she doesn't have sufficient milk or any milk, and the baby is put on a formula which is at best a modification of nature's elements.

Later in life it is fed de-mineralized cereals and foods, de-vitaminized by processing, and later on in life, if you can get it to eat vegetables at all, the vegetables are grown on vitamin-deficient and mineral-deficient soils so they are already deficient before they get to you, and by the time they get to you they are stale either by the long time that it takes to deliver them or by the long time of refrigeration before you use them.

Later in life as these conditions lead to indigestion and upset in the gastrointestinal tract, the patient is liable to feed himself such things as crackers and tea which actually increase the condition for which he is trying to get relief.

Finally, in our actual treatment of some of the cases we have developed what we term malnutrition by some of the therapy.

Q. Doctor, from your education and experience and from your reading of the literature in medical and other publications on vitamins and minerals, can you arrive at an opinion of the present consensus of informed medical opinion as to the value of the known vitamins and minerals?

Mr. KLEINFELD: I will object to that, your Honor, as being irrelevant. I suggest that he may ask him questions about the

product involved in this case rather than the general question about vitamins.

JUDGE GOLDSBOROUGH: What is your objection?

Mr. KLEINFELD: I say it does not deal with the issue in this case.

JUDGE GOLDSBOROUGH: It deals with the man's ity to pass judgment.

151 JUDGE CLARK: He is testifying as an expert. Objection overruled.

THE WITNESS: Will you state that question again? I didn't quite get it.

Mr. RHYNE: Yes, Doctor.

By Mr. Rhyne:

Q. From your education and experience and from your reading of the literature in medical and other publications on vitamins and minerals, can you arrive at an opinion of the present consensus of informed medical opinion as to the value of the known vitamins and minerals?

A. Yes. I think the tremendous volume of literature, both scientific and lay, appearing on this subject, indicates that the informed consensus of medical opinion is that vitamins and minerals are a necessary adjunct to a good diet, and they are being added by the doctors at times when the patient is in severe illness, debilitation, after surgery, during pregnancy, and in old-age.

Q. Based upon the experience to which you have testified and the literature sources to which you have testified, what in your opinion is the present consensus of informed medical opinion as to the symptoms for which vitamin A would be an effective treatment?

A. Before answering that question I must say that we cannot consider a single vitamin deficiency without looking at how
152 it may be divided. The literature talks about classical vitamin deficiency, but today we consider what we call subclinical—that is, conditions that are less than the classical disease. When we speak of vitamin A deficiency, even Hippocrates in 300 B. C. recognized the condition in the eyes known as xerophthalmia, which is a condition where the transparent part of your eye becomes hard and actually looks like a scar is across it and that was given the term of xerophthalmia. And wherever we mention classical vitamin deficiency that is what we think of.

Today, of course, we do not see that picture. We actually see minor deficiencies, deficiencies of a smaller nature. Even Hippocrates at that time recognized that when a patient was exposed to bright sunlight that this condition was very prevalent. He actually learned how to clear it at that time by putting poultices of liver on the eyes of the patients and said that these scars would fall away like skins off the grape.

Of course, as I say, today we don't see them. Today we find vitamin A deficiency associated with a peculiar condition in our population known as night blindness. Many of you would recognize that if you went from a brightly lighted outside into a theatre and could not find your seat in the dark, or if you were driving an automobile at night time, and your eyes were flashed by the
153 oncoming light of an automobile, you were unable to see after the automobile passed. That is a condition of mild vitamin A deficiency and called nightblindness.

There are other conditions associated with vitamin A deficiency; that is a roughened skin, an irritation and a hardening of all of the linings of the mucous membranes of the nose and throat, and the linings of the glands, gall bladder, bladder itself, the kidney, and because of this we believe that it is the beginning of some of the concretions that form in those glands. Certainly, it has been proven that they do occur in experimental vitamin deficiency in animals.

In pregnancy, a woman may have difficulty getting pregnant, and afterwards a child always has difficulty in growing in the absence of vitamin A. It is very important in the growth of a child.

Q. Doctor, when you speak of "classical": by that you mean "acute"?

A. Yes, sir. Acute and classical are the same. The literature calls them "classical" rather than "acute."

Q. Doctor, from your practice, can you give us an example of a patient with vitamin A deficiency, that you have treated.

A. Yes. One of the most amazing cases that came to my attention just a few years ago was that of a federal judge from Tampa, Florida, Judge William J. Barker.

154 Q. Do you have his permission to tell about his case and his record?

A. Yes, I do. I talked to Judge Barker on the telephone a few days ago. In fact, he was to come up here to tell of his case but found he couldn't get up.

Q. That is all right about that. You have his permission to talk about his case?

A. Yes, sir, I do.

Q. Go ahead.

A. Judge Barker, for two years, had been complaining of very severe irritation of the cornea of his eyes, and he consulted many physicians about it, and a diagnosis of some chronic infection was made. He was treated with local applications, with immunizing serums, and for the last year, before he came to Baltimore, he was actually treated by turning the eyelids out and painting them with sclerosing material, and he told me the pain was almost insufferable, and for several hours afterwards he could hardly even stay still without some sort of sedative.

After the two years he finally decided that he would have to give up his work. He was unable to see any more. All of his work was read to him by his secretary. He was not even comfortable sitting in a darkened room, and even at night time the pain was intolerable.

In that condition he was sent to the Wilmer Clinic at Johns
155 Hopkins University. There the condition was noted to be as I have told you. It was so bad that the possibility of infection could hardly be overlooked; and he was recommended to take another serum which they recommended would be more potent than the ones he had already taken.

However, Judge Barker was of the opinion, when he was told that, that he was at the end of his rope and that this serum was probably no better than what he had used for two years, and he felt that he was not going to get well.

It happened at that time, and for two years previously, that I had been treating his daughter and she came to see me after she got this information and asked me if I would take him over. Well, I refused to do so, realizing that he had been to the finest authorities that I knew, certainly in the realm of eye disease, and I didn't feel that I could offer anything. But he came himself, crying almost like a baby that he just couldn't go back without some other kind of help, and so I offered to help him by the use of vitamin material if he decided that he would not use the other material any more—that is, the new vaccine they had been giving him. This he refused to do, and he left the office rather upset. He said that he could not give up the opportunity of using everything that had been offered him, but I didn't see any point of splitting the responsibility. If anything did happen, certainly there was no point in saying, "Well,
156 it was the vaccine or the vitamin."

So the next day he came back and said he was ready to try anything and he had stopped giving himself the vaccine—he gave that to himself.

I have his record here which I would like to read a few of the notes from. I saw Judge Barker the first time when he came to see me on November 1, 1946, and he was at that time 60 years of age. He came back the next day, telling he, as I said, that he was ready to start, and I gave him a treatment with vitamin A. And I might say also that his condition was associated with riboflavin. Both of those are associated with high intensity light, and I gave him injectible vitamin A and B complex including riboflavin.

When he came back to see me two days later, on Monday—that was Saturday and then he didn't come to see me on Sunday—he told me that within an hour after he left the office his eyes had begun to feel better, and when I saw him on Monday he actually was able to sit in light of this intensity, when on Friday he was unable to sit even in a dimly lighted room with a low bridge lamp.

That is exactly what he told me. There was less redness of his sclera, and his eyelids which had been fiery red were almost normal. He was given the same treatment, and on the next day when he came back he said he was already beginning to forget that
157 his eyes hurt him any more, and for the last six months he could not think of anything else but his eyes. He said he still noticed the hurting effect of the light from automobile headlights, and his daughter told me that on Sunday when he went to church he would take a squint at automobile headlights when they went down the street just to get an idea how they affected them.

On Wednesday he said he felt fine, his eyes were in excellent condition, there was no discomfort, and he was already beginning to read again. This was only four days later. On Thursday he felt fine, his eyes were quiet. Friday he called Tampa and had his time extended for two more days, and stayed until Monday.

When he left on Monday he said he had more pep and stamina, more interest in his surroundings; his appetite was ravenous; he was feeling better than he had felt for a long time in his life.

I asked Judge Barker if he would like to have his doctor give him injectible material and he said No, that he would like to continue it by mouth, so we gave him a capsule very similar to this Nutrilite.

I didn't know about it at that time but it was put out by another company. He continued to use it until I saw him on a vacation trip to Florida on February 25, 1947. At that time he felt very well. He was so pleased with himself that he drove me all over
158 Florida in his automobile and would not let me touch the wheel because he wanted to let me see that neither the bright lights in the daytime nor the brilliant lights of automobiles at night time would bother his eyes. It was a very pleasant trip. He came back to Baltimore again late in the summer of that year, bringing his wife back for some treatments and I saw him at that time. I have not seen him since until I talked to him over the telephone a few days ago, and he told me that he is feeling well except that his eyes are beginning to bother him a little bit despite the fact that he has been taking this preparation by mouth all the time.

Q. Doctor, of course, that is an example of an acute condition rather than a subacute condition?

A. Yes, sir, that is one of the most acute you would probably find.

Q. Now, based upon the two same premises—your experience and the literature in the field—can you tell us the symptoms for which vitamin B_1 would be an effective treatment?

A. Again we have the same picture. Vitamin B_1 is taught in its classical form as a disease of the Orient known as beriberi. If you should see a patient with that disease he would just look like he was practically dead. He is hardly able to move. His muscles are

flabby and edematous, he can't stand up, he is highly nervous
159 and jittery, and very often they do drop dead very quickly from a heart attack.

In its milder forms vitamin B_1 deficiency takes almost the entire realm of nervousness and irritability that you can possibly think of, from mild nervousness, insomnia, gastric irritation and upset, peculiar pains and swellings in the legs, numbness and tingling in the hands and fingers, nausea and vommiting, irritation of the gastrointestinal tract, and the entire realm of what are very often termed neurotic symptoms in a patient.

Q. Doctor, can you give us the same information for vitamin B_2?

A. Vitamin B_2 or riboflavin is another part of the B complex, and a very important one. It, however, is more difficult to give clear-cut cases. The symptoms appear in a more general form. In the classical form the cornea of the eye or the white part of your eye has an invasion of blood vessels so that the person looks like he had pink-eye, and that is what I mentioned before that Judge Barker had. His eyes looked exactly like they had been painted with red paint even at a distance of about 10 feet.

There is a scaly irritation and crusting all around the eyelids, around the ears, around the nose and mouth, and a cracking of the angles of the mouth, which is in the literature known as cheilosis.

There are very many other symptoms. The one that I am
160 primarily interested in at the present time is the production in babies at the time they are being carried by the mother, of a severe picture of vitamin B_2 deficiency, which has none of the symptoms of what I have just told you, but the baby is born with cleft palate, hairlip, fused ribs, all sorts of modifications of the bony skeleton.

Mr. Goodrich: May I have that last answer read back?

(The last answer was read by the reporter.)

A. (Continuing) This work is experimental, of course.

By Mr. Rhyne:

Q. Will you continue, Doctor, if you have any more to add?

A. I think that is all I have to say to that.

Q. I didn't ask you for an illustration of vitamin B_1 deficiency. Can you give me an example from among your patients of vitamin B_1 deficiency?

A. Yes, I can. I failed to mention, too, in vitamin B_1 deficiency that its greatest importance is also in pregnancy, and that is universally recognized by the physicians in general.

At the University Hospital we had a young woman 22 years of age come in the fifth month of her second pregnancy. She was brought

to the hospital on Friday evening by her husband, who told the interne in the accident room that his wife had very peculiar
161 feelings in her feet and she said she did not know where she was putting them—she could not walk up and down steps with any degree of assurance—so the interne took her by the arm and walked her up and down the steps and he didn't see anything wrong with her and told her husband to take her home, that she was probably just a little anxious.

She was brought back Saturday morning, and the interne was told she had peculiar feelings of bugs running up and down her spine, she had tinglings in her feet, and that now she had to stumble up the steps. The interne tested her skin with pinpricks of hot and cold water and he found that she had normal reactions, and again he walked her up and down the steps, and again he found nothing that he could see, so he again told the husband to take her home, with a little bit more emphasis to his voice this time.

She was again brought back that evening, and this time the condition had gone up to her mid thighs and the severity of the condition in her feet was much greater. She said that she was practically numb in her feet and could not feel anything above her ankles. Again the interne tested her and found nothing wrong. This time he sent her home.

She was brought back Sunday morning practically paralyzed. She could not move either leg and she was hospitalized by the resident in charge.

Monday morning the paralysis had extended up above her—
162 abdomen and the tingling reflexes of her abdomen were completely missing. You could scratch her and there were no abdominal reflexes.

At that time because of my interest in this subject I was called by the professor of medicine to see the individual, and I immediately diagnosed her condition as vitamin B_1 deficiency and gave her the largest dose we had then given, 250 milligrams intravenously. That was about 2 o'clock in the afternoon. About 6 o'clock that afternoon her abdominal reflexes had returned; by next morning she had sensation in her upper thighs; by the end of the week she was able to walk again.

She continued to go through her pregnancy and was delivered, and so far as I know is still well. I haven't heard from her.

Q. Doctor, can you give us an illustration of a patient with a vitamin B_2 deficiency?

Mr. KLEINFELD: May I again renew my objection to this entire line of testimony on the ground that it is not relevant to the issue before this Court?

JUDGE GOLDSBOROUGH: What is your ground?

Mr. KLEINFELD: On the ground that the beneficent effect of vitamins generally is not an issue in this case, that the only issue is

whether the labeling of this product Nutrilite was in the opinion of the Food and Drug Administration, in material respect, to
163 the injury or damage of the purchaser or consumer.

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. If you can't think of an illustration——

A. I can give you one. This was B_2, wasn't it?

Q. Yes, B_2.

A. In March of 1944 I had one of my very fine surgeon friends at Hopkins operate on a patient of mine. After the operation was over we stepped aside and began talking to one another, and I noticed that he had a very marked redness and scaliness about his eyes, around his ears, a soreness around his nose and mouth, and I was so amazed at the appearance that I just expostulated, "Where did you get that beautiful riboflavin deficiency?" And with equally quick response he said, "Do you think that is what I have?" I said, "Certainly do." He said, "You know, I developed the grippe last fall and after I got over the grippe I had this condition left and I have not been able to find anything to help it; we have put local applications on it and have treated it but nothing happens." I said, "Well, I think it is one of the beautiful clear-cut cases of riboflavin deficiency and I think you can get results very quickly."

He came to the office on Thursday of that week and I gave him a treatment then, and by Saturday one eye was completely
164 clear. And an injection on Saturday caused the other eye to be completely clear by Monday.

Since then he has been one of my very fine patients and has kept his face and eyes completely clear by getting injections approximately once a month.

At the time I saw him though I said, "By the way, have you had any twinges in your heart?" He said, "Yes. How did you know about it?" I said, "I didn't, but usually riboflavin deficiency is associated with heart ailments and it is the commonest cause of sudden death that we know of."

Riboflavin deficiency always causes sudden death in our experimental animals.

Q. Doctor, based upon these two sources—your experience and the literature in the field—can you give us the symptoms for which vitamin C would be an effective treatment?

A. Again we have the same picture. The classical form of vitamin C has been known since time immemorial and known as scurvy. The first records are back as far as the 1500s, and a classical story written by Sir James Lynn of the British Navy was written about 1755.

The picture he wrote then is just as good today as it was at that time, and it was following his analysis of this condition that the British Navy was told never to leave port without sufficient limes to protect the crew, and to this day the British sailors are
165 called Limeys.

Mr. KLEINFELD: I object to that unless he advises the Court how he knows that the British Navy was told all this.

THE WITNESS: I read the books.

Mr. KLEINFELD: What books? I respectfully object to the question and answer unless he explains how he knows that the British Navy took all these vitamins.

JUDGE CLARK: Overruled. You may cross examine as much as you please on that.

By Mr. Rhyne:

Q. Will you proceed?

A. When we get to subclinical vitamin deficiency, again we get to milder table conditions that are very difficult to prove in any way except by a therapeutic test with the vitamins. However, we know that a condition which many of us suffer—gingivitis or sore and puffy gums—is a common condition in early vitamin C deficiency. We believe, from our experimental work, that dissolution of the teeth and cavities are also a product of vitamin C deficiency. Many irritabilities of the muscles, bruising spots over the bodies, tiredness in the legs, and general debilitation or tiredness all over, especially following infectious disease, is a vitamin C deficiency precipitated by infection and the need of more material to overcome infection.

166 Q. Doctor, I don't want to ask you about too many examples, but can you give us an example of a vitamin C deficiency and I won't ask you on the others?

A. Vitamin C deficiency comes very close to my heart because I have been a sufferer from acute scurvy on six different times. As a child I nearly died of diphtheria and diphtheria hits the gland in which vitamin C is most important.

As far back as I can remember, I was constantly tired, ached in the legs, could hardly walk, my gums were bleeding, constant colds. When I was a medical student at the Johns Hopkins University I was asked to perform a test—all of us have to perform these tests—to determine how much activity certain kinds of food had in the body, and it was my job to eat a high carbohydrate diet and then to measure how much oxygen I would take in and how much carbon dioxide I would take out. In the course of the two weeks that I subsisted on a high carbohydrate diet, which was practically bananas and cane sugar, I got so dizzy I could hardly walk. Every tooth in my head got so loose that I could wiggle them around with my

fingers. My gums bled and I couldn't touch them with my finger, much less a tooth brush. I was so nauseated and sick that a tooth brush in my mouth made me vomit in the morning, so the boys used to tease me as to whether I was pregnant.

My legs hurt me so that when I walked down stairs it
167 felt like the steps were coming up to me. I had pains in the teeth to such an extent that I forced the dentist to take out one tooth which I couldn't stand the pain from and yet he told me it looked perfectly well when it was removed.

I went to see several of the doctors and they told me, well, I probably had the grippe or some other disease like that and just passed it by. However, it was almost impossible for me to read or study or keep anything before me, and yet it was necessary for me at that time to continue working.

Fortunately, I was reading in the field of nutrition and I ran across the story of scurvy and immediately recognized my condition, or thought I did at the time, and I tested it by eating lemons. I ate as many as a dozen a day. Within three days I felt so much better that I was amazed and within two weeks I actually felt better than I had ever felt that I could remember in my whole life.

After the examinations were over which we had in our second year I allowed myself to go back in this condition again to see if I could do without the lemons. It took me about two weeks to have my teeth become loose and my legs to ache and my gums to bleed.

Since that time I have done it six more times, because after you get well from these conditions you have no memory hardly of
168 what those symptoms were, and I have done it, first to prove to myself what the condition was, secondly to prove to myself that the criticisms of the doctors that such a condition does not exist, or certainly does not exist as easily as I said it did, was true, and thirdly, so that I could remember these symptoms when I hear them from patients.

It has been the condition that has started me out on this subject, and since that time I have heard from patients time and time again exactly the same story, and it makes it much easier for me to recognize them, because I have felt them and know exactly how it is to feel in the depths of a severe deficiency and how it feels to get out of it, and it is because of this change that I recognized the minor changes that come as you get well, not only those classical ones that you could see even if you were not a medical student.

Q. How old are you now?

A. 44.

Q. Doctor, can you give us, based on the same two assumptions, the symptoms for which vitamin E would be an effective treatment?

A. Vitamin E was first discovered as an adjunct to fertility in the experimental animals. Since that time it has been called a fertility vitamin, but actually the use that we make of it in general practice is in threatened abortion in women who have
169 habitual abortion or threatened abortion. The obstetrician feeds them large quantities of vitamin E, and in some cases it has good effect.

Recently, there has been a great deal of work done by some experimenters in Canada on the use of vitamin E in severe bruising over the body. Although these men have tested many patients and find it to be true, it is still controversial. However, I have seen it work in several patients that I have been interested in.

Q. Can you tell us about vitamin K?

A. Vitamin K is probably one of the most interesting vitamins in the entire list. It was discovered by a Dutch physician, Dr. Dam, about 1929, when he found that a deficiency of a certain material led to a hemorrhagic disease in chickens, and by following this course of study he actually found out what that material was and was able to extract it in crystalline form and to synthesize it by 1935.

At that time we had a disease in children known as hemorrhagic disease of the newborn. A baby would be born and die by hemorrhage almost through its body, and there was nothing the medical profession could do about it. When a child was born that way, it was doomed to be dead.

After this vitamin K was made available, of course, every effort was made to help these children, and it was found that an injection of this material would completely cure the baby. But more than that, it is now known that even if a mother is deficient
170 in vitamin K and would give birth to a baby who would have this condition, if that mother is injected with vitamin K before the child is born, the child will not have the disease.

We also now know that this material is necessary in the manufacture of prothrombin in the blood and without it we would all bleed. In certain cases of jaundice it was known for many years that you could not operate on one of those patients because he would be likely to bleed and ooze so you could not control him. Jaundice patients were always approached with surgery with a great deal of trepidation.

Now, we know that in patients to whom vitamin K is fed by mouth in large quantity if bile salts which are produced by the gall bladder and the liver are not present, vitamin K cannot be absorbed in the body and consequently this prothrombin cannot be made. So if a patient is brought to surgery with jaundice he cannot be operated on without bleeding.

Q. Does that complete your answer on vitamin K?

A. No. There is one other condition for which it is used. It is now recognized that some of the bleeding and flooding of women at the menopause may be due to a vitamin K deficiency, and where it is used, some very striking results have been obtained.

Q. Now, Doctor, I hand you a box that has been marked
171 Exhibit 8 and offer in evidence. Are you familiar with that particular product, Nutrilite food supplement?

A. Yes, I am.

Q. And you are familiar with the other vitamins and minerals that it contains?

A. Every one of them.

Q. Doctor, I hand you a 58-page pamphlet that has been marked for identification as Exhibit No. 1 and I ask you if you have read that pamphlet?

A. Yes, sir—numerous times.

Q. Will you tell us, Doctor, whether the statements contained therein about vitamins and minerals are a good description of those vitamins and minerals contained in Nutrilite?

A. Actually, when I first read this book I was so impressed with the way in which it was gotten together—it seemed to be almost the exact wording which I had used in telling my own patients about this thing—that I asked for a copy that I may have.

Q. Did you find anything in that booklet that you would call false or misleading?

A. I did not.

Mr. KLEINFELD: Objection, your Honor, on the ground that he is not competent to answer that question.

JUDGE CLARK: He is qualified in the highest degree.

172 Mr. KLEINFELD: The question was whether he found anything in that pamphlet that was false and misleading.

JUDGE CLARK: He is a medical man and he has a right to express his opinion about it.

Mr. KLEINFELD: Objection.

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. Did you think that this pamphlet representing Nutrilite would effect a cure of all cases of deficiency disease?

A. By no means.

Mr. KLEINFELD: Same objection.

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. Of all cases of common diseases?

A. No, sir.

Mr. KLEINFELD: I beg your pardon; may I ask that that question and answer be read? I didn't get it.

(The last question and answer were read by the reporter.)

Mr. KLEINFELD: May I respectfully make the same objection on the ground that it is not competent?

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. It has been called to my attention that your answer
173 about whether the pamphlet was misleading in any particular was not in the record. Would you answer that again, just to be sure it is?

A. I didn't get that.

Q. I asked you the question whether you found anything in this pamphlet that was false or misleading in any particular?

A. No, I did not.

Q. Doctor, you will note on the label that Nutrilite contains 25,000 USP units of vitamin A: Is it your opinion that that amount of vitamin A could be helpful in case of a vitamin A defiiciency in a human being?

A. Yes, I do.

Q. Do you think it is an excessive amount?

A. On the contrary, in cases of real vitamin A defiiciency, that is anatomically manifest, similar to those I have told you, we have found that not 25,000 units, but 100,000 units may have to be given every day in order to effect a cure. This is mostly what we could call a basic amount.

Q. You recall, do you, the description of symptoms of the various vitamin and mineral deficiencies contained in this pamphlet that I have handed to you?

A. Yes, sir.

Q. Based upon your experience and the literature in the
174 field, would you say that the contents of Nutrilite—that is, the vitamins and minerals contained therein—would be helpful for the symptoms described in that pamphlet?

A. Yes, sir, helpful.

Mr. KLEINFELD: May I object, if the Court please?

A. Not necessarily——

JUDGE GOLDSBOROUGH: Let him finish his answer.

A. (Continuing) Helpful, but not necessarily sufficient to completely eradicate them.

Mr. KLEINFELD: I object to that question unless it is made more particular as to which symptoms and conditions he has in mind.

JUDGE CLARK: Objection is overruled. This is an expert witness. He understands questions and can answer them in his own way.

By Mr. Rhyne:

Q. Doctor, you find that in that pamphlet no representations that any of these vitamins and minerals would effect any cure, do you?
A. Absolutely not.

Mr. KLEINFELD: Same objection to this entire line of questioning.
JUDGE CLARK: Overruled.

175 A. (Continuing) Entirely throughout the book, just as I have told you before and as I have told all patients, these do not effect a cure. They alleviate the symptoms and if you stop them they come back again, and that is exactly what the book says.

By Mr. Rhyne:

Q. Does the base of alfalfa, parsley, and watercress contained in Nutrilite as a food supplement possibly contain something more valuable than the ordinary vitamins and minerals?
Mr. KLEINFELD: I object. This is very speculative.
JUDGE CLARK: This is an expert witness. You have an opportunity of examining him as much as you please on cross-examination. You can't conduct the examination of the plaintiff as well as you conduct your own cross-examination.
Mr. KLEINFELD: I just want to object to those questions. I think they are speculative and irrelevant.
JUDGE CLARK: Overruled.
THE WITNESS: I wish you would state that again.

By Mr. Rhyne:

Q. Does the base of alfalfa, parsley, and watercress contained in Nutrilite as a food supplement possibly have something that makes that supplement more valuable than the ordinary vitamins and minerals which are listed on the label of Nutrilite?

176 A. Yes. I am sure it does, because the more we study deficiency disease the more we realize that with all we know we are still not able to do as much as we desire. There seem to be some factors still missing, and just this year, at the Johns Hopkins School of Hygiene and Public Health, one of the early investigators of vitamin deficiency diseases, Dr. E. V. McCollum, had an institute named in his honor, the Pratt-McCollum Institute, and endowed for half a million dollars, for the specific study of trace elements in dietary deficiency.

Q. And you think this base may contain some of those trace elements?

A. Yes, sir, I do.

Q. Are vitamin and mineral deficiencies in their sub-acute stage easy for doctors to diagnose?

A. No, sir, they are extremely difficult to diagnose, and the milder the symptoms—that is, the more nearly you get the patient well—the more difficult it becomes.

I might even add, further, to that, that in my own case after I had cleared myself of the acute symptoms and felt perfectly well, when I began to go down into the condition again, I went down so incipiently that I hardly realized I was slipping into trouble, and almost invariably I had to wait until the symptoms were bad before I even realized that I had gotten into trouble again. And remember I had done that 8 times.

177 Q. Do you think that reports of users of Nutrilite as to beneficial results would be of aid in arriving at its value in vitamin and mineral deficiencies?

Mr. KLEINFELD: Objection.

JUDGE CLARK: Objection sustained. That is something on which the witness hasn't qualified.

By Mr. Rhyne:

Q. Do physicians—medical doctors—rely upon the reports to them by their patients for whom they have prescribed certain things, of either good results or bad results, to arrive at the value of the particular thing that is prescribed for that patient?

A. As I have mentioned several times, because there are no objective tests, either chemical or physical, or any other kind, we are forced to rely on what the patient tells us because he is the only one who can tell us how he feels, so I would say there is no other way to tell you.

Q. And doctors do rely on reports to them by their patients of the effects of a particular drug?

A. Positively.

Q. Are not the present-day enriched flour and milk examples of instances where the Government has recognized the absence in the ordinary diet of certain vitamins and minerals?

Mr. KLEINFELD: Objection. It calls for a conclusion of
178 the witness.

JUDGE CLARK: He is qualified as an expert.

Mr. KLEINFELD: He is not qualified to tell whether the Government program of enrichment was sufficient. No foundation has been laid as to that point at all.

JUDGE CLARK: I think you are mistaken. That is a question that involves an estimate of the action of the Government in requiring these enriched products. Certainly a medical man is qualified to pass on that.

Mr. KLEINFELD: He hasn't testified he knows just what enrichment program has been undertaken, so I object to the answer.

JUDGE CLARK: Overruled.

A. I certainly think so. From what I have seen, it appears that the enrichment program has been instituted to put back into these products things that have been taken out necessarily in milling, in an effort to preserve them over long periods of time from decay and infestation.

By Mr. Rhyne:

Q. Is it not true that unless a medical doctor has adequate facilities for properly determining whether a patient's diet is actually deficient in vitamins and minerals, he cannot be sure that the common complaint, such as fatigue and lack of pep, are not due to such a deficiency?

A. In the first place, he does not have them anyway, and
179 we do not have any kind of specific tests by which we can tell you even one of the vitamin deficiencies with certainty, even in its acute stage.

It has been proven time and again in experimental scurvy, which is one of the easiest to recognize, that the animal may have an acute scurvy and yet not give any signs. And even by tests you cannot tell. So the only way he would be able to tell would be to give the material and see if the irritability, the tiredness or whatever it is that you are talking about, would disappear.

Q. Is it not true that a serious impediment to acceptance by physicians in the Government of the current knowledge of vitamins and minerals has been a lack of this specificness in the criteria or diagnosis of the state of such deficiency?

A. I would certainly think so.

Q. Doctor, do you think that an ordinary person, complaining of being run-down, lacking energy, minor muscular pain, and so forth, should try a vitamin and mineral preparation such as Nutrilite?

A. Yes, I——

Mr. KLEINFELD: May I object unless the "and so forth" is elaborated?

Mr. RHYNE: I will strike the "and so forth."

Mr. KLEINFELD: Will you please read the question again?

180 (The last question was read by the reporter.)

Mr. KLEINFELD: Do I understand that the "and so forth" has been stricken?

Mr. RHYNE: Yes.

A. It has been my experience that patients suffering from these diseases just enumerated usually make attempts to visit doctors to

see what effect they can get. If they do not find help from them, I see no reason why they should not attempt to use a product such as this.

By Mr. Rhyne:

Q. You don't then think, Doctor, that use of Nutrilite without prior concurrent medical advice is dangerous?

A. No, I do not.

Q. Doctor, do you think that a pamphlet devoted to discussion of vitamin and mineral deficiency, such as this pamphlet we have been discussing here, is false or misleading for failure to discuss or explain calory or protein defiiciency?

Mr. KLEINFELD: Objection please on the ground that that is not one of the issues involved in this case.

JUDGE GOLDSBOROUGH: I didn't understand all of that question.

MR. RHYNE: My question, your Honor, is this—I will explain it: I am asking him whether or not this pamphlet which discusses vitamin and mineral deficiencies only is false or misleading for
181 not also explaining calory and protein deficiencies?

JUDGE CLARK: What is your objection?

Mr. KLEINFELD: May I have the question re-read?

(The last question was read by the reporter.)

Mr. KLEINFELD: I renew my objection and my objection is based on this: that the question of whether the labeling is false or misleading is left by statute and by Congress to the Federal Security Administrator. He has determined that he has probable cause to believe that the labeling is misleading. If this Court determines that he was arbitrary or illegal in that determination, it will, of course, enjoin him from doing so; but I don't think it is up to this witness or any other witness to reach the conclusion that the labeling is or is not false or misleading.

JUDGE CLARK: Objection is overruled. Let me ask a question: As a matter of fact, a whole large volume has been written on the subject of diet deficiency and sometimes one small phase of it?

THE WITNESS: That is right. On vitamin B_1 in heart disease the libraries are so large on heart disease now that one person could not read them in a lifetime, and that is only one single subject, and that only started in 1935.

JUDGE CLARK: Proceed, Mr. Rhyne.

By Mr. Rhyne:

Q. Can you answer the question? Can you recall it,
182 Doctor?

A. It has been twisted up so much. Perhaps you better read it to me again.

Q. Do you think that a pamphlet such as Exhibit 1 here, devoted to a discussion of vitamin and mineral deficiencies only, is false or misleading to the layman for failure to discuss calory or protein deficiencies?

Mr. KLEINFELD: May I object again, your Honor, because——

JUDGE CLARK: Your objection has already been overruled.

Mr. KLEINFELD: I have a different objection, your Honor. May I voice it?

JUDGE CLARK: Voice all the objections at one time. I don't wish to be ruling on them all the time.

Mr. KLEINFELD: May I voice it?

JUDGE CLARK: Go ahead.

Mr. KLEINFELD: My objection is that the question is definitely leading and assumes a point that has not been proven, that is, that this pamphlet only makes claims in connection with vitamin deficiency diseases. That is implicit in the question which he puts to the witness and is not established and the Government disputes it.

JUDGE CLARK: That is overruled.

A. No, I do not think it is misleading because it does not discuss protein or calory deficiency.

183 By Mr. Rhyne:

Q. Doctor, is it not true that no medical doctor can guarantee the same results from the same remedy in every case?

A. Positively, not even with aspirin.

Q. You do not then think that a vitamin and mineral product such as Nutrilite should not be used because it cannot guarantee to produce results in every case?

A. No, sir.

Q. Doctor, is it not true that most subacute vitamin and mineral deficiencies are chronic in character?

A. Yes, sir.

Mr. RHYNE: That is all.

JUDGE CLARK: All right. You may cross examine.

Cross-examination.

By Mr. Goodrich:

Q. Where are you presently employed, Doctor?

A. I am employed as a physician in Baltimore.

Q. You have stated that you were with Hynson, Waestcott & Dunning, did you not?

A. No, I did not. I said I was a member of the research staff there.

Q. Are you in the general practice in Baltimore?

A. Yes, that is right.

Q. Do you limit your practice in any way?

184 A. Internal medicine.

Q. Are you a board member?

A. No, I am not.

Q. Of internal medicine?

A. No.

Q. You have never taken the examinations in internal medicine?

A. No.

Q. How long have you been in general practice in Baltimore City?

A. Since 1938. I was registered in Baltimore in 1935, took the Baltimore City medical examination in 1935.

Q. What is your relationship with Hynson, Waestcott & Dunning?

A. Only as a consultant in this vitamin research that we are doing there.

Q. More specifically, if you don't mind, please?

A. There is no more specificness to it.

JUDGE CLARK: Will you speak a little louder, please?

THE WITNESS: Excuse me, I am sorry.

By Mr. Goodrich:

Q. Are you employed on a daily basis or a yearly basis or endowed basis?

A. Yearly basis.

Q. What is the project that you have underway with

185 Hynson, Waestcott & Dunning?

A. We are doing some research in vitamin deficiency disease, experimentally.

Q. What type of research?

A. I don't think we need to tell you that. That is our business, what we are doing over there.

Q. You refuse to answer that question?

A. Yes, I do.

JUDGE GOLDSBOROUGH: What was the answer?

THE WITNESS: He wants to know the exact nature of the research we are doing in Hynson, Waestcott & Dunning, and I refused to divulge what we are doing. That is our business.

Mr. RHYNE: Is it a secret project, Doctor?

THE WITNESS: No, it is not.

JUDGE CLARK: I think that objection will be sustained. I don't think that in cross examination you have any right to go into the laboratory of a concern that this witness might happen to be affiliated with and force them to disclose the nature of particular experiments that may be in progress at the moment.

Mr. GOODRICH: Without wishing to be offensive, your Honor, this witness opened up this question on his direct examination.

JUDGE CLARK: I don't see how he opened it up as to exactly what experiments he was doing. He told his experience but he
186 didn't state what experiement he might happen to be working on at the present time.

Mr. GOODRICH: It is the Court's ruling then that I am not to be allowed to pursue that?

JUDGE CLARK: Yes.

By Mr. Goodrich:

Q. How long have you been employed by Hynson, Waestcott & Dunning?

A. I don't recall. About three years or so, something like that. I don't remember exactly.

Q. At what annual salary?

Mr. RHYNE: I object to all that, your Honor.

A. I don't think that is necessary. Why is that your business?

Mr. RHYNE: I don't think that the mere fact that he referred to being on their research staff as a part of his activities on direct examination opens up all of this. It does not have anything to do with the witness's credibility and qualifications. He has testified about his experience and knowledge in the field.

JUDGE CLARK: Objection sustained.

Mr. RHYNE: I object to all further questions on that. It is just a fishing expedition and has nothing to do with the issues in the case.

JUDGE CLARK: I can't rule before the question is asked, Mr.
187 Rhyne.

By Mr. Goodrich:

Q. What is the full name of the vitamin nutritional research academy in Los Angeles that you stated you were associated with?

A. The American Academy of Applied Nutrition.

Q. What is the address of that academy, if you know?

A. It is Labrea Boulevard, Los Angeles.

Q. Who is the director of the academy, if you know?

A. I don't know. I don't remember all that stuff. What difference does it make anyway, so long as I am a member?

Mr. KLEINFELD: I object to the tone of the witness. I suggest that he answer the question.

JUDGE CLARK: The witness has a right to use any tone he pleases. He hasn't the right to refuse to answer questions. The witness stated that he didn't remember what the name of this director was and then added that he couldn't carry in mind the name of everybody that he knew.

Mr. RHYNE: Doctor, will you just answer the questions Yes or No, leaving out explanations.

By Mr. Goodrich:

Q. What is your connection with the academy?

A. Just a member.

Q. Who do you communicate with at the academy?

A. When I communicate with them, the secretary.

188 Q. And who is that person, if you know?

A. I don't even recall his name.

Q. What is the nature of your association with the academy?

A. Just a member.

Q. Are you on the advisory staff?

A. Just a member.

Q. What are the duties or what is the relationship of a member to the academy in this particular instance?

A. We receive bulletins, educational bulletins, giving us information of nutritional material gleaned from informed literature.

Q. In other words, you are just on their mailing list as a member?

A. Exactly.

Q. Will you name the common and current illnesses, exclusing the germ diseases, but including the ones that are most responsible for death, in the 40s and 50s, and the ones that are the most common causes of illness, and the ones that are considered incurable?

JUDGE CLARK: You have asked five or six questions at one time.

Mr. RHYNE: I object that the question is so broad that the witness couldn't possibly understand it or answer it.

JUDGE CLARK: There are certainly five or six questions

189 in one.

Mr. RHYNE: There certainly are, your Honor.

Mr. GOODRICH: I will reframe the question.

JUDGE CLARK: Very well.

By Mr. Goodrich:

Q. Will you name the common and current illnesses?

Mr. RHYNE: I object that that is too broad, your Honor. The witness couldn't possibly name all the common and current illnesses of the human race. We are only concerned with vitamin and mineral deficiencies here.

JUDGE CLARK: The Doctor couldn't take up all the diseases. Until recently nobody ever heard of a virus disease. Now, every time you turn around somebody has it.

Mr. GOODRICH: If the booklet which we have before us, to which the witness has testified, is entirely true in every respect, it includes several quotations I will refer to, but I don't believe it is necessary to go into more than one.

The booklet says on page 33, "Think of our population and think of all the common illnesses, pick up any newspaper and read of the prominent citizens dying in middle age and of the various diseases that cause the deaths or claim the lives of so many. Think of the people you know who are ill right now and suffering without relief."

I am inquiring of this witness what he understands by "the common ailments" or "the common illnesses" as those phrases
190 are used throughout the book. Am I not entitled to that?

Mr. RHYNE: I am quite willing to have him state what he thinks the common ailments are that are referred to throughout the book.

JUDGE CLARK: Very well. You may answer.

A. The common diseases that we as physicians think of are the ones that we hear commonly complained of, not necessarily the things that are listed in the death records, for instance: gastrointestinal disease, peptic ulcer, constipation, headache, general irritability, colds, sinusitis, and as I mentioned, severe fatigability, edema and swelling of the ankles, mild degrees of arthritis and rheumatism.

By Mr. Goodrich:

Q. Is it your opinion that a headache is a disease entity?

A. If you had migraine, I think you would think so; I certainly do.

Q. Headache?

A. Yes.

Q. Without qualification, is it your opinion that that is a disease entity?

A. Yes, I do.

Q. Do you think that a feeling of weakness is a disease entity?

191 JUDGE GOLDSBOROUGH: Feeling of what?

Mr. GOODRICH: Weakness, your Honor.

A. I think you would have to qualify that a little bit to make it a disease entity. No, I think it is more a symptom.

By Mr. Goodrich:

Q. Do you think that vague aches and pains are a disease entity?

A. In vitamin deficiency disease they certainly are.

Q. In and of themselves, as symptoms, as your counsel has asked, are they diseases or are they not diseases?

A. As I pointed out in my testimony briefly, these conditions exist in these deficiency diseases and are really the basis of the deficiency disease as a disease entity, but as we have no test to prove it, the only way we can satisfy such a question is to give the material and have them go away.

Q. Going back one moment: Is over-fatigue a disease entity?

A. Exactly the same statement I made a few moments ago.

Q. Is insomnia a disease entity?

A. Exactly the same.

Q. Your statement is that insomnia is a disease entity when it involves vitamin deficiency; is that right?

A. I would say that insomnia is a symptom of vitamin
192 deficiency disease.

Q. You know, do you not, that insomnia is a symptom of many diseases?

A. Exactly.

Q. And does not occur exclusively or even generally in connection with vitamin deficiencies?

A. I think that is true.

Q. I refer you to page 55 of the 58-page book, fourth paragraph, in the middle of the paragraph: "Most of our common diseases, with the exception of the germ diseases, but including the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies."

Mr. LEV: May we enter an objection, your Honor, on the ground that he left out a word—"some of the most painful"—an inadvertent omission I am sure.

Mr. GOODRICH: I beg your pardon. Apparently I left out the word "some of the most painful"—the word "some."

Mr. RHYNE: Have you asked a question.

Mr. GOODRICH: I read him that.

Mr. RHYNE: You read him the statement but you haven't asked a question.

Mr. GOODRICH: I am getting to the question.

193 By Mr. Goodrich:

Q. What is your understanding of the common diseases there?

A. Gastrointestinal diseases, peptic ulcer.

Q. One moment, right at that point. Gastrointestinal diseases?

A. Yes, sir.

Q. What do you include in the gastrointestinal diseases?

A. Entire irritation of the gastrointestinal tract from the tip of the tongue to the anus which occurs in pellagra.

Q. Do you include carcinoma of the large intestine?

A. We do not know anything about cancer, and I don't think that that subject should be included.

Q. Is that a common disease?

A. No.

Q. It is not a common disease?

A. No, it is not, fortunately.

Q. Is it your opinion that gastrointestinal disturbances due to vitamin deficiencies are more prevalent than carcinoma of the intestine?

A. I should say so. Dr. Spies in discussing his work with pellagra in the South says 90 per cent of the people down there have pellagra, which involves the intestinal tract.

Q. But carcinoma of the intestine is not a common disease?

194 A. I don't think 90 per cent of the people would have it.

Q. That was not my question: My question was: Is it a common disease?

Mr. RHYNE: I think he has answered the question at least twice.

THE WITNESS: I have answered it.

Mr. GOODRICH: What was the answer?

A. No, I don't think it is a common disease.

By Mr. Goodrich:

Q. Is colitis a disease of the gastrointestinal tract?

A. Very much so.

Q. Is it a common disease?

A. It certainly is.

Q. Is gastroenteritis a common disease of the gastrointestinal tract?

A. Yes, sir.

Q. Is it caused entirely by vitamin deficiencies?

A. I would say in the majority of cases.

Q. Which vitamin is it, the lack of which is responsible for gastroenteritis?

A. The B complex.

Q. And by that, which ones do you refer to?

A. Thiamin, riboflavin and *nicotine* I can identify as a group.

195 Q. The well-known ones, in other words?

A. Yes, sir.

Q. Is colitis caused by a vitamin deficiency?

A. That is a gastroenteritis and would fit into the same class. Colitis is a very severe vitamin deficiency disease.

Q. Is it generally caused by a deficiency of thiamin, riboflavin and nyacin?

A. I think so.

Q. Are there other causes for colitis?

A. There are many causes for colitis.

Q. As a matter of fact, other causes predominate in colitis, do they not?

A. Not necessarily.

Q. You do not know that?

A. Yes, I do. At one time in these United States colitis was a very severe disease caused by intestinal parasites, amebic dysentery, typhoid fever, and a number of dysentery diseases. By the efforts of our engineers in the Public Health Service, those bacteria have been eliminated from our dietary by water, milk and foods, and now they are practically nonexistent. But if you will go to Mexico, you will find the same condition there that we had here in the United States.

196 Q. It is your testimony, then, that the deficiency of these three named vitamins now causes colitis in a majority of the cases?

A. Much of the disease we see in the gastrointestinal tract, yes, sir.

197 Q. You started with the gastrointestinal diseases in common diseases. What was the next category you were going to give?

A. I would say one of the commonest troubles that we see in the human is eye trouble.

JUDGE GOLDSBOROUGH: Is what trouble?

THE WITNESS: Eye trouble.

A. We hardly see people any more who do not have some reason for wearing glasses.

By Mr. Goodrich:

Q. And it is your opinion that eye trouble is a common disease?

A. I certainly do.

Q. Is eye trouble known as a disease among physicians or is it broken down into a large number of categories?

A. It would be broken down into a large number of categories.

Q. Is cataracts a disease?

A. Yes, sir.

Q. Is that caused by a vitamin deficiency?

A. We believe so.

Q. Who is "we"?

A. Physicians, by experimental evidence that we have had in animals, by production of cataracts in vitamin deficiency states.

198 Q. Is it your testimony that cataracts are generally caused by a vitamin deficiency?

A. I do.

Q. The absence of which vitamin is responsible for cataracts?
A. Riboflavin has been most associated with cataract development.
Q. Are cataracts reversible by the injection of riboflavin?
A. No.
Q. By injection or orally?
A. No.

JUDGE GOLDSBOROUGH: What do you mean by "reversible"?
Mr. GOODRICH: They may be eliminated.
JUDGE GOLDSBOROUGH: Do you mean in a specific case?
Mr. GOODRICH: Yes, sir. He has testified that cataracts are a common disease, that they are not curable by this.

JUDGE GOLDSBOROUGH: All right.

By Mr. Goodrich:

Q. Have you ever seen a case of a glioma of the eye?
A. Not dealing with eye diseases, I don't see those, no, sir.
Q. Do you know what a glioma is?

Mr. RHYNE: Your Honor, I object. This is going a long
199 ways beyond his direct examination. I don't want to cut off cross examination, but there should be some reasonable limits in inquiring into subjects that the witness has not mentioned on his direct examination.
Mr. GOODRICH: If your Honor please, this witness has testified that each and every statement in this book is true and correct.
Mr. RHYNE: You don't find that in the book.
Mr. GOODRICH: I am examining on the common diseases, if I may.
JUDGE CLARK: Mr. Rhyne, the Court thinks that in cross-examination very wide latitude is allowed and he has a right to test the qualifications of the witness to the fullest extent.
Mr. RHYNE: I withdraw the objection.
Mr. GOODRICH: Read back the last question.

(The last question was read by the reporter.)

A. Yes. I know what a glioma is.

By Mr. Goodrich:

Q. What is it?
A. It is a tumor of the eye.
Q. A tumor of a nerve that leads into the eye, is it not?
A. That is true.
Q. It is a fatal disease, is it not?
200 A. Possibly.
Q. Is it curable by a vitamin product of this kind taken orally?

A. Nor by injection, and so far as I know did not exist in this book.

Q. Is glaucoma an eye disease?

A. It certainly is.

Q. What is the nature of glaucoma?

A. Glaucoma is a disease of the eye that has to do with an increased pressure in the eye.

Q. Is it curable by vitamin pills?

A. No, but it might be very definitely produced by vitamin deficiency.

Q. And it is irreversible?

A. Irreversible, so far as we know at the present time.

Q. So if you had glaucoma and you took these pills according to the directions, you would get no better?

A. That is probably true.

Q. And glaucoma is a common disease, is it not, of the eye?

A. Not too common. It is a disease of the eye, but not a common disease of the eye.

Q. You have mentioned gastrointestinal diseases and eye diseases. What was your next category of common diseases?

A. The common diseases that we hear complained of are
201 tiredness and fatigue.

JUDGE GOLDSBOROUGH: What page are you referring to?

MR. GOODRICH: On page 35, your Honor, in the fourth paragraph, the middle of the paragraph.

JUDGE CLARK: All right.

A. (Continuing:) When the patients are examined it is frequently found that they are suffering from a mild cardiac condition.

MR. GOODRICH: I beg your pardon. Would you read that answer back.

THE REPORTER: (Reading) "A. The common diseases that we hear complained of are tiredness and fatigue. When the patients are examined it is frequently found that they are suffering from a mild cardiac condition."

By Mr. Goodrich:

Q. Let me understand you. Do you say that tiredness and fatigue are diseases now—disease entities?

A. No, I say it was associated with the cardiac condition.

Q. Diseases of cardiovascular origin are the common diseases, is that right?

A. That is right.

Q. What are those diseases in terms of the leaders of cause of death?

A. I don't quite get that question.

202 Q. Break down cardiovascular diseases, or diseases of cardiovascular origin, which are the common diseases as we know the common diseases.

A. Cardiac infarction is one of the causes of sudden death.

Q. What was that?

A. Cardiac infarction is one of the causes of sudden death.

Q. Explain to the Court what that is.

A. This is a plug of coagulated blood that sticks in a vessel in the heart and prevents that section of the heart from getting sufficient oxygen and nutrition, and that part dies; frequently there is a rupture and the patient dies.

Q. Is it your testimony that that is caused by or cured by a vitamin pill of this kind?

A. Not cured by a vitamin pill.

Q. If you had that, you wouldn't get well, would you?

Mr. RHYNE: There are two questions there, your Honor.

JUDGE CLARK: Let the witness answer the question.

Mr. RHYNE: He said "caused by" and "cured by." He is asking a double question in one. I object and ask that it be severed. If he is asking two questions, let him ask two questions.

203 JUDGE CLARK: Let the witness answer any question rather than making a speech on the subject.

Mr. RHYNE: I would also like to submit that he has taken two words "common diseases" and placed an interpretation on them that no one on earth would place from reading this pamphlet and is going far afield.

JUDGE CLARK: It is cross examination.

Mr. RHYNE: All right. I will confine it to the fact that he has asked a double question and ask that he reframe it.

Mr. GOODRICH: I will reframe it so as not to be offensive for being double.

By Mr. Goodrich:

Q. Is it your contention that this condition, coronary infaret, is caused by a vitamin deficieney?

A. The formation of blood clots in the vessels of the body may be produced in many cases of debilitation, where the blood will lose its fluidity, and that is definitely possible in vitamin deficiency disease. In that case one of those clots getting loose and sticking in the heart would definitely cause cardiac infarction and death.

Q. It is true, is it not, that there are many other causes which predominate in the cause of this condition?

A. There are other causes, yes, sir.

Q. And the other causes predominate over the vitamin
204 deficiency?

A. Not necessarily.

Q. Which vitamin is responsible for this condition?

A. There would be no single vitamin to set up a vitamin deficiency picture, as we pointed out so many times now, that the vitamin pictures are vague in their statements, but if you would want to pick single ones, vitamin K and vitamin C would probably play very important roles.

Q. Do I understand your testimony to be that a deficiency of these two vitamins is the predominant cause?

A. No, you don't understand that at all.

Q. Is it a major cause?

A. No. I said it is a contributory cause.

Q. Contributory cause?

A. Yes, sir.

Q. What are some of the other cardiovascular diseases——

Mr. Goodrich: I beg your pardon. Strike that. I am sorry, your Honor.

By Mr. Goodrich:

Q. Is it your testimony that this condition may be cured by taking vitamin pills of the composition of Nutrilite and according to the directions on the bottle?

A. No. You would not cure a dead man with vitamin pills.

Q. Would you cure dead tissue in the heart?

205 A. No.

Q. Would you dissolve the clot?

A. No.

Q. It would have no effect?

A. No.

Q. What are some of the other cardiovascular conditions that are common diseases?

A. One of the commonest would be rheumatic heart disease.

Q. Rheumatic heart disease. Would you tell the Court what that is?

A. Rheumatic heart disease is a condition that is seen frequently or very commonly in children. It very commonly follows infection, especially streptococcus infection, of some kind in the child and leads to an impairment of the heart muscles so it is weak and flabby and unable to pump blood easily throughout the body. The child is usually so tired and ill that often as long a period as a whole year of rest and care is necessary before it can navigate.

Q. The effects of rheumatic heart disease are permanent are they not?

A. No, they are not.

Q. In most cases they are permanent, are they not?

A. In many cases they are.

Q. And what is the permanent cardiovascular or cardiac
206 impairment that comes with rheumatic disease?

A. Usually weak heart muscle, difficulty of carrying the blood supply, feeling of weakness and tiredness.

Q. In medicine they are difficulties with the valves of the heart and the muscles of the heart, are they not?

A. That comes from the building up of vegetative organisms—that is bacteria on the valves themselves. That really is considered as a secondary process of the condition. The rheumatic heart disease actually involves the heart muscle itself.

Q. Is it your testimony that Nutrilite will prevent rheumatic heart disease?

A. I think that rheumatic heart disease is a condition—the rheumatic picture in the entire child is a picture that follows debilitation from vitamin deficiency conditions.

Q. Is it your testimony that vitamins will prevent the streptococcus infections which you have given as one of the causes for rheumatic heart disease?

A. I would go further than that and say the properly fed children would probably not even get the streptococcus infections, that their resistance to disease would be improved to the point where many of them would not be so debilitated and consequently would not fall heir to the disease itself.

Q. Having been infected or having gotten the strepto-
207 coccus infection, is there anything in Nutrilite which will eliminate that infection?

A. We have found that the severe infections of any kind, no matter from what source, actually depleted the body of these important minerals and vitamins, and that a source of any vitamin material, whether it be Nutrilite or any other, is a very necessary adjunct to building up a child, and in all rehabilitation work in our hospitals today, all children with rheumatic heart disease are fed some sort of vitamin supplement. It is one of the most important materials in their rehabilitation.

Q. Having suffered from rheumatic heart disease, are the effects of rheumatic heart disease reversible by vitamin pills taken in the form of Nutrilite or in the dosage of Nutrilite?

JUDGE CLARK: What do you mean by "reversible": That it may be cured?

Mr. GOODRICH: Yes, sir. I am sorry, sir.

JUDGE CLARK: I had never heard of that phrase before.

Mr. GOODRICH: Doctors speak of that phrase and I thought he would understand it.

A. When you say "reversible" do you mean the condition would have to go back to where it was before he was ill?

By Mr. Goodrich:

Q. Is the cardiac damage that has been done remediable
208 by vitamin pills of this kind taken in this dosage?

A. You did not answer the question.

Q. I have restated it.

A. I asked you the question when you say "reversible" do you mean that the condition would have to go back to where it was in the normal state?

Q. Yes.

A. No. We do not have any condition, no matter how mildly ill a person is that I know of where any remedy ever available to a doctor would make the condition go back to its normal condition. Remedy so far as a doctor is concerned is sufficient to get the patient back on his feet and able to get around but it would not be reversible to the point where he would be just as well as a person who never was ill.

Q. Is the cardiac damage that comes from this rheumatic heart disease reparable in whole or in part by vitamin pills of the composition of Nutrilite taken in accordance with the dosage?

A. I think I answered that a moment ago by saying that in rheumatic heart disease the debilitation produced by the disease is greatly helped by vitamin intake whether you give Nutrilite or any other type of vitamin.

Q. Is the heart muscle?

A. Yes, the heart muscle is.

209 Q. And the pathology of the heart is changed by taking these pills?

A. The pathology of the heart is not completely eliminated.

Q. Are the cells or the tissues in the heart, that have died as a result of this condition, or have been damaged as a result of this condition, are they restored to normal?

A. As I said a moment ago, they are not restored to completely normal, but they are rehabilitated to the point where they are functionable again to a great degree.

Q. Are heart murmurs that come with this disease remediable by the vitamin pills?

A. As the condition improves some heart murmurs could disappear. We have shown many, many times that heart murmurs can occur from vitamin deficiency disease, anemia, and other cases, and that they will completely disappear as the patient is rehabilitated.

Q. What are some of the other common forms of cardiovascular disease?

A. Arteriosclerotic cardiovascular disease is probably one of the largest in the group.

Q. Arteriosclerotic cardiovascular disease?

A. That is right.

Q. Would you tell the Court what that is?

210 A. This is a condition that exists in almost all of us as we grow older.

JUDGE CLARK: That is known as hardening of the arteries?

THE WITNESS: That is exactly right, your Honor.

A. (Continuing:) It is a condition that progresses throughout life, and practically all of us come to it as we grow older, and is listed as the commonest cause of death in our records.

By Mr. Goodrich:

Q. What is the pathology, simply, of arteriosclerosis?

A. It is a hardening of the arteries, as your Honor said, a deposition in the blood vessel wall of calcium, cholesterol materials that cause the vessel to become hardened, a hardening and stiffening of the heart muscle itself, and generally a weakening of that muscle so that you are not able to carry on the load that you carried before.

Is arteriosclerosis caused by a deficiency of any vitamin?

A. Yes. I think a gradual deficiency extending over a long period of time is actually the basis of arteriosclerotic cardiovascular disease and I have some records here from the literature if you care for me to read them.

Q. Which vitamin is involved?

A. No single vitamin. It is a general condition of gradual
211 vitamin deficiency, probably involving all of them.

JUDGE GOLDSBOROUGH: What you mean, Doctor, I presume, is that the vitamin supply would retard arteriosclerosis. You don't mean it would eliminate it so you would live forever do you?

THE WITNESS: No, sir.

JUDGE GOLDSBOROUGH: Because if that is true, I want to start in right now.

MR. GOODRICH: You haven't read the book, your Honor.

THE WITNESS: If I may give you an illustration of some of the work that Doctor Sherman did, I think you may be very much interested in it, your Honor.

Dr. Sherman of the Columbia University actually tried to prevent animals from getting aged by feeding them special diets, and he fed them diets high in calcium, high in vitamins, and high in protein, and the animals did not live an extended length of time as you just mentioned, but two very striking things happened. In the first place, the animals passed from infancy into adulthood without passing through a stage of adolescence, and they went through an adult life

right up to death without passing through a stage of senility. One day you would see them and the next day they would be dead. The actual length of time that they lived was not much longer than animals in other stages; but two stages of life were
212 practically eliminated, adolescence and senility, and even that would be a great measure, I am sure, if you didn't have to bother with those two stages.

By Mr. Goodrich:

Q. I take it you agree with the statement on page 28 of the booklet which refers also to the picture on page 27, in discussing the staff of life—the wheel of life——

A. What paragraph is that?

Q. 27 is the wheel of life. The paragraph is the third paragraph. "The wheel you develop as a result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in the 40s and 50s, whereas we should live, in good health and vigor, with full possession of our faculties, to the age of 95 or 100."

A. Yes, I think that is true.

Q. If people took Nutrilite all their lives they would live to be a hundred?

A. No. You would have to feed it to your mother before you were born so you would get a good start in life before it would do you that much good.

Q. In other words, it would take several generations to make this a true statement?

A. That is exactly true.

Q. At the present time it is untrue? You couldn't do
213 that?

A. Just as I said, that is exactly what I am working for, to treat the mothers so that the children born would not be suffering from these deficiencies and abnormalities.

Q. But this statement at the present time is not true?

A. For you it would not be.

Q. Having been affected by arteriosclerosis, is there anything in Nutrilite, taken as directed, which would cure or alleviate in any way that condition?

A. No.

Q. And that is one common disease that it will not affect?

A. There are many common diseases. Once they have been precipitated we do not offer to alleviate them. Vitamin deficiency disease is preventive medicine, not curative medicine. As we have mentioned all the way through the book, it does not effect a cure.

Q. Do I understand your testimony now to be that this product won't cure any of these common diseases?

A. That is right.

Q. It hasn't any effect in curing them?

A. By cure we mean to get a patient well and when we take him off the medication he stays well. In vitamin deficiency there
214 is no cure. When you take the material you feel well, and when you stop it, you regress, and that is exactly what we are trying to maintain and to teach.

Q. In other words, the statements in this book as to being free from the dietary deficiency diseases if you take Nutrilite are all untrue?

A. No. That is exactly true. If you take the Nutrilite you can stay free of them, but you must take it.

Q. You must take it permanently?

A. Exactly, as part of your dietary control. If you would be getting sufficient food with these materials in it then you wouldn't need the dietary supplement, but because we are living in a situation in which they are not available to us, especially in city life and in the class of society we are, we must supplement our food to get these valuable materials.

Q. What are some of the other common diseases of cardiovascular origin?

Mr. RHYNE: I would suggest at this point that he should recall to the doctor's mind the many he has mentioned so far. This is sort of a memory test, it seems to me. Of course, I really don't understand all——

Mr. GOODRICH: So far he has only mentioned three: coronary infaret, rheumatic heart disease and arteriosclerosis.

215 Mr. RHYNE: Those are the three that you recall.

Mr. GOODRICH: That is my recollection.

A. There is a condition, as I mentioned a while ago, of this beriberi heart disease.

By Mr. Goodrich:

Q. Is that a common disease?

A. Yes, very common.

Q. Is that common in the United States?

A. Yes. Very common. As I mentioned in speaking to the Judge here a little while ago, the actual literature that developed after we found thiamin, the actual effect on hearts, the remarkable changes that took place in giving even the *cyr*stalline vitamin was amazing to the entire profession and the literature has grown up to volumes that can hardly be read.

Q. Let me be sure I understand you. You are saying that there are volumes of literature on beriberi heart?

A. Maybe we have to be very careful. I don't mean single volumes, but I mean so many papers have been written on the subject.

Q. On beriberi heart?

A. On conditions that were helped by thiamin deficiency—by giving thiamin—and we believe that when a condition responds to thiamin——.

JUDGE CLARK: You don't call it beriberi commonly in this
216 country?

THE WITNESS: That is right, your Honor. That is what I was going to tell him.

A. When a condition responds to thiamin, we believe that basically it is that type that you would see in beriberi, because the disease beriberi is caused by thiamin defeciency.

By Mr. Goodrich:

Q. Beriberi heart is well-understood among physicians, is it not?

A. As beriberi heart disease in its classical form many physicians would probably know its story. We do not see it as such in the United States.

Q. You see no beriberi heart?

A. Very little.

Q. It is not a common disease?

A. In the United States.

Q. You previously testified, I believe, that it was a common disease.

A. No, I did not. It is so easy to get you confused. As I said before, when we had crystalline vitamin B-1 made available to us and found that these hearts which were dilated would shrink down in a few days from giving thiamin, we were forced by that analysis to say that that condition which we did not have a term for
217 before, was a part of beriberi heart disease. In other words, we did not start out by looking at the patient and saying, "You have beriberi heart disease."

We made that determination by therapeutic tests, the results of which caused his heart to change in its picture by x-ray examination, and we have to assume then that that must be a part of beriberi heart disease, and that condition is very, very prevalent.

Q. How are those cases of beriberi heart that you are talking about now, that are common in the United States, classified by physicians generally?

A. The entire field of heart disease, as I mentioned a moment ago, is very difficult to classify until you have given the material as a therapeutic test, because there are no specific ways that it comes with a little tag on and says, "This is beriberi heart disease."

Q. I am not making myself clear. I beg your pardon. What types of heart disease do you encounter this so-called beriberi condition in?

A. We do not encounter it strictly as a heart disease, I started that out as my first statement, and tell you that many of these patients come to the doctor after a debilitating illness, feeling tired and worn out, and you find this enlarged heart, and in treating it, as we do now, with thiamin you see a very marked reduction
218 in the size of the heart and then we make a diagnosis.

JUDGE CLARK: The Court will take a recess until two o'clock.

(Whereupon, at 12 noon, the Court recessed, to reconvene at 2:00 p. m., Tuesday, October 18, 1949.)

219 Afternoon Session

(The trial was resumed at 2:00 p. m., upon the expiration of the recess.)

JUDGE CLARK: All right, Mr. Goodrich. You may resume.

Cross-examination (resumed).

By Mr. Goodrich:

Q. When we discontinued for lunch, doctor, I believe we were talking about arteriosclerosis or arteriorsclerotic heart disease.

A. I think so, yes, sir.

Q. You have mentioned three types of heart disease, I believe, that you say are common—the coronary infarct, the rheumatic heart disease and arteriosclerotic heart disease, is that right?

A. I think so.

Q. What other types of heart disease are common diseases?

A. Another one of the commonest causes of sudden death would be coronary occlusion.

Q. Coronary occlusion?

A. Yes, sir.

Q. Will you explain that to the Court please?

A. Coronary occlusion in contradistinction to coronary infarct: In the infarct you actually have a plug plugging up a vessel which prevents the oxygen and blood supply from getting to that
220 part, whereas in coronary occlusion you actually have a spasm of one of the arteries of the heart which in effect practically causes the same thing.

JUDGE CLARK: What is coronary thrombosis?

THE WITNESS: The thrombosis is the infarct. That is the first one. The thrombosis is a moving part, but in the occlusion if you were to examine the heart after death you wouldn't find anything because it would be a physiological shutdown due to activity in the

blood vessels, whereas in the other one, you would actually find a plug which would be the embolus.

Q. Is it your opinion that coronary occlusion is caused by a deficiency of any of the vitamins or minerals contained in Nutrilite Food Supplement?

A. Not if you pick on one specific one, but I believe that the irritability of the nervous system generally which we see in vitamin deficiency as an entity also affects the irritability of the heart blood vessels and nerves, and that under stress they would be so irritable that they could shut down also.

Q. It is true, is it not, that there are many anatomical causes of coronary occlusion?

A. Anatomical ones?

Q. Yes.

A. If there are I don't know of any.

221 Q. What are the major causes of coronary occlusion?

A. When I mentioned occlusion I am talking about the one where it shuts down with the nerves, not the occlusion from an embolus or plug, because that is an occlusion also.

Q. What are the causes of the coronary occlusions that cause a shut-down from the spasm of the heart muscle?

A. We do not know.

Q. Is is your testimony that it is caused at least in part by an absence of vitamin preparations?

A. That is right. Extending over a long period of time, gradually building up the condition that we see.

Q. What is the basis for your conclusion.

A. I have seen several very striking patients brought into my office—one will give his testimony here—suffering from the typical pains of heart disease that we would see in occlusion: grasping at his chest, choking, hardly able to move, writhing in agony, and on an injection of thiamin and the B complex of most of the thiamin, almost by the time you could snap your finger, that condition was completely relieved.

Q. By the injection of what dosage of those vitamins?

A. In the case I have in mind, he was injected with 30 milligrams of thiamin and a half cc of a combination of the B complex sold under the name of Sol-U-B by the Upjohn Company.

222 Q. He used no other therapy?

A. No other therapy, no, sir.

Q. Is it your usual practice to treat coronary occlusion by injection of these two vitamins?

A. It is—as a start at least.

JUDGE GOLDSBOROUGH: As what?

THE WITNESS: As a start at least.

By Mr. Goodrich:

Q. What other therapy is used?

A. There are other supportive therapies: keeping the patient quiet if he doesn't respond soon enough, of course. If he becomes worse we may use morphine to keep him quiet. We may use basal dilator drugs to help. However, in the cases thus far, the results I have seen have been very good.

Q. In other words, you use sedatives, Digitalis, bed rest?

A. Did you say Digitalis?

Q. Did you not say Digitalis?

A. No, I did not.

Q. You did not use that?

A. No, sir.

Q. You used bed rest, sedatives and vitamins, nothing else?

A. That is right.

Q. After a patient has had——

223 MR. GOODRICH: Withdraw that question.

By Mr. Goodrich:

Q. Is coronary occlusion generally a fatal disease?

A. Yes, it is, very frequently.

Q. In those cases of coronary occlusion that you have treated with vitamins, the recovery has been full and complete?

A. Yes, sir.

Q. What are some of the other types of coronary disease that are common diseases?

A. We have discussed so many. How about your asking me ones you would like me to talk about, Mr. Goodrich?

Q. The question is to you sir. I can recall to your mind the ones you have discussed if you like.

A. No. At the moment I am so filled up with heart disease I can't think of any more.

Q. We have discussed coronary infarct, rheumatic heart disease, coronary occlusion, and arteriosclerosis.

A. That pretty well covers the list of general heart disease.

Q. Is hypertensive heart disease a common disease?

A. Yes, but that is a syndrome, not a specific disease. It covers an entire picture and it is not only the heart, it is the high blood pressure you are talking about, not just the heart.

224 Q. Hypertensive heart disease is not a disease, is it?

A. Oh, yes. I didn't say that.

Q. It is a common disease, then?

A. You were talking about a heart disease, something that is wrong with the heart. Here we have a picture that covers the entire body, it involves the kidneys, the heart, the blood vessels.

Q. And that is a common type of heart disease?

A. Yes.

Q. Is it your opinion that thiamin therapy will prevent hypertensive heart disease?

A. Yes. I have seen some very dramatic and remarkable lowering of blood pressure and improvement in the heart condition by vitamins.

Q. What vitamins particularly?

A. B complex again.

Q. Administered by what route?

A. Injection.

Q. Injection, not by vitamin pills?

A. As I said before, vitamin pills as such are supplementary to any treatment and when a patient is as sick as a patient is with hypertensive cardiovascular disease or any of the other conditions that you have mentioned, which are practically dead-end diseases, we do not get them well by the pills. We use that as supple-
225 mentary to our treatment, supplementary to the diet and add those by injections that we feel are necessary.

Q. Your testimony then is that vitamin pills are not the indicated therapy for coronary infarct, for arteriosclerosis, for rheumatic heart disease?

Mr. RHYNE: Just a minute. I object.

JUDGE CLARK: Mr. Goodrich, I have had occasion to speak to you before about that. You start making speeches while the witness is trying to answer.

Mr. GOODRICH: I beg your pardon, your Honor. I thought that I had not completed my question.

Mr. RHYNE: He has covered all of that about four or five times, and I think he is asking about four questions in one. I object to the question.

JUDGE CLARK: Mr. Goodrich, unquestionably you have four questions in one.

Mr. GOODRICH: I beg your pardon, sir. I was attempting to sum up in one question. If that is offensive to the Court I apologize.

By Mr. Goodrich:

Q. Your testimony then is that vitamin pills are not the indicated therapy for a coronary infarct?

A. Yes. I will sum that up for you, Mr. Goodrich, by saying that every one of the conditions that you have mentioned, I would
226 say that vitamin pills alone will not help or cure.

Q. Can you think of any other types of heart disease that are common diseases?

A. No, but I would be glad to talk about any you remember.

Q. Did you ever hear of acute endocarditis?
A. Yes, I have.
Q. Is that a common disease?
A. No, it is not.
Q. Did you ever hear of pericarditis?
A. Yes, I have heard of that, too.
Q. Is that a common disease?
A. No, it is not.
Q. Did you ever hear of chronic infections of the valves of the heart?
A. Yes, we talked about them in rheumatic heart disease.
Q. That is one type?
A. Yes.
Q. There are other types, are there not?
A. Yes, there are others. You can practically have any type of bacteria you can think of at one time or another settle on the heart valves so you can have almost an infinite number of them.

227 Q. Those are not common types of illness?
A. No, they are not.
Q. Is angina pectoris a common disease?
A. It is very difficult—angina pectoris is a name given to this syndrome that very often accompanies coronary occlusion. It is very difficult to separate them. Actually when a person has a coronary occlusion, the picture of breathlessness and pain across the chest is an anginal picture so that the two are taken mostly together.
Q. Is your testimony the same, that vitamin pills will not help or cure that condition?
A. As I said before, and so many times, that is supplementary to the diet and not to these end products. I don't think you have to go over that any more. I have said it enough.

Mr. KLEINFELD: If the Court please, may I ask the Court to admonish the witness to answer the questions?
JUDGE CLARK: I was about to admonish the witness not to say anything other than to answer the questions propounded on examination.

By Mr. Goodrich:

Q. What is an aneurism?
A. An aneurism is a rupture in the blood vessel leading to extravasation of blood between its linings.
Q. Is it caused by the deficiency of vitamins?

228 A. It could be.
Q. A preliminary question then: Is it a common disease?
A. No, it is not common.

Q. Not a common disease?

A. No, sir.

Q. We have discussed now the gastrointestinal disease that you said was a common disease, eye disease which you said was a common disease, and some cardiovascular diseases which are common diseases. Can you specify another type, another field, in which there are common diseases?

A. Yes. I think probably the disease that afflicts most everyone at some time in his life is sinusitis.

Q. What is the cause of sinusitis?

A. Sinusitis is a picture of irritation of the mucous membranes of the nose and upper respiratory tract, involving the accessory nasal passages.

Q. Did you say it is an infection? I beg your pardon.

A. Yes, it could be an infection.

Q. What is the organism—affecting organism?

A. Any organism can infect it. Commonly it is infected by staphylococcus aureus, streptococcus, pneumococcus. They are influenza. They are the common ones, but it could be affected by any one.

Q. Is the incidence of sinusitis affected by vitamin pills
229 taken in the dosage of Nutrilite?

A. Yes, sir.

Q. In what way?

A. Almost invariably patients who have suffered from chronic sinusitis, irritation of the nasal mucous membrane, when placed on vitamin therapy, to improve their diet, tell you within a very short time that their nasal passages are much stronger, they do not have as much mucus drainage, they do not cough mucus out of their chest as much, their passages are more free to breathe, and they do not get colds as often.

Q. What is the mechanism of this vitamin preparation that affects sinusitis?

A. By improving the metabolic health of the nasal mucous membrane. As I mentioned earlier, in vitamin A deficiency, one of the first things that happens is a carbonization, that is a hardening of the entire mucous membrane of the sinus area. This entire membrane is covered with a cilia, little tiny hairs that will beat almost like a waving field of grain when you see them under a microscope.

In vitamin A deficiency this completely disappears and is replaced by a hard, horny layer, very similar to that which is on the skin of the hand and those cilia disappear. Those cilia are there to beat the bacteria out of the small areas and with that deterioration of the mucous membrane infection is no longer protected
230 from staying in its one place and so infection grows very rapidly on this deteriorated mucous membrane.

Q. Is it your opinion that vitamins in Nutrilite taken in the dosage indicated on the package will prevent or cure the common cold?

A. No, I did not say that, no, sir.

Q. Does it have any effect on the occurrence of the common cold?

A. Yes, sir.

Q. In what way?

A. By reducing it.

Q. What is the mechanism of that?

A. By improving the metabolic activity of the mucous membrane.

Q. Does it have any effect on the virus of the common cold?

A. No, sir.

Q. None whatever?

A. None whatever.

Q. And similarly, does the vitamin preparation have any effect on the infecting organism involved in sinusitis?

A. No.

Q. None whatever?

A. Just by improving the patient's resistance to that in-
231 fecting organism.

JUDGE GOLDSBOROUGH: Gentlemen, I may misunderstand the effect of the doctor's testimony. My understanding of his testimony is this: that the better the diet is, the better the general health and ability to withstand the inroads of disease occurs. And then he says that these vitamins tend, in that sense, to be a preventive and not a cure. If I am wrong in that, there is nothing more to be said so far as I am concerned, but if I am right in that, it doesn't seem to me that this cross examination is pertinent to the inquiry.

I don't know whether I am right in what I have said or not.

THE WITNESS: That is exactly right, your Honor.

Mr. GOODRICH: If your Honor please——

JUDGE GOLDSBOROUGH: I don't mean to say as one member of the Court that I want to stop the cross examination, but I don't see the effectiveness of it if I am correct in my analysis of the witness' testimony.

JUDGE CLARK: It seems to me this cross examination has gone very far afield.

Mr. GOODRICH: The issue in this case is whether the Federal Security Administrator was justified in finding that this product was not a cure for most common diseases. Now this witness has testified, as your Honors will recall, that there are no false or misleading statements in this book. That testimony was
232 given over our objection, but was admitted, and that is the point that we are——

JUDGE CLARK: The book itself specifically denies that it is a cure.

Mr. RHYNE: It says so about eight times in it.

JUDGE CLARK: And it has not been represented that it is a cure. That is why I think the cross examination has gone far afield. You have taken one statement about common diseases out of its context and are basing this whole cross examination on the words "common diseases."

Mr. RHYNE: And I submit, your Honor, that no one who read the pamphlet would ever dream of the things that Mr. Goodrich has been talking about from reading the term "common diseases."

Mr. GOODRICH: I would like to refer your Honors to several quotations in this booklet, if I may.

JUDGE CLARK: Very well.

Mr. GOODRICH: On page 10 is the first one, the fourth paragraph, the last line: and there they are talking about the result of the American diet: "The result of the American diet is that almost all members of our families have bodies which are malnourished, and which show evidences of the malnutrition which causes most of our common deficiency ailments."

Then the book goes on in the last paragraph on the page:

233 "So the purpose of this book—and the objective of the person who lent it to you——".

JUDGE GOLDSBOROUGH: Where is that, sir?

Mr. GOODRICH: On 10, the last paragraph.

THE WITNESS: Page 10, the last paragraph.

Mr. GOODRICH: "So the purpose of the book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, and have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, you must put into your body all the food factors required by it."

The next one is on page 11, the last paragraph:

"And remember your reward—a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them."

In other words, there is a clear statement——

Mr. RHYNE: I object to his arguing his case as he goes along
234 unless he reads the entire pamphlet.

JUDGE GOLDSBOROUGH: What he is doing is to try to clarify what he thinks the effect of the testimony of the witness is. I made

a suggestion of what it seemed to me to be, and he thought it was the contrary, which he has the right to do.

JUDGE CLARK: I don't see anything obscure in anything you read, Mr. Goodrich.

Mr. GOODRICH: It is the issue of the case, your Honor.

JUDGE CLARK: I don't see anything in what you read which indicates that this booklet said it would cure any people.

Mr. GOODRICH: I haven't finished my argument, if I may proceed without offense.

JUDGE CLARK: All right.

Mr. GOODRICH: Page 33: "Think of our population, think of all the common ailments, pick up any newspaper, and you read of prominent citizens dying in early middle age of the various diseases that claim the lives of so many. Think of the people you know who are ill right now, and suffering, without relief."

The next one is page—I believe I skipped over the one I had been working on this morning—no, I did not. It is on page 35: "Most of our common diseases, with the exception of germ diseases——"

235 JUDGE GOLDSBOROUGH: Where are you reading now?

Mr. GOODRICH: On 35, your Honor, the middle of the fourth paragraph.

JUDGE GOLDSBOROUGH: All right.

Mr. GOODRICH: "Most of our common diseases with the exception of germ diseases but including some of the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies."

On page 52; the first full paragraph: "You should realize that most of our present illnesses are due to dietary deficiencies."

Mr. RHYNE: Where are you reading from?

Mr. GOODRICH: The first full paragraph on page 52, the middle of it.

"But if you have read this book carefully, and if you have absorbed the facts and followed the argument, you should realize that most of our present illnesses are due to dietary deficiencies, that these deficiencies show themselves in different ways in different people (and in the same person), and that relief from all the deficiency diseases lies simply in putting *pack* into the body the basic factors needed for vital health, many of which are at least partially lost in the preparation of our American diet."

It is true that the third full paragraph says: "Nutrilite
236 Food Supplement supplies the micro-food factors (nutrilites) necessary for health, but when these factors are supplied by Nutrilite and the ill person becomes free from the unpleasant or painful symptoms of his deficiency ailment, be sure to remember that Nutrilite did not cure the ailment. Nutrilite supplies the neces-

sary micro-food factors, the body uses these and rebuilds. In this process the symptoms simply disappear and the person is well again."

As we interpret that, and as the Federal Security Administrator interpreted that, and a reading of the entire book—I don't wish to belabor the point, but beginning on page 45 and for several pages following there are reports of recoveries from arthritis, from diabetes, from heart disease, and the like, and for that reason I was testing this witness on his understanding of what the common diseases are, and the effect of this preparation on those diseases.

I respectfully submit that that is entirely proper.

JUDGE GOLDSBOROUGH: The Court didn't cut your examination off.

Mr. GOODRICH: I understand that.

JUDGE GOLDSBOROUGH: The Court was endeavoring to give you the benefit of the Court's views. If you don't take the same view, you may proceed.

Mr. GOODRICH: That is the basis on which the examination is proceeding.

237 JUDGE GOLDSBOROUGH: All right.

JUDGE CLARK: Go ahead.

THE WITNESS: Could I offer you, Mr. Goodrich, some——

Mr. RHYNE: No, Doctor. Just let him ask the questions.

THE WITNESS: Excuse me.

238 By Mr. Goodrich:

Q. Do you know the common diseases in fields other than the ones we have covered?

A. We can talk about arthritis.

Q. Arthritis is a common disease?

A. Very common.

Q. Is it your opinion that arthritis is caused by a deficiency of vitamins?

A. Yes, sir.

Q. And that it may be overcome by oral administration—that is, by mouth—of vitamin pills, in the dosage and in the manner prescribed by Nutrilite Food Supplement?

A. One of the most serious that we have is rickets, which is a disease of joints, producing a very severe deformity, and now since about 1920, certainly 1925, by doses even much less than exist in Nutrilite, we hardly see rickets in children.

In those years, before the knowledge of vitamin deficiency, or vitamins as we know them here, many women during pregnancy suffered from a condition similar to this under the term of "osteomalacia," "osteoporosis," and many of the older women after childbirth actually had such bending and twisting of their joints and

bending of their bones that they actually shortened and looked like they were bow-legged. You still see many of them around.

That is a severe rickets, deficiency of vitamin B that occurs
239 in pregnancy, and it is curable to the extent that the patient's symptoms are made static. But by giving the vitamin we do not straighten the bones; we do not overcome the deformity that nature has brought on by this deficiency, but we can give the patient a great deal of comfort by bringing the condition to a static state instead of letting it go to one of complete disorganization, and that by mouth.

Q. Am I correct in taking from your answer that arthritis deformans is not overcome by vitamins?

A. That is right.

Q. Is arthritic deformans a common type of arthritis?

A. No.

Q. What are the common types of arthritis?

A. The commonest type of arthritis is rheumatory arthritis.

Q. What are some of the others?

A. Rheumatory arthritis is one that you have heard a great deal about in the newspapers recently, the spectacular help that had been given to patients who were bedridden and unable to move by the use of cortisone by Dr. Hench at the Mayo Clinic.

That material has produced such a stir and furor in the medical world that great amounts of money are being expended to develop it for the help of this terrifying and tremendous disease that
240 exists all over the world.

Q. There is no cortisone in Nutrilite?

A. Yes, there is a very close association with Nutrilite. The hormone that Dr. Hench extracted from the adrenal gland actually is made in direct proportion in the gland by the presence of vitamin C. That has been proven a long time ago. So in those patients needing cortisone, the lack of that material may well be associated with the lack of vitamin C in the patient who has this terrifying disease.

In my experience, where I have seen many patients myself with painful arthritis so severe that they could hardly get up and down the steps, and I myself suffered from it when I had my scurvy so bad that I could hardly move, by just the taking of vitamin C alone, no cortisone, none of those materials that you know of today, because they were not known, there is absolutely no pain, no deformity, no hurt of any kind. And I have seen that in many of the patients that I have treated.

Q. Is it your testimony that the research on cortisone is unnecessary in that these vitamins will handle the situation?

A. No.

Q. The vitamins then are not a complete remedy?

A. No. We haven't carried our research far enough to answer that question, Mr. Goodrich.

241 Q. Do you mean to testify, then, that the recoveries which you have seen are just on an experimental basis and not well proved in medicine?

A. No. The ones I am telling you about, I have seen and I am positive of.

Q. Did you have controlled experiments over a long period of time with those cases?

A. Long enough for them to get well.

Q. Are you not aware that arthritis is a disease with its ups and downs, its periods of pain and its periods of regression?

A. Believe me, sir, nobody knows better than I. I have been up and down many times.

Q. It does have that, though?

A. Yes, sir. As soon as I stop taking the vitamin C I have it again.

Q. Over what period of time have you administered and observed patients with rheumatory arthritis?

A. Since 1936.

Q. And you have tested vitamin C against placebos—against controls, against milk sugar tablets?

A. Yes.

Mr. RHYNE: You are asking really two questions when you ask about controls and placebos at the same time.

A. I understand.

242 MR. GOODRICH: I think the doctor will understand that placebos is a method of control.

THE WITNESS: I have done that.

By Mr. Goodrich:

Q. And it is your testimony that vitamins have a beneficial effect on rheumatory arthritis?

A. Yes, sir.

Q. What are the other types of arthritis?

A. There is an arthritis of overgrowth of bone in which bone develops. We call that osteoarthritis. There the bone piles up around the various joints and can pile up around any of them throughout the body.

That is not as common or anywhere near as common as rheumatory arthritis, which is by far the most common of all, but we see that quite frequently. You can see it in many people. You can probably right here in the courtroom see people with knobs on their fingers, and that is a form of osteoarthritis.

Q. Is it your testimony that vitamin pills of the Nutrilite type

taken orally, as directed on that package, will prevent or cure osteoarthritis?

A. It will not prevent or cure nor cause the bone to regress, but it will help relieve the discomfort and pain around the joints.

Q. Is there any analgesic property in Nutrilite?

243 A. None whatever.

Q. What are some of the other types of arthritis?

A. We have any number of arthritities associated with infectious disease. Again we could name every bacteria down the list that get into a joint and cause it to become infected and dissolved. However, in that case, there is nothing in the vitamin picture other than support of the body against the ravages of depletion because of the infection and the fight that the body puts up against infection that would in any way help it. The disease would have to be eradicated by first eradicating the disease germ.

Q. There is nothing in Nutrilite to eradicate that germ?

A. None whatever.

Q. So that I may understand you on the infections: Is it your testimony that persons taking Nutrilite, in accordance with the directions on the package, will not suffer from infectious diseases?

A. No.

Q. Does Nutrilite have any effect upon the persons contracting pneumonia?

A. Yes. Again going back to my first statement a few moments ago about sinusitis: In severe vitamin A deficiency, one of the most amazing facts was brought out: Every animal that suffered vitamin A deficiency died with pneumonia.

244 In other words, the epithelium of the entire upper respiratory tract was so damaged that there was no resistance against the invasion of the pneumococcus organism, but that does not mean that if you get pneumonia that vitamin A will cure it.

Q. It will not cure it?

A. No.

Q. Will it cure any of the other common infections such as syphilis?

A. No.

Q. Gonorrhea?

A. No.

Q. None of that type?

A. None. None of the bacterial infections whatever.

Q. Is cancer a common disease?

A. It is getting to be more common.

Q. Is it a common disease at the present time?

A. Yes. I would say it is much too common.

Q. What are the common types in man—the most common types?

A. The most common type in man is prostatic cancer, and the second one would be gastric cancer.

Q. Are those common diseases—those two?

A. Common in what way? In the total amount of disease
245 that exists?

Q. Yes.

A. No.

Q. As you would understand common diseases?

A. No.

Q. What is the most common type of cancer in woman?

A. The most common type of cancer in woman is cancer of the cervix uteri.

Q. Cancer of the cervix?

A. That is right.

Q. And the next most common?

A. Cancer of the ovary, and then the body of the uterus.

Q. Is cancer of the breast common?

A. Yes, and then cancer of the breast.

MR. RHYNE: I object to this whole line of testimony on the ground that the doctor has not testified in his direct examination about cancer, and there is nothing in this booklet about cancer. I think his qualifications are so amply demonstrated that this is for the purpose of testing his knowledge of the field, and that he has gone way beyond bounds.

JUDGE CLARK: The Court is disposed to extend wide latitude on cross examination. As I indicated a little while ago, it seems to me that this cross examination has gone pretty far afield.

246 MR. GOODRICH: Is the objection sustained?

JUDGE CLARK: No. I will overrule the objection. I have been trying to explain that he has no right to go on, except for the purpose of testing qualifications on which the doctor seems to have given a good account of himself and can hardly be challenged. There is no excuse for going completely outside of his direct testimony.

MR. GOODRICH: I am not examining him, your Honor, to challenge his qualifications. I am directing my examination to the booklet which says that the common diseases are prevented and overcome by this drug?

JUDGE GOLDSBOROUGH: You see, you are taking sentences and paragraphs out of context. If you read the whole book, the question is whether the diseases that you are asking the doctor about now come within the purview of the common diseases which would be implied from the pamphlet taken as a whole.

MR. GOODRICH: Absolutely, sir, and the preliminary finding of fact was made by the Federal Security Administrator, to the effect

that he thought the book represented the drug as a preventive and cure of the common diseases.

If that is arbitrary, then, of course, the case falls, but that was his decision, and I have attempted to show from the book—of course, I can't read the entire book, but I would be perfectly willing to take a recess for the Court's convenience to read the entire book.

247 JUDGE CLARK: The Court has read the book; all members of the Court have read the book.

Mr. RHYNE: May I submit that we have the book, not the decision of the Administrator, before us; and this witness has not testified about the Administrator's decision and his understanding of the term "common diseases."

JUDGE CLARK: You may proceed, Mr. Goodrich, but I think you ought to stay within reasonable limits and not go wandering far afield, as you have been doing.

MR. GOODRICH: I am attempting to comply entirely with the Court's ruling, but as I have stated, there seems to be a difference of opinion between us as to just what the proper interpretation of the book is.

JUDGE CLARK: You can cross examine as to anything in his examination in chief.

MR. GOODRICH: As I attempted to explain to your Honor, the examination in chief was that there are no false or misleading statements in this book (indicating) and that is the part that I am directing my attention to.

More specifically, I refer again to page 35, which has a very strong statement in my opinion. That is what I was investigating this morning: "Most of our common diseases with the exception of the germ diseases, but including some of the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered
248 incurable, are the result of dietary deficiencies."

JUDGE CLARK: The Doctor's testimony has abundantly borne out that statement. Your own cross examination has emphasized it. You may be able to rebut those facts. I don't take the Doctor's testimony as being conclusive.

MR. GOODRICH: I suppose I may as well state at this time, so there may be no misunderstanding, that it is our purpose to go through the entire gamut of common diseases, and to inquire of this witness as to the effect of vitamins in the prevention or the cure of those common diseases.

Now, I am prepared to offer the vital statistics on what are common diseases, but at this stage it isn't our part of the case.

I have been inquiring of their witness on cross——

Mr. RHYNE: Could I say on that subject, your Honor: He has a list in some publication, and I don't think it is a reasonable interpre-

tation of this pamphlet that any person who read it would think of all these many things that he is talking about.

For that reason, his cross examination has gone way beyond reason, and he has picked one little sentence out of a 58-page book, and two words out of a 58-page book, and given an interpretation that is so unreasonable as to make his whole line of cross ex-
249 amination unreasonable. And if he intends to take some list that he has gotten out of some medical book or something else of each common disease we will be here forever.

JUDGE CLARK: How many of these things have you got, Mr. Goodrich?

Mr. GOODRICH: I have the 10 leading causes of death from the vital statistics, and they are broken down in parts, as this witness has been answering this morning. I intend, certainly, to inquire into the 10 leading causes of death, and the effect of this——

JUDGE CLARK: Go ahead and inquire about them, but you have wandered off on some very rare diseases.

Mr. GOODRICH: That is a misinformation on my part then, your Honor, because I had always understood that cancer was a common disease.

JUDGE CLARK: Cancer is. There is not a word in this book about cancer. The doctor never testified that vitamins would cure cancer.

JUDGE GOLDSBOROUGH: Your theory is that a reasonable mind would gather from the book that this medicine would cure cancer; is that what you have in mind?

Mr. GOODRICH: Yes, sir, absolutely.

JUDGE CLARK: Where do you find that?

Mr. GOODRICH: In the excerpt which I have read.

JUDGE CLARK: I didn't hear a word about cancer.

250 Mr. GOODRICH: The rule is well established, as your Honor undoubtedly knows—certainly we have put it in our trial brief—that in interpreting labeling under this statute, the wording of the label is to be gathered from a reading, and as it would appear to the person to whom directed, not necessarily to a discriminating, smart person, but to the ignorant, the credulous, the unstudied, who in making a purchase do not stop to analyze.

The Federal Security Administrator and the Food and Drug Administration both reached a conclusion on this book, and we intend to offer testimony to show how this book represents this drug as a cure for most common ailments. The book states that almost every disease, as I have read it, is due to a vitamin deficiency.

That being the case, our theory of the case is that we are entitled to inquire as to what this witness understands by common diseases, he having testified that the book is entirely truthful, and as to whether vitamins will prevent or cure.

JUDGE GOLDSBOROUGH: I have stated my view. As far as I am

concerned, as one member of the Court, I am not inclined to cut off the cross examination if you think that the book means what you say it means. I don't think it does.

Mr. GOODRICH: That is what the Administrator said. Maybe the decision was arbitrary, but your Honor has already arrived at that conclusion. If counsel concedes that the product is
251 of no effect in the cure of diseases of the heart, cancer, and other malignant tumors, intracranial lesions of vascular origin, arthritis, pneumonia, influenza, tuberculosis, diabetes, then, of course, that part is conceded and we must go to the next part: what the labeling means.

If they are prepared to admit that at this time, then, of course, there is no purpose in this cross examination.

Mr. RHYNE: May I point out that the Doctor has not said that Nutrilite would cure anything.

Mr. GOODRICH: The Doctor has said that everything in the book is true.

JUDGE GOLDSBOROUGH: The effect of what he said, as I understood it, was that there was nothing in the book that was misleading. I don't remember his exact language, but that was the understanding I got.

JUDGE CLARK: Yes.

Mr. GOODRICH: He said, if your Honor will permit me, that the book was neither false nor misleading in any particular. That was his testimony, I believe.

Mr. RHYNE: Yes.

Mr. GOODRICH: Of course, if counsel will concede that point, then we are, I will admit, wasting time on this interrogation. But the point is that as the Administrator has interpreted the book,
252 as the Food and Drug officials have interpreted it, it does represent the product for those conditions.

Mr. RHYNE: That is a matter of argument on the language of the book, not on the cross examination of the witness.

Mr. GOODRICH: I am not inquiring of the witness as to what he interprets the book as. I believe that would open the question for the Court as it was in the first instance for the Administrator. If the Court finds that no rational man could have come to the conclusion that the book represented the drug for these common diseases which I have mentioned, then, of course, the conclusion is that the decision is arbitrary.

JUDGE CLARK: You come back to your theory of reasonable doubt.

Mr. GOODRICH: No, sir.

JUDGE GOLDSBOROUGH: There is nothing that we come in contact with that is ideal, and you are asking for this advertisement to be an ideal one. What strikes me, as one member of the Court, is this: that compared to the ordinary advertisement that I see, it is so

nearly ideal that I don't know of any advertisement that is as innocuous as this one.

When you look at these advertisements of cigarettes and this whiskey made of flavored alcohol—you can see them on full pages of magazines—and compare with this, there is no comparison.

253 This is no attempt to dramatize anything here. Of course, any advertisement, if it is worthy of the name "advertisement," is supposed to be a legitimate recommendation of the product. But I, as one member of the Court, don't see any overemphasis here at all.

Mr. GOODRICH: Apparently your Honor takes the view that there may be a certain amount of puffing in advertising; is that the point?

JUDGE GOLDSBOROUGH: I didn't say that. That couldn't be the point because I didn't say that.

Mr. GOODRICH: Under both this law and the Federal Trade Commission Act—the Wheeler-Lea Amendment—the rule has been clearly announced that labeling or advertising that is false or misleading in any particular is offensive to the law.

That phrase has been interpreted by the Supreme Court of the United States on several occasions.

JUDGE GOLDSBOROUGH: The Court is familiar with the authorities I presume.

Mr. GOODRICH: Under that theory, the Administrator, at least, arrived at the conclusion—and it is not disputed here that he arrived at the conclusion that the book did represent the product as a cure for most common diseases.

Now, as I have said, if the Court is ready at this time to find, having read the book and considered it, that the book

254 does not represent this product as a cure for common diseases, and that no reasonable person could have come to that conclusion, then, of course, the point is against us.

JUDGE GOLDSBOROUGH: Don't say "common diseases," sir. As far as I am concerned, there is nothing in the book which would lead me to believe that it would cure an active case of tuberculosis or coronary occlusion or cancer or diabetes or Bright's Disease. It never occurred to me that those things are included at all.

Mr. GOODRICH: Your Honor, of course, is familiar with page 42, the testimonial at the top: A man claimed he was cured of 19 disorders, one of which was heart trouble.

JUDGE GOLDSBOROUGH: Heart trouble may be a good many things. I have had a pain in my heart at times. I suppose it was in that side.

Mr. GOODRICH: That is exactly what I am attempting to develop, your Honor, that there are many types, and that this product has no effect one way or the other on certainly all that we have mentioned this morning.

JUDGE GOLDSBOROUGH: Anyone knows that a person who builds up his general health, gets his nervous system in shape, gets himself in shape so he can sleep, and doesn't overload his stomach with food, that he is very apt to keep in good health and not have tuberculosis or heart disease either, or Bright's Disease. That is practically what that book says. This book says that this supplements diet and tends to perfect the diet so as to keep the individual in good health and enable him to resist disease. That is the picture I see. Is that what your testimony is?

THE WITNESS: Exactly, sir.

MR. GOODRICH: That is not the impression that the Administrator got.

MR. RHYNE: Why shouldn't he prove that by the Administrator rather than try to do it on the cross examination of this witness, who didn't have anything to do with it?

MR. GOODRICH: If it is conceded, as I say, that this drug will not cure these common, specified diseases which I have mentioned—and I suppose Mr. Rhyne is willing to do that if he agrees with the Court's theory of the case.

JUDGE CLARK: The doctor has testified, as to most of these things, that vitamin deficiency had nothing to do with them as to this time it has developed, and that taking vitamin pills wouldn't do any good to them. Isn't that your testimony as to most of these specific diseases?

THE WITNESS: Yes, sir.

JUDGE CLARK: It wouldn't cure pneumonia?

THE WITNESS: Right.

JUDGE CLARK: It wouldn't cure cancer?

THE WITNESS: Right.

JUDGE CLARK: It wouldn't cure tuberculosis?

THE WITNESS: Right. Could I offer a statement that may clarify the thing?

JUDGE CLARK: You are under cross examination here.

THE WITNESS: I can't speak?

JUDGE CLARK: You can't speak unless Mr. Goodrich consents.

MR. RHYNE: Does Mr. Goodrich object to his offering an explanation?

MR. GOODRICH: Yes, I do.

MR. RHYNE: You do object to his offering an explanation?

MR. GOODRICH: You may ask him yourself on redirect. As I pointed out to your Honors I haven't completed this list. Judge Clark very helpfully has brought out the answer on tuberculosis and the other heart disease. The others I had in mind were nephritis and kidney disease, and after that, diabetes mellitus.

JUDGE CLARK: You can ask him about those diseases. I objected

to you going off on a wild goose chase as to a lot of diseases that nobody ever heard of, except possibly the witness and you.

Mr. Goodrich: Begging your Honor's pardon, I have taken those out of the vital statistics that we will prove as we come to our part of the case.

Judge Clark: I think that is the way you should prove them, as part of your own case.

257 Mr. Goodrich: I didn't want to offer these at this time. I was only inquiring as to whether the drug was helpful in those diseases from their expert who has testified that it was good for those conditions.

By Mr. Goodrich:

Q. Is it your testimony that vitamin pills will not prevent or cure in any way nephritis?

A. Yes, sir.

Q. And diabetes mellitus?

A. In diabetes mellitus, there is a little change in the picture. Diabetes for many years has been understood to be a disease of the pancreas so that not sufficient insulin has been manufactured to control the level of blood sugar in the blood so that the patient has to be given a certain amount of this material to keep it at its proper level.

However, in the past few years a great deal of information has come about to show that diabetes is not altogether that type of disease, but happens to be a derangement of the function of the liver, and that if you feed the patient vitamin B complex you will improve the physiology of the liver to the point where it is able to control the blood sugar and will reduce it in some cases practically to normal. And in many cases the requirement for insulin may be almost cut in half.

This work has been done by Dr. Biskind in New York and
258 is probably one of the most beautiful pieces of work that has come to us.

So we no longer think of diabetes mellitus as only a disease of the pancreas, but as a disease of the body in which the metabolism of the liver and its function in controlling sugar, getting it back into the bloodstream, and into its other forms is deranged, and that derangement seems to be very closely associated with the B complex.

Q. What percentage of diabetes mellitus is of the latter type?

A. I cannot answer that; the work is too new.

Q. It is true, is it not, then, that a large portion of diabetes mellitus is caused by deficiency in the production of insulin by the pancreas?

A. No, it is not. We have actually shown, in all of the work, that the production of insulin by the pancreas is practically normal—that is, compared to a normal person, that is, one who does not have diabetes—but because of the arrangement of the liver more is neces-

sary in order to keep the blood sugar down so that the derangement apparently is not in the gland itself but because of the inefficiency of utilization in the liver more is required than the gland produces.

Q. Do you treat diabetes mellitus without insulin?

A. No, sir.

259 Q. May it be treated without insulin by giving orally Nutrilite Food Supplement in accordance with the directions?

A. I have seen some cases in which marked changes and improvement have been made in the individual by taking Nutrilite alone. One person I know of, having been a diabetic for a considerable period of time, well regulated, well balanced, and carefully followed by doctors with insulin, and by taking Nutrilite alone his insulin requirement has been reduced, and the case with which his sugar values can be kept has been markedly changed, and no other product but Nutrilite.

Q. The insulin has been discontinued then?

A. No, sir. Reduced I said.

Q. Reduced?

A. Yes.

Q. What percentage of reduction is normal with the giving of Nutrilite?

A. In the cases I have seen, about 30 percent.

Q. The rest of the cases were not affected one way or the other?

A. I didn't get that?

Q. The remainder of the cases are not affected one way or the other?

A. I say the cases I know about that have been helped, the reduction has been about 30 percent. If you mean the re-

260 mainder of the patient's feeling: He has always been made to feel better by the taking of the Nutrilite along with the reduction in the necessity for his insulin requirement.

Q. Nevertheless, he still had the diabetes?

A. Exactly.

Q. What are the common deficiency diseases spoken of in this book, "How to Get Well and Stay Well"—on page 10 for example?

JUDGE CLARK: The Court will take a recess for 5 minutes.

(Whereupon a short recess was taken.)

261 By Mr. Goodrich:

Q. When we recessed, you were talking about your experience with Nutrilite in diabetes mellitus?

A. That is right.

Q. Have you been experimenting with this product on behalf of Mytinger & Casselberry?

A. Never.

Q. What has been your experience with diabetes mellitus?

A. Just what I mentioned before; only a couple of patients that I have under my care with diabetes,——

Q. Two patients?

A. Two patients; that is right. (Continuing)—were complaining of the symptoms that I mentioned to you in the earlier part: the rundown feeling, easy fatiguability, the tendency to develop ulcers in the legs that would not heal, a feeling of lassitude, insomnia
262 —that entire group that you asked me if they were, specific diseases—but actually they were symptoms in these patients.

Q. In these patients with diabetes?

A. In these patients with diabetes; yes, sir. And in giving this material, with nothing else, in these cases, the condition improved remarkably—much more than I would have expected.

Q. Was it your belief that the patients had a dietary deficiency disease as well as diabetes mellitus?

A. Yes, sir. That was quite evident, because the patients had been placed on a diet to try to help them control their value.

You understand that we treat diabetes by two methods: first, by restricting the amount of carbohydrate that he has, hoping to keep his blood sugar down, and then, after we have gotten some level beyond which we feel he can not go, either because it is not within reason for the amount of work he is doing, then we try to control him with insulin.

We try to stay away from insulin if possible. But it turned out that these patients were so rambuctious—they wouldn't do what we told them to do anyway; they would eat just like you would eat; anything that was placed before them they would eat; so it became very difficult to know what to do with them.

263 So in giving them the Nutrilite, which was entirely a shot in the dark, because I only knew of Dr. Biskind's work, where the liver and metabolism had been improved, I thought this was a good opportunity, because the patients were not young and were difficult to control, and the results were just as I mentioned: The patients felt better all over, the ulcers on the legs healed.

In one case an operation on the toe had to be performed and the healing was just remarkable, and the need for insulin dropped about 30 percent.

Q. Would you mind giving us the names and addresses of those patients?

Mr. Rhyne: Do you have permission to reveal their names?

The Witness: No, I did not ask them.

Mr. Goodrich: I respectfully submit that there is no doctor-patient privilege in the Federal Court under a civil case.

Judge Goldsborough: Sir?

Mr. Goodrich: I respectfully submit that there is no doctor-patient privilege under the federal practice in a civil case of this kind, and we are entitled to the names and addresses of those people, or a motion to strike is the proper motion.

Judge Goldsborough: There is, under the District of
264 Columbia Code. I don't know that we are bound by that.

Judge Clark: I never thought of that.

Mr. Rhyne: It has always been the law in this jurisdiction.

By Mr. Goodrich:

Q. Did you attribute the recovery of these two patients to an improvement in their diabetic picture as a result of Nutrilite, or to an eradication of the deficiency disease that was present with the diabetes?

A. I don't think they can be separated, Mr. Goodrich.

Q. Do you prescribe Nutrilite in your practice?

A. Yes. It came to my attention last November, and of course previous to that time I had been using other preparations that I considered of equal value. My main reason for using Nutrilite was because it had this base in it from alfalfa, parsley, and watercress, which I felt contained trace elements that were specific and yet we knew nothing about, and so I have tried it in a number of cases—I can't tell you the exact number; I don't recall—and I picked the cases very well, because they were cases that I had tried my own treatment very carefully and felt that I wasn't getting all that I should be getting from them, and I have been very pleased with it.

Q. What type of disease conditions do you prescribe
265 Nutrilite in?

A. Vitamin deficiency cases.

Q. Vitamin deficiency cases?

A. Yes, sir. Very similar to those I gave you pictures of in my explanation to the Court.

Q. And Nutrilite was the only therapy involved?

A. No. As I told you before, Nutrilite is a basic therapy to me, a supplement to the diet.

Q. Did these patients for whom you prescribed have other diseases than the dietary deficiency diseases?

A. No.

Q. What was the main therapy for the dietary deficiency disease then?

A. I supplement the diet with this material, because we have long ago found, in the treatment of dietary deficiency disease, no matter how specific the picture may be of the presenting lesion—for instance, the one of Judge Barker—no matter how specific that may be, if one single lesion stands out so that you can see it, we are positive that there has been a general deficiency throughout

the body, and it is only a matter of time before other tissues will be damaged also.

So I used a material like Nutrilite as a basic supplement, supplying all the factors that, in a balanced proportion, have
266 been recommended by the National Research Council, and by a great deal of research by experts in this field of general nutrition, as a base to supplement the food.

Then, in cases like Judge Barker, I add to that specific vitamins, either by injection or by mouth, if he does not happen to be in my jurisdiction, so that there will be excessive materials for those predominating symptoms. That is the general procedure I used throughout my entire work.

Q. How many cases have you treated with Nutrilite, approximately?

A. As I said before, I don't know; I don't recall.

Q. You don't have any idea of approximately how many?

A. I could guess. Probably 30.

Q. About 30 patients?

A. Yes.

Q. Did you supplement Nutrilite in each instance with injectible material?

A. There have only been a few cases in which there was not supplementation. One of the cases if diabetes I purposely have in no way supplemented, and have not even given the patient his regular care: that has been done by another doctor.

Q. You are treating that one patient with diabetes only
267 with Nutrilite?

A. Exactly.

Q. What was the nature of the disease of the other few persons who were on Nutrilite alone?

A. I can't recall. I didn't bring that data with me. I don't know.

Q. You say "a few cases": do you have any idea? Could you give me an approximation?

A. There are very few of my patients who do not get supplementation, because most of them are so sick when I get them that, unless they get supplementation and quickly, the basis would be a matter of too long a time to get results. Roughly I would guess about five out of the thirty.

Q. You are getting then, are you, clinical dietary deficiency diseases?

A. Clinical?

Q. Yes.

A. I should say so.

Q. Are you hospitalizing those patients?

A. No, sir.

Q. They are not sick enough to require hospitalization?

A. No, sir. In fact, I should say that most dietary deficiency

disease is not sick enough to be hospitalized. We do not
268 see the classical disease of beriberi, and diseases that will practically floor a patient. The ones that we are talking about are common deficiency diseases. The patients are walking around, struggling to stay on their feet, to try and maintain a living, and it is that type of patient who has gone from doctor to doctor trying to get relief, and finally is told by his friend that this was something that helped him.

Many of the patients that I have seen have made great efforts to find help for that type of trouble.

Q. What are the common deficiency diseases spoken of in the book as the causes for death between the 40s and 50s?

A. I don't know.

Q. Do you know of any common dietary deficiencies that cause death in the 40s and 50s?

A. My interpretation of that is gleaned from a purview of the literature of the experimental work, and what I have mentioned to the Court on two occasions: (1) in the production of experimental riboflavin deficiency, one of the most striking things is sudden cardiac collapse. In the work that I mentioned—Dr. Sherman's work—in his work of taking care of animals and keeping them on a good diet, sudden death is very noticeable. In the vita-
min deficiency disease of scurvy, which has been recorded
269 for many years, sudden collapse and death by cardiac failure is also true.

The same is true of pellagra, as shown by Dr. Goldberger in his work in the South.

The same is true of Dr. Spies in his work at the Birmingham Clinic.

Q. I call your attention to Page 28 of the booklet, the third paragraph.

Mr. RHYNE: You have questioned him about that before, Mr. Goodrich, at great length.

Mr. GOODRICH: I am developing a different line here, if I might.

By Mr. Goodrich:

Q. "The flat wheel you develop as a result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40s and 50s."

What are those diseases, if you please?

A. Possibly it would be best explained in this way: As the person goes through life, in a gradually declining state, with nutritional deficiency, he is well enough to get along until, in those years from 40 to 50, nature sets in to take away from him the vigor of his glands of internal secretion in a normal manner.

I mentioned previously that, in the work of McLester,
270 he showed that, very quickly in the beginning of vitamin deficiency disease, the thyroid, the pituitary, the adrenal, the pancreas, the testicle, the ovary, were very quickly involved in deterioration.

All of you know that, in the years between 40 and 50, what is known as the menopause in women and the climacteric in men is the natural consequence of aging. That is the time, regardless of whether or not you have actually taken on an adequate supply of vitamins, Nature says, "This is the time that your flowering period stops."

It is the end of the gestation period, so to speak, and when those glands are normally stopped by Nature, the hormones are slowed down, aging begins, and we call that either the menopause or the climacteric.

As I said a moment ago, this same condition can be brought on very severely by vitamin deficiency in the early years of life, but at these years, if this condition settles upon a chronic dietary deficiency, quickly the body goes to pieces, and very often the patient will fall heir to an intercurrent infection, such as pneumonia or some other disease, and die, not because of the pneumonia but because he did not have sufficient stamina to withstand the onslaughts of the disease.

271 By Mr. Goodrich:

Q. Is pneumonia the type of disease you are talking about here?

A. I gave that as an illustration of what we mean by the gradual flat wheel—of what I took out of this as the gradual flat wheel of dietary deficiency, leading, in middle life, to a strained condition where the body could not stand the wear and tear that Nature and the load of life produced at that time.

I believe, under that same condition would be heart diseases that we mentioned a moment ago.

Q. All of the group we were talking about?

A. Not necessarily. The vitamin deficiency group which would fall under the pellagrous heart, the beriberi heart, and probably some others—scurvy.

I would like to give you one other example to show that to be true. When I was resident at the Church Home and Infirmary, it was my duty to take care of 40 very old ladies from about 70 to 90. As I made my rounds in the early time, one of the old ladies said to me one day: "Doctor, why do you give us digitalis?"

I said, "Well, digitalis is on your record, so I supposed you needed it. You all have chronic heart disease of one kind or another."

We didn't specify them as Mr. Goodrich wants to here,
272 but they were debilitative conditions.

The old lady said, "Doctor, we don't take them anyway; we throw them away. They make us sick at our stomachs."

So I thought: Well, if they are not taking them, maybe we ought to find out what is wrong with them. Certainly these old ladies were bedridden, they looked sick; they could hardly get around; we could hardly feed them.

So there was a drug brought on the market at that time called coramine. All I know about it is what I am telling you. It was called coramine and was supposed to be a heart stimulant.

I got permission to buy this very expensive stuff and give it to these old ladies, to make a trial. I was not able to make a diagnosis of the kind of heart disease they had.

Much to my amazement, in about a month most of these old ladies were walking around, and they were just begging for coramine, which was taken by mouth and not by injection. At that time I still did not know what coramine was, other than by its name.

However, after I left the hospital, and about a year or so later, it turned out that coramine was a diethylamine of nicotinic acid, which was the cure for pellagrous heart disease in the South.

Since that time, and by that example, I have been amazed,
273 in old people, how important these vague cardiac symptoms, not demonstrable and not labeled as clearly as Mr. Goodrich would like to have you do it, but the kind that our patients come and complain about, respond most dramatically to nicotinic acid or one of its analogues, of which coramine is the most important.

Q. Let's get back to my question, Doctor. What are those common dietary deficiency diseases that are the cause of death in the 40s and 50s, that are referred to on Page 28 of the booklet?

Mr. RHYNE: I believe he answered that at great length, your Honor.

JUDGE CLARK: I thought the witness had answered the question.

Mr. GOODRICH: I beg your pardon; I certainly didn't so understand. I would hate to have him read the entire record back.

JUDGE CLARK: He stated "pneumonia" very clearly.

Mr. GOODRICH: I understood he said "pneumonia."

JUDGE CLARK: What do you wish him to do: make up a list?

Mr. GOODRICH: No, sir. I would like to have more than one example if I might.

JUDGE CLARK: He said that, when you got between 40 and 50 years old, you are apt to go into a period of climacteric, and
274 if you were not in good shape, and if you happened to contract pneumonia or some other disease, these preparations of this kind, supplementing the diet, would tend to build you up and protect you from going to pieces because of getting one of these diseases.

Isn't that what you said?

THE WITNESS: Exactly, sir.

Mr. GOODRICH: I understand it now. I am sorry; I missed the point.

JUDGE CLARK: That is what the witness said before.

By Mr. Goodrich:

Q. Is cancer one of these diseases that is a common deficiency disease that is responsible for death, or is it due to a deficiency?

A. It is impossible to answer that positively. Actually we do not have the slightest conception of what causes cancer, but it is my personal belief that the time is not far distant when we will find that the gradual degeneration of the body lease to cancer, and that degeneration may well be associated with dietary deficiency.

Q. That is sheer speculation on your part?

A. That is my idea from my experience.

Q. Is nephritis one of these diseases—common deficiency diseases—one of the ones most responsible for death in the 40s and 50s?

275 A. Nephritis is a common disease of that period, but as I pointed out a moment ago, the deterioriating effect on the body's metabolism by a chronic deficiency very easily allows the kidney, which is one of the most important organs of filtering out of the body the bacteria which circulate in the blood, and if that organ is weakened by this condition, it would be much easier for bacteria to take hold than if it was in a healthy state.

Q. Is cerebral hemorrhage one of the common diseases that is a cause of death in the 40s and 50s?

A. That is right.

Mr. RHYNE: Wait a minute. You were asking about deficiency diseases. Now you are asking about common diseases. So many times you have mixed those two, and he thinks you mean deficiency diseases when you use the words "common diseases."

Mr. GOODRICH: I beg your pardon. I will reframe the question.

By Mr. Goodrich:

Q. Is cerebral hemorrhage one of the common deficiency diseases that is most responsible for death in the 40s and 50s?

A. Yes, and we have had a very beautiful picture in that disease only recently. As I mentioned, in the story of scurvy, the

276 need for Vitamin K is shown by the breakdown of the capillaries all over the body, and bleeding into the tissues.

If that bleeding should happen to occur in the brain you would have cerebral hemorrhage. In the lack of Vitamin K, in which there is a tendency for the patient to bleed without healing easily, that condition would be exacerbated. There is another vitamin known

as Vitamin P, which is associated with Vitamin C, and that is also associated with keeping the permeability of the capillaries intact. What we mean by that is to prevent the exudation of blood through the capillary wall, and in the absence of Vitamin P the permeability is increased so the blood leaks out.

So the present idea in high blood pressure, or in debilitation, is to feed the patient adequate amounts of Vitamin C and rutin, which is the Vitamin P and Vitamin K, to improve the structure and strength of the blood vessel so that it will not break down and leak into these valuable areas.

In other words, we believe that even in the case of high blood pressure, where we can do nothing to lower the blood pressure, we might be able to do something to make the tubes that carry the blood pressure stronger so they will not break down as quickly.

Q. There is no vitamin P or rutin in the Nutrilite at this time?

277 A. Yes, there is.

Q. Would you mind looking at the exhibit?

A. I understand what the question is. Vitamin P and rutin are vitamins extracted from alfalfa and exist in the supplement. The present extraction of that material has been from those substances, and I am sure there is an adequate amount in there, because the amount necessary is very small.

Q. Do you have an analysis of this product to show its rutin content?

A. No, I do not.

Q. How much rutin is required in these cases that you explained?

A. We can not give a definite requirement and cure in anything, as I mentioned before. We give the amount that we feel is necessary, and watch the patient, and watch the change of h morrhage throughout the body, and vary it according to the needs that we see clinically.

Q. And it is your opinion, then, that the administration of these two vitamin preparations will prevent cerebral hemorrhage in a number of cases?

A. Yes, sir.

278 Q. In cerebral hemorrhage, is the cause of death due to other causes than a deficiency of these two vitamin products?

A. Yes. If you would get hit on the head and shake your head quite a bit you might shake it enough to break a blood vessel, which would cause cerebral hemorrhage; you could die from it. That would be one. And if the blood vessels in that case were weak, it might be easy to do.

Q. Is hypertension a common cause of cerebral hemorrhage?

A. That is what I tried to point out in my statement a moment ago. It was believed, for many years, that hypertension was the sole cause of that, but I have seen patients with hypertension up in

the neighborhood of 230, which I think you would all admit is extremely high blood pressure, and not die of cerebral hemorrhage.

As I mentioned a few moments ago the addition of these two materials to make the blood vessels carry the contained fluid under high pressure, without breaking down, is our method of preventing such an accident.

In other words, the high blood pressure, per se, is not the trouble, but the weakness of the tubes that carry it.

Q. Is tuberculosis one of these common deficiency diseases which is responsible for death in the 40s and 50s?

279 A. Tuberculosis is a common disease in elderly people. I could not say that it is a common disease of death in the 40s and 50s.

Q. Your opinion then would be that it was not among the first eight killers in that——

A. I do not know.

Q. I didn't quite finish my question. If you don't mind——

A. Excuse me. I am sorry.

Mr. Goodrich: Would you read back what I said? I beg your pardon, your Honors. I just wanted the record to be straight.

(The question was read by the reporter as follows:)

"Your opinion then would be that it was not among the first eight killers in that——"

By Mr. Goodrich:

Q. (Continuing) —age group.

A. I do not know.

Q. Is pneumonia one of the common deficiency diseases that is most responsible for death in the 40s and 50s?

A. Pneumonia per se is not a deficiency disease. Pneumonia is a bacterial infection.

Q. When you said a while ago that you were talking about pneumonia, or you understood this paragraph to refer to pneumonia, you were wrong in that; is that right?

280 A. I didn't say that.

Judge Clark: What the doctor testified to, Mr. Goodrich, was that a vitamin deficiency might very well weaken you to the point where some disease like that would take hold of you and possibly carry you off.

Mr. Rhyne: I would also like to point out that the doctor has never testified that he understood this paragraph to mean or include any of the things that Mr. Goodrich has been questioning him about. There is nothing in his direct testimony about that, or in the pamphlet.

Mr. GOODRICH: I have attempted to stay right to the language and ask him about the very quotation. I have understood his testimony to be that those were the diseases.

By Mr. Goodrich:

Q. Am I wrong in that?

A. You certainly are.

Q. What are those common deficiency diseases—that is what I started off to try to learn—that cause death in the 40s and 50s?

Mr. RHYNE: I submit, your Honors, the question should be: What does the doctor understand by that language?

Mr. GOODRICH: I will accept that amendment.

281 By Mr. Goodrich:

Q. What do you understand are the common deficiency diseases that cause death in the 40s and 50s as referred to in the third paragraph on page 28?

A. Giving a clearcut example: the patient had mild scurvy extending over a period of a few years, and that is a very common deficiency disease, and he should come down with nothing more than a common cold. It is amazing how much it takes out of his system—the load that it throws upon his glands, and the amount of material that it takes to build him up. That depression may very well lead from a cold to pneumonia because of his lowered resistance and he would die. If he would die of that disease in the hospital, the hospital record would say that he died of pneumonia, not that he died of sub-acute scurvy, which was the thing that actually led to his death.

So the difficulty in explaining this is to try to say that actually the patient died of pneumonia, whereas what we are trying to show: that if the patient was in good health he would have been able to resist the ravages of the infection and not die.

Q. Is scurvy one of the common deficiency diseases that is responsible for death in our 40s and 50s?

A. If you were to go by the record that you have there of the statistics of what causes death, you probably wouldn't even
282 find it mentioned.

A. You didn't answer my question. I beg your pardon. What is the disease, in your own understanding of this quotation?

A. I have just tried in my way to make it clear to you, and I don't know how to do it any better, Mr Goodrich, so I will have to decline an answer I don't know.

Q. Then I take it that you can't name any particular common deficiency diseases that cause death within that period?

A. I don't think I could name any that would suit the question.

Q. And you disagree with the statistics in listing the causes of

death—and this is subject to being tied up later with the introduction of statistics, if I may be permitted—that the major causes of death in the United States, from the ages of 40 to 59 inclusive, for the most recent year reported, 1947, are diseases of the heart, cancer, intercranial lesions of vascular origin, accidental deaths, tuberculosis, nephritis, pneumonia, and diabetes.

Mr. RHYNE: Are you testifying that that is true, Mr. Goodrich?

Mr. GOODRICH: I am asking him a question. If he disagrees with that I will offer to submit the statistics when our case goes on or I have no objection to having them marked at this
283 time.

Mr. RHYNE: You are talking about causes of death rather than deficiency diseases there. The doctor hasn't been talking about that at all. I think you are trying to confuse the witness.

Mr. GOODRICH: I have no intention of doing so. This witness has testified as I understand it, that these deaths are improperly recorded as to cause. They are recorded as pneumonia deaths and other kinds of deaths because the physicians do not recognize——

JUDGE CLARK: What the doctor testified to, Mr. Goodrich, was that due to general bodily weakness caused by patients with dietary deficiency enabled other diseases to come along and take hold.

THE WITNESS: That is right.

Mr. GOODRICH: Whether or not it was one of the diseases that take over that are the common deficiency diseases referred to on page 28, or whether it was another type of disease, the name of which I can't get out of this witness so far that is the cause of death, that is the purpose of my inquiry.

Mr. RHYNE: I submit the question is so vague that no one can understand it. I object to it.

THE WITNESS: I would like to answer a little further——

Mr. RHYNE: Just a minute, Doctor. I have objected to
284 the question.

JUDGE CLARK: If the doctor can answer, let him answer.

A. I would like to give another illustration that will throw a little more light on what I am getting at.

In the early part of this century the statistics on heart disease did not list heart disease as we know it today. One of the commonest causes of death by heart disease—or commonest causes of death, let us say,—as listed in the statistics that Mr. Goodrich has there—was acute indigestion. I am sure that all of you gentlemen recall the common occurrence of death by acute indigestion. As we began to understand the nature of this trouble, we began to realize that that was not the cause of death, but that the overloading of the stomach, actually led to a reflex nervous reaction on the heart that probably at that time was in a state of vitamin deficiency and sensitivity and the heart stopped by coronary occlusion or some

other disease, and so if you were to see the curves put out by the Life Institute, you would see that as the curve of acute indigestion—that is, the number of diseases or causes of death listed in the vital statistics—as that category of acute indigestion declined; the category of coronary occlusion and coronary thrombosis went up, and today they still supplant one another.

So what I mean to say here is that just as our diagnosis has changed and we no longer say that the cause of death is
285 acute indigestion but it actually is a heart disease, I believe the same is going to be true of our vital statistics in vitamin deficiency disease.

We cannot say at the moment with certainty, because we do not have sufficient information, except in the way that I have presented it to you.

By Mr. Goodrich:

Q. Then am I to understand that you believe these causes of death which I have listed from the vital statistics are improperly recorded, and that a greater showing for what you know as a deficiency disease—that is survey and the like—should have been recorded in place of these?

A. Yes I do.

Q. Have you filled out any death certificates within the last month?

A. No, I have not. Not within the past year.

Q. None within the past year?

A. No.

Q. Have you ever filled out a death certificate giving cause of death as scurvy?

A. No, I have not.

Q. As beriberi?

A. No.

Q. As riboflavinosis?

A. No, none of the vitamin deficiency diseases.

286 Q. You have never recorded a death of any kind from vitamin deficiency disease?

A. No. Because we have a booklet which is called the "Standard Nomenclature of Disease" and it is very difficult to fit our picture into those, but I am sure that in the course of my residency at two hospitals that I have recorded the death of heart disease that fall within the classification that I mentioned here, that they probably were not so, but that is as close as I could decide at the present time.

Q. That was in 1937 and 1938?

A. That is right.

Q. Is it your opinion that beriberi is a common deficiency disease?

A. Only insofar as what I mentioned in my previous testimony.

Mr. RHYNE: The doctor testified it was not common, Mr. Goodrich, if you will recall his testimony.

Mr. GOODRICH: I don't have any recollection of that. May I ask that question again, with the Court's indulgence. I have forgotten?

JUDGE CLARK: He answered it.

Mr. GOODRICH: Did he answer it?

JUDGE CLARK: Yes, but there is no objection to his answering it again.

287 By Mr. Goodrich:

Q. Is it your testimony that beriberi is a common deficiency disease?

A. I believe that vitamin B deficiency is very common, and as I pointed out to you, when a patient comes with cardiac symptoms, if we treat that patient with thiamin, and there is a marked reduction in the x-ray picture of his heart, we assume that that was beriberi in mild form, and as I mentioned at that time, it is amazing how much of that takes place, so I would say that by inferential diagnosis—that is, by therapeutic test—we find a great deal of beriberi heart disease.

Q. Is that of the sub-clinical type or the clinical type?

A. Sub-clinical type.

Q. Sub-clinical type?

A. Most of what we see in the United States is sub-clinical.

Q. It is a fact, is it not, that in any major hospital in the United States it is very unlikely that you will find a disease that is known in the medical profession as a common dietary deficiency disease?

A. I don't quite get that, sir.

Mr. GOODRICH: Would you read it? If it is not clear, I will rephrase it.

288 JUDGE CLARK: I didn't get it.

Mr. GOODRICH: I better reframe it, then, your Honor. Strike that out.

By Mr. Goodrich:

Q. You testified, I believe, that your experience was with the University of Maryland Hospital in Baltimore City?

A. Yes.

Q. And what other hospital?

A. Church Home.

Q. Church Home Hospital in Baltimore City?

A. That is right.

Q. Are you on the regular staff or the visiting staff?

A. I am senior staff member of the Church Home Hospital and a visiting staff member of the University Hospital.

Q. Have you within the last year at either of these hospitals seen a clinical case of a dietary deficiency disease?

A. Most of my work has been in private practice, and I have not had occasion to hospitalize any of those patients.

Q. Those that you have treated in your office were sub-clinical cases, I take it?

A. Exactly, except the ones that I have mentioned here to you, which are certainly far from subclinical, but they were able to be ambulatory.

289 Q In the medical profession and from your familiarity with the literature, what are the common dietary deficiency diseases, as that term is understood?

A. The outstanding ones as they exist today are certainly overwhelmingly the B complex. The tremendous work of Dr. Spies of the Birmingham Clinic—he has an entire hospital full of pellagra. Dr. Jolliffe at Bellview Hospital in New York, and Dr. McLester, I think at Tulane, and Dr. Wilder at the Mayo Clinic—has been that the more we look into the subject of dietary deficiency, and actually look for it, the more we find. The actual knowledge that we are discussing here today is relatively new in this field, so it is very difficult to give all the statistics that Mr. Goodrich requests.

Q. What I asked, sir, was: What are these common dietary deficiency diseases as known to the medical profession? I will ask one further question in an attempt to clarify it. I believe you have testified that they are the B complex deficiencies.

A. That is right.

Q. The B complex deficiency is not an entity known to medicine, is it?

A. You say it is not.

Q. It is not a disease entity known to medicine?

A. Yes, I think it is. Pellagra.

290 Q. Now we are getting somewhere. Pellagra is one of them?

A. Exactly.

Q. What are some of the others?

A. Sub-clinical beriberi that we were just talking about.

Q. The rest?

A. Scurvy.

Q. Scurvy.

A. And vitamin deficiency, which I mentioned before. That is the only name which we have to that one, because it does not exist as xerophthalmia, which would be the classical name which we apply to them.

Q. And riboflavinosis is the name we apply to the riboflavin deficiency?

A. Yes, but that usually occurs as a part of the B complex. As I mentioned before, whenever a single condition exists it is usually

a multiple deficiency. Even pure pellagra is not nicotinic acid deficiency and pure beriberi is not thiamin deficiency and pure riboflavinosis is not a single entity. They are always associated with others in the group and probably others that we do not know about at the present time—unknown factors that we feel exist in the natural material.

Q. Is sub-clinical beriberi one of the deficiencies most responsible for death in our 40s and 50s?

291 A. In the manner in which I have mentioned a few moments ago.

Q. In that it causes heart disease?

A. Exactly.

Q. And it is your opinion, then, that vitamin deficiencies are a major cause of deaths from heart disease?

A. Exactly—vitamin B deficiency.

Q. Vitamin B deficiency?

A. Exactly.

Q. That would be the B complex?

A. Exactly.

Q. Is it your opinion that scurvy is one of the common dietary deficiencies most responsible for death in the 40s and 50?

A. Scurvy is a very common vitamin deficiency disease, and intercurring infection on it is very severe and could cause death at any time.

Q. Is it one of the diseases most responsible for death within that age bracket?

A. In the manner in which I have just maintained.

Q. And that is in that a deficiency is likely to cause pneumonia or some other infectious disease?

A. No, I did not say that. I did not say at any time that deficiency disease causes pneumonia or any other infectious

292 disease, but if a patient has a deficiency disease and then contracts an infectious disease on top of it, he then is greatly debilitated, but the deficiency diseases do not lead to pneumonia or infectious disease of any kind.

Q. The death rate from tuberculosis and pneumonia is increased because of the incidence of scurvy, is that your testimony?

A. Exactly.

Q. Is riboflavinosis a fatal disease?

A. As such I cannot tell you. As I mentioned in my direct testimony, riboflavinosis is a very difficult disease to set aside from the other members of the group.

Q. So far as it is a major cause or a common cause of death within the 40 to 50 age group, that again would go back to heart disease.

A. In exactly the same way I mentioned with the others.

Q. In your direct testimony this morning you attributed the widespread irritability, gastric distress, headache, and minor ailments, of which the entire population complains, as the sub-clinical vitamin deficiency diseases?

A. That is right.

Q. Are those symptoms which I have mentioned a syndrome of vitamin deficiency disease?

A. They are always present in it.

293 Q. Does that combination of symptoms always add up to vitamin deficiency disease?

A. No. If a person had an infection it would make that condition worse.

Q. Let us take irritability, gastric distress, and headache as three symptoms: Could you tell on the basis of those three symptoms what the person's disease was?

A. No.

Q. Why not?

A. Because there is not sufficient information there.

Q. It is true then, is it not, that headache is a common symptom of many conditions?

A. No, I would not say that.

Q. Headache is a symptom of brain cancer, is it not?

A. But I doubt if you would have to use such very careful diagnostic methods to find that the headache was due to brain cancer. You could tell that without having to guess that the patient had vitamin deficiency.

Q. If a person had a brain cancer, to an extent where he had headaches, would he also be irritable?

A. He certainly would.

Q. Would he have gastric distress?

A. He certainly would.

Mr. RHYNE: If your Honor please, this witness hasn't testified about anything about cancer in the head. It seems this has
294 gone far afield from the direct examination.

JUDGE CLARK: I think it is very far afield.

Mr. GOODRICH: Sir, I was attempting——

JUDGE CLARK: It has nothing to do with anything that is in that book.

Mr. GOODRICH: If your Honor please, this witness testified this morning that those symptoms indicated to him widespread subclinical prevalence of dietary deficiency disease.

Mr. RHYNE: What symptoms are you talking about? You keep saying "those symptoms."

Mr. GOODRICH: Shall I address my remarks to the Court or to counsel?

JUDGE GOLDSBOROUGH: You can use your own judgment about that.

Mr. GOODRICH: Thank you. I am referring, then, to irritability, gastric distress and headache which I have just explained. This witness testified this morning that those indicated to him that he believed they were due to a widespread deficiency—sub-clinical deficiency of the vitamins in the American diet. I thought I was entitled to inquire as to whether these——

JUDGE CLARK: You named three symptoms and asked him what that added up to. They might add up to a number of dif-
295 ferent things.

Mr. GOODRICH: I understood his answer was that he didn't know what it added up to, that there wasn't enough information. That is simply an attempt to test his knowledge from his direct examination. May I pursue the inquiry?

JUDGE CLARK: Yes, until four o'clock.

Mr. RHYNE: May I ask this: I would like to inquire whether it is his purpose to try to hold the doctor over here so he cannot return to Baltimore tonight, if he has any more questions along this line?

Mr. GOODRICH: We have quite a few more questions to ask him. It will take somewhat more than five minutes.

JUDGE CLARK: All right.

By Mr. Goodrich:

Q. What are some of the other conditions that these three symptoms may occur in, that are common disease conditions?

A. If a patient should come with that picture; as you present—headache, gastrointestinal upset and headache, and we should carefully examine his blood, his urine, give him a physical examination, and find no specific thing that we could place our finger on—x-ray of his head so we would not find any brain cancer—
296 and as much of the detailed examination that was capable of us to carry on, and I should give him some thiamin, or some of the B complex, and his headache and his gastric distress and his nervousness would go away, I would be prone to say that that patient's condition was due to lack of the B complex in his diet.

Q. As a specialist in internal medicine you have testified, I believe, that it is a safe procedure for a layman suffering from these common symptoms that have been discussed in the 58-page booklet, to take Nutrilite without prior medical advice, that that would be considered a safe practice?

A. It has been my experience in dealing with patients of this type, that no patient in his early distress takes any of these materials on his own. Certainly none have come to me. Most of them that

I see have made great effort through legitimate channels and doctors and clinics, to find out what causes these things. If he has the simple things Mr. Goodrich just mentioned, he is likely not to go to a doctor at all, but to take a little aspirin and soda and things that he could get at the corner drug store. He would not be likely to buy an expensive preparation like Nutrilite or some other expensive preparation until his condition got very much worse. That has been my experience.

Q. Do I take it that that would be an unsafe procedure

296a Reporter's Certificate to foregoing transcript omitted in printing.

297 if he doesn't go to the doctor in the first place?

A. I didn't say that.

JUDGE CLARK: We will take a recess until ten o'clock tomorrow morning.

(Whereupon, at 4:00 p. m., the Court was recessed, to reconvene at 10:00 a. m., Wednesday, October 19, 1949.)

298 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

Washington, D. C.,
Wednesday, October 19, 1949.

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a. m.

APPEARANCES:

On behalf of the plaintiff:

Mr. CHARLES S. RHYNE and
Mr. LESTER L. LEV.

299-300 On behalf of the defendants:

Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and
Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

301 PROCEEDINGS

THE CLERK: Mytinger and Casselberry, Inc., versus Oscar R. Ewing, et al.

JUDGE CLARK: All right, Mr. Goodrich.

DR. JOHN A. MYERS resumed the stand, having been previously sworn, was further examined and testified as follows:

Cross-examination (resumed):

By Mr. Goodrich:

Q. Doctor, when we discontinued last evening——

JUDGE CLARK: I think I should warn you that the Court is not going to tolerate this endless repetition of questions sometimes after the objection has been sustained, that you indulged in yesterday.

Mr. GOODRICH: Yes, your Honor.

By Mr. Goodrich:

Q. When we discontinued yesterday we were speaking about the symptoms of general debility, gastric distress and headache?

A. That is right.

Q. I believe it was your testimony that these symptoms are general symptoms of a number of diseases that occur in some cases of vitamin deficiency but also in connection with other diseases; is that right?

A. Right.

302 Q. And if those symptoms were not attributable to vitamin deficiency they would not be affected one way or the other by the administration of vitamins; is that right?

A. That is right.

Q. Is persistent indigestion one of the symptoms of vitamin deficiency?

A. Yes, sir; one of the most cardinal symptoms, I should say.

Q. Do you regard it as a safe practice for a layman suffering from persistent indigestion to indulge in self-medication with a product of the type of Nutrilite, in accordance with the directions on the package of Nutrilite?

Mr. RHYNE: Your Honor, I object to a characterization such as "indulge." If he wants to ask a question, let him ask a straight question rather than argue the case as he goes along.

JUDGE CLARK: I think the point is well taken.

Mr. RHYNE: I object to the question.

Mr. GOODRICH: I will rephrase the question.

By Mr. Goodrich:

Q. Do you think it is a safe practice for a patient to medicate himself without medical attention, from persistent indigestion, with a vitamin preparation of the type of Nutrilite?

303 A. It has been my experience in 13 years of treating private patients who complain of chronic indigestion and intestinal discomfort of all kinds; that long before they would be likely to try such a thing as vitamins or materials of that kind, they are just as likely to take Tums, Anacin, and materials of that type that have been given for indigestion from time immemorial.

Certainly, those things are the things that come to the mind of the individual with indigestion long before he would think of taking vitamins.

JUDGE GOLDSBOROUGH: Is there anything in this pamphlet that suggests to the individual that he should treat himself?

THE WITNESS: I didn't understand you?

JUDGE GOLDSBOROUGH: What is there in this pamphlet that suggests to the individual who reads it that he should treat himself with Nutrilite rather than go to a physician?

THE WITNESS: I didn't see anything there, your Honor.

Mr. GOODRICH: I refer to page 44, your Honor, at the top of the page.

JUDGE GOLDSBOROUGH: Before you get to page 44, you ought to read from 1 to 44. Then when you come to 44 it will have more sense.

Mr. GOODRICH: I realize that, sir; but I have no desire to take the Court's time.

304 JUDGE GOLDSBOROUGH: There is no use segregating one paragraph or two paragraphs out of context.

The first part of the pamphlet, so far as I can see, says very clearly that this preparation is simply for the purpose of keeping the system in such condition that it can fortify itself, so far as humanly possible, against disease, and that it can also remedy common ills such as aching bones, ordinary indigestion, sores in your mouth, bad feelings, insomnia, bad dreams, and things of that kind.

The whole first part of this pamphlet, as I see it, creates that settled impression, so that there is nothing in the individual paragraphs in the latter part of the book that could possibly mislead the person who had read the whole book.

But proceed, sir, in your own way.

Mr. GOODRICH: Might I have the privilege of answering that and explaining my theory, sir?

JUDGE GOLDSBOROUGH: Certainly.

Mr. GOODRICH: On page 40, and following, your Honor, are a number of testimonials, reports of what has happened to people suffering from various symptoms.

It has been settled, at least up until this time—and I cite the Fulton case which is included in our brief—that where a person merchandising drugs adopts and uses testimonials in his labeling, that he adopts those for the truth and those are the equivalent
305 of a representation to the user that that user will be benefitted, if he has like symptoms.

JUDGE GOLDSBOROUGH: That would be true if the testimonials stood by themselves without anything which tends to explain them. As far as I can see, in this book before they come to the testimonials they undertake to explain away anything that might be misleading in the testimonials.

But proceed, sir, in your own way. I don't want to begin an argument right at this time about it.

By Mr. Goodrich:

Q. On the top of page 44, sir, of the booklet——
A. You say the top paragraph?
Q. Yes.

"For more years than I care to remember, I have suffered continual (almost continuous) discomfort and pain in my stomach. For years I have grasped at every suggested remedy—over the past 15 years I have tried at least 40, including the Sippy Treatment. For years I haven't slept the whole night through. For years I have dreaded eating ordinary foods. One month ago I was due for another operation. Believe me, I could say much more."

Then the testimonial goes on—I won't read it since it is already in the record.

306 Mr. RHYNE: Why can't you read the rest of it?
Mr. GOODRICH: I will be glad to.

"How grateful I am that one month ago today I began adding Nutrilite Food Supplement to my meals. I felt better all around in less than two weeks, and for the past two weeks have enjoyed undisturbed sleep every night, with only one exception. Abdominal pains are entirely gone, and gas disturbance is noticeably less."

Mr. RHYNE: There is another sentence to it.

By Mr. Goodrich:

Q. "My family can scarcely believe it. But—there stands, untouched for two weeks now, my shelf of former 'remedies.'"

That is the entire testimonial. Does that give a picture of persistent indigestion?

A. Your Honors, I could name patients in my practice that I have seen since 1938, whose names I could place at the head of that and they would say exactly the same words.

Yes, it is one of the most beautiful pictures of the B complex deficiency that has ever been written and every patient who says it, says it in almost exactly the same words, and the results are almost as dramatic in every case. Maybe some of them would go a month instead of a couple of weeks, but, believe me, I have heard it so many times it has gotten to be a broken record in my records.

307 Yes, I believe it just as it is written.

Q. And is that a picture of persistent indigestion, sir?

A. Yes, sir. A very, very persistent picture of indigestion.

Q. And it would be safe for a person who was suffering from persistent indigestion to rely on that as indicating to him that he had a vitamin B_1 deficiency and would be helped by the taking of Nutrilite according to the directions on the package?

Mr. Rhyne: I object to the question, your Honor, on the ground that this book does not refer to vitamin B_1 in connection with this testimonial at all.

Judge Clark: The question is objectionable for the further reason that it is admitted on all hands and specifically stated in the book that what might cure one man wouldn't cure another.

Mr. Rhyne: Yes.

Judge Clark: There is no question about that. You are trying to take the experience of one man, with which he is certainly familiar himself, if he is not just a common liar, and say that that would convince anybody that the same thing would happen to him, if he had like symptoms.

Mr. Goodrich: If your Honor please, that was the reason I cited the Fulton case for a well established principle under this law.

308 Judge Goldsborough: Does the Fulton case say you can take one statement out of context, from a whole pamphlet of this kind, and make that the basis of criticism of an advertisement?

Mr. Goodrich: The Fulton case holds, sir, that where a merchandiser of drugs adopts statements or puts in his labeling——

Judge Goldsborough: You said that before, sir. I understand that.

Mr. Rhyne: Could I say to your Honor, it most certainly does not make any such holding, that you have to look at the entire context and the contents of the testimonial and the way they were used and all the facts surrounding it and this is an—I will say—unfair interpretation of that case.

Mr. Goodrich: Shall I desist from this line of inquiry then? Is it the Court's pleasure that I do so?

JUDGE CLARK: You can continue in it if you think there is any profit in it for you.

Mr. GOODRICH: Thank you.

JUDGE CLARK: But you can't do what the Court just ruled that you couldn't do: You can't undertake to twist this into being a representation of general application, that this one man's experience would necessarily apply to everyone else with like symptoms.

Judge Goldsborough suggests you are trying to twist that
309 one sentence and paragraph into being the impression that this book would give. If anybody would read the whole book, he wouldn't get any such impression at all if he had any sense.

Mr. GOODRICH: Unfortunately, the Administrator and the Food and Drug Administration did arrive at that conclusion, and that is the issue in the case. If no reasonable person could have arrived at that conclusion upon a reading of the book——

JUDGE CLARK: To the Court a very important issue is the question of constitutionality of that section of the statute on which you are relying.

Mr. GOODRICH: Yes, of course. Bu the second issue was whether they were arbitrary.

JUDGE CLARK: Of course, that is the reason there are three judges sitting in this case, because of the question of constitutionality.

Mr. GOODRICH: I was directing my interrogation to the question of arbitrariness. I thought that I would be entitled to prove on that as well as the constitutionality.

JUDGE CLARK: That is a problem this witness, I assume, is not qualified to pass on: the question of constitutionality. That is for the judges.

Mr. GOODRICH: Yes, sir.

JUDGE CLARK: You don't profess to be a lawyer, do you?

310 THE WITNESS: I don't know a thing about it, sir. This is the first time I have ever been here.

Mr. GOODRICH: Let's go back to page 1.

Mr. RHYNE: It is the first time you have been on the witness stand, isn't it, Doctor?

THE WITNESS: Yes, sir.

Mr. RHYNE: I might say the doctor is a little disturbed that he might have stated something he shouldn't have in response to questions; but he has never been on the witness stand before in his life, and he asked me to state that, so I do it at this time.

JUDGE GOLDSBOROUGH: He'll learn.

By Mr. Goodrich:

Q. Go back to page 1, the third paragraph:

"On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in

energy, having trouble digesting their food or suffering with actual stomach pains"——

Mr. RHYNE: Where are you reading from?

Mr. GOODRICH: Third paragraph, page 1.

(continuing) —"with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment.
311 Think of those who should be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely."

I respectfully submit that this is a direct representation if the testimonial cannot be taken.

Mr. RHYNE: Are you arguing your case now, or asking a question?

JUDGE GOLDSBOROUGH: I think it is preliminary to a question.

Mr. GOODRICH: That was my purpose.

Mr. RHYNE: I would ask that he read the paragraph just preceding the one he just read because it starts out with——

JUDGE GOLDSBOROUGH: He has a right to predicate his question.

Mr. GOODRICH: I refer to this predicate on my question, if I may.

JUDGE CLARK: Very well. I don't see that that is a representation of anything. I have observed the same phenomenon myself among a great many of my friends.

By Mr. Goodrich:

Q. Doctor, in taking people you know who have acute stomach pains and trouble digesting the food, would you say that those are normal symptoms of vitamin deficiency diseases?
312 A. If it please the Court——

Mr. RHYNE: Doctor, just answer the question, please.

JUDGE GOLDSBOROUGH: That is what he was trying to do.

THE WITNESS: That is what I was trying to do.

JUDGE GOLDSBOROUGH: Let him answer it in his own way. You can't answer it for him.

A. This subject that is being brought up here is one that has befuddled the minds of medical men, not only lawyers since the beginning of vitamin deficiency experimentation; and as far back as the first part of this century, after the classical diseases were discovered and the milder diseases came into understanding, exactly this question has been debated right up to the present time.

If you will give me permission I would like to read you the finest article written by the first man who really made an effort to study this disease in the human to find out why these causes that you and I suffer from, and that Mr. Goodrich is asking me about, could be produced instead of the classical deficiencies of xerophthalmia, pellagra, and scurvy, and beriberi, which he has been asking about.

That is to be found in Dr. Sir Robert McCarrison's book that was written in 1921.

Mr. GOODRICH: If it please your Honors, may we have an objection for the record to his reading in?

JUDGE CLARK: You have been reading in ever since you
313 started your cross examination. You asked him a question, Mr. Goodrich, and he has a right to answer by quoting an authority.

Mr. GOODRICH: Yes, your Honor. May we nevertheless have an objection?

JUDGE CLARK: You have an objection, of course. The objection is overruled.

Mr. GOODRICH: Thank you, sir.

314 The WITNESS: In the preface to this book, Studies in Deficiency Disease, by Sir Robert McCarrison, M. D., of the British Medical Service, written in 1921, he states:

"I have thus approached the study of deficiency disease from an aspect differing somewhat from that of other students of this subject whose object, as a rule, has been the induction in animals, by means of specially-devised food mixtures, of such maladies as scurvy, beriberi, rickets, and pellagra.

"My own method, on the other hand, has been to observe the more general symptomatic and pathological effects of faulty food on the animal body as a whole, and thereby to ascertain what forms of human illness might reasonably be attributed to it. In this way I have been brought to the conclusion that much of the gastrointestinal disorder so common at the present day, and much of the endocrine disorder probably almost equally common, though less readily recognizable, are attributable to deficient and ill-balanced food. * * *

"It is rare that the food of human beings is totally devoid of any one vitamin; it is more usual for the deficiency to be partial, and for more than one vitamin to be partially deficient; it is more usual still for partial deficiency of vitamins to be associated with deficiency of suitable protein and in-
315 organic salts and with an excessive richness of the food in carbohydrates.

"Consequently, the manifestations of disease resulting from the faulty food are compounded of the several effects of

varying degrees of avitaminosis on the one hand, and of ill-balance of the food on the other. Nor is this all, for pathogenic organisms present in the body, during the period of its subjection to the faulty food, contribute their share to the general morbid result.

"For instance, a diet deficient in vitamins and disproportionately rich in starch leads to depression of digestive and gastrointestinal function. If, then, these organs are exposed at the same time to the action of pathogenic microorganisms, their depression, which is at first functional, may become accentuated or fixed by organic changes due to the pathogenic agent.

"Further, under conditions of food deficiency, the presence in the bowel—let us say—of some infectious agent may determine the character of the morbid states initiated by the food deficiency, and even impart to them endemic or epidemic characters. In these circumstances the etiological significance of the underlying food defects, which have permitted the unhampered action of the pathogenic agent, may be obscured.

"Experiences illustrating these points are given in succeeding chapters, but it cannot be too strongly emphasized that many of the infectious scourges to which human beings are subject—such, for example, as infantile diarrhea and tuberculosis—require consideration as much from this point of view as from that of the pathogenic organism to which they are due.

"Other factors also, such as age, sex, individual idiosyncrasy, rate of metabolism, fatigue, cold, insanitary surroundings, overcrowding, the varying susceptibilities of different individuals, of different organs, and of the same organs in different individuals, all play a determining part in the production of the morbid result of food deficiency.

"So it is that in practice the manifestations of deficiency disease are influenced by a number of factors apart from the actual food fault. It may be expected, therefore, that wide variations in the incidence, the time of onset, and the character of the symptoms will occur in human beings in whom the dietetic fault has been to all appearances the same."

316

And I brought here some illustrations to show this business of difficulty in the gastrointestinal tract, a comparison of normal and deficient, taken from Dr. McCarrison's book. And I think it will be easily seen by anyone that, from the normal animal——

317 Mr. RHYNE: Before you talk about these, I will ask that these be marked for identification. Will you mark them for identification.

(The document referred to was marked for identification as Plaintiff's Exhibit No. 17.)

Mr. Goodrich: If it please, your Honor, it may be understood, may it not, that my objection goes to this entire line?

Judge Clark: Certainly.

Mr. Rhyne: You asked about this very thing.

Mr. Goodrich: Of course. I have been overruled, but I would like the record to show my objection.

The Witness: These two pictures illustrate, from the left, the entire intestinal tract from the stomach to the anus of a normal experimental animal—in this case a monkey—having been fed on perfectly normal food; and on the right side you will see the picture of the entire intestinal tract of another animal fed the same food except that it was cooked in a pressure cooker—autoclaving, as it is called in this case—and you will see a dilitation of the stomach almost bursting out sections in the small intestines where the arrows are, and in the lower section the colon in such a state of colitis irritability almost to the state of rupture that could
318 possibly exist in any animal, and it died, as you see there, after a period of 67 days on the autoclaved food, which is food cooked in a high pressure cooker. That is what happened to it by killing the vitamin material that is present.

This is the type of work that Dr. McCarrison attempted, using food that a normal human would use from his own home country of Great Britain, and also in the land in which he did his work, in India. And throughout his book you will see examples of just this type of degeneration, and from that he deduced that these vague ills and pains that I have mentioned as symptoms, not as the true picture of the disease, lead back to a deficiency of these vitamins in the diet of the individual.

By Mr. Goodrich:

Q. Doctor, what does this prove about Nutrilite Food Supplement, if I might ask?

A. This proves that in a deficiency of vitamins in the diet, that a condition of colitis, gastrointestinal irritability, indigestion, in your question, is one of the most persistent and most difficult things for the patient to overcome.

In supplementing your diet with Nutrilite or some other substance containing the necessary vitamins of the B complex—Nutrilite in this case supplies them all—you would get a relief from that condition.

319 Q. Did the control monkey have diet supplementation of the type involved in Nufrilite?

A. The control monkey in this case was given raw food—food as natural as it could be obtained in the raw state.

Q. He was given no supplementation of crystalline vitamins or of the minerals; is that correct?

A. They were not known at that time.

Q. Does this prove that a person on an ordinary diet would not have these difficulties?

A. I don't understand.

Q. Does this picture prove that a person on an obtainable diet, we will say, would not have these troubles as the second monkey had?

A. Actually what Dr. McCarrison was trying to prove: that the ordinary diet as existed and as eaten by a person would produce this picture; that is exactly what he was trying to do; and an ordinary diet does do just that.

Q. Where in the booklet—on what page—is this experiment explained, and may I have the booklet to look at it before the noon recess?

A. Yes. I will be glad to present copies to everyone who wants them.

Q. Your testimony, then, is in substance, or in sum-total, in answer to my question, that persistent indigestion is a regular symptom of dietary deficiencies?

320 A. Absolutely.

Q. And that it would be a safe practice for a person to take vitamin pills without medical attention——

JUDGE CLARK: The doctor never said any such thing.

Mr. GOODRICH: I was asking him a question, your Honor.

JUDGE GOLDSBOROUGH: The pamphlet doesn't say it.

Mr. RHYNE: If your Honor please, Mr. Goodrich constantly goes back and states what he says the witness says in kind of a different way, and every time he puts two or three words in there that kind of give an unfair impression. I haven't been objecting as we go along, but I am afraid that when it is over he will pick up the record and say that certain things where he slipped in the restatement of the doctor's answers give the very opposite impression which the doctor intended, so I think I am going to object to his characterizing the testimony.

Mr. GOODRICH: I am confident that the Court will not regard my questions as testimony in any sense.

JUDGE CLARK: Mr. Goodrich, you have plenty of opportunity to put on your own case and make all the argument you please. I don't think it is proper for you to try to put words in the doctor's mouth that he hasn't used.

Mr. GOODRICH: I think that is not proper, too, your Honor. I

had no intention of trying to put words in his mouth.

321 JUDGE CLARK: You did all day yesterday, and all morning today—stating the thing in your own way, which is not what the doctor said.

Mr. GOODRICH: I have given the doctor, have I not, sir, an opportunity to answer in his own way?

Mr. RHYNE: I am not so sure the doctor always understood the questions the way he put them. I think if you just ask questions instead of repeating them, we might get a little further.

JUDGE CLARK: Like the old question of asking the man whether he quit beating his wife.

Mr. GOODRICH: I understood that was proper on cross examination.

JUDGE CLARK: It is not.

By Mr. Goodrich:

Q. Is it safe, Doctor, for a person with persistent indigestion to take Nutrilite products, in accordance with the directions on the package and in accordance with the story in the Customer Booklet—the Customer Booklet being exhibits that have been marked for identification—without medical attention?

Mr. RHYNE: I object that the book makes no such statement, so the question is absolutely improper.

Mr. GOODRICH: I respectfully submit, your Honor, that this drug is sold directly to consumers without medical attention as

322 has been testified by Dr. Casselberry on his direct.

This witness, of course, was taken out of turn in order to accommodate him. We certainly shall prove, if it is not already amply clear in the record, that this product is sold on a house-to-house basis by salesmen who have no scientific training, who leave the booklet to the layman to read so that he may decide whether he needs this drug or does not need this drug, that the patient or the customer thereupon buys and medicates himself without the intervention of a doctor.

JUDGE CLARK: Mr. Goodrich, you can prove anything you please when you come to your case. The doctor hasn't said anything to remotely indicate the words that you put in his mouth. You can't try your own case now.

Mr. GOODRICH: No, your Honor.

Mr. RHYNE: Yesterday they asked too many questions about death causes and they waved and waved this list of vital statistics. That is a kind of standard scare technique that I know the Food and Drug Administration uses in trying their cases before juries to get the mind of the jury off the real facts before them and start thinking about death.

JUDGE CLARK: Mr. Rhyne, it doesn't make any difference what the Food and Drug Administration does. It may be the
323 general custom to do that——

JUDGE GOLDSBOROUGH: Maybe Mr. Rhyne is suggesting that this Court is a jury.

MR. RHYNE: I am just coming to this. In doing that, they had a right, of course, to find out about Dr. Myers' qualifications, but I think their whole cross examination has gone far beyond reason along that line, on these so-called scare tactics of theirs when the doctor gave no such testimony on his direct examination.

JUDGE CLARK: When the Government, if it chooses to, puts that document in evidence, the Court can pass on it at that time and its relevancy. I don't think that is fair cross examination, to take some document which you say is an official document, and examine the witness, without even showing to the witness the copy, and then proceed to cross examine him about something he hasn't seen.

MR. RHYNE: That is what I had reference to, your Honor.

JUDGE CLARK: If you want to offer that in evidence when you are trying your case, you would have a perfect right to do it, and the Court would pass on it.

MR. GOODRICH: My entire effort, your Honor—and perhaps I have failed—was to examine this doctor on his understanding of the common diseases, the common diseases that were the cause of death, the common deficiency diseases that were the cause of death,
324 all as mentioned in the booklet. And I attempted, as much as I could, to point to the places in the booklet where those references occurred.

I didn't offer the vital statistics at that time because it wasn't part of my case, but I assured Mr. Rhyne that I would do so, and I assure the Court that I will do so, if it is the Court's pleasure that they go in now——

JUDGE CLARK: If you offer them the Court will pass on them.

MR. GOODRICH: If it is the Court's pleasure that I offer them now, I will be glad to do so.

JUDGE CLARK: It is part of your case. I don't think it is fair to cross examine the witness about something like that.

By Mr. Goodrich:

Q. Doctor, what is your answer with respect to the safety or nonsafety of a layman using a vitamin pill to treat himself for persistent indigestion?

A. As I said before, all of the patients that I have found who take vitamin pills, whether they buy them from the corner drug store, because somebody recommends them to them, or whether they buy Nutrilite, is because they have made repeated attempts, honest attempts—and when I say repeated, I have had patients

who have gone to as many as 16 doctors, and fine doctors—and I don't mean to deride their reputation in any way: they just were not interested in this work at all and they just didn't see it.
325 They were interested in treating the kind of things that you have been bringing up here, just as entities, not as specific underlying food deficiencies.

When those patients cannot get help, they resort to anything, and when somebody comes along over the back fence and mentions Nutrilite or vitamin pills or anything else, they are likely to take them. But in this case of Nutrilite, I don't think they would take them very long if they didn't produce results, because of the expense of the things.

You would rather buy something for $2 rather than something that costs as much as this stuff, so I don't think they would take it, and I don't think it would hurt them if they did take it after they had tried everything else.

Q. Are you familiar with the widespread publicity being put out by the American Cancer Society on the seven danger signals of cancer?

A. Yes.

Mr. Rhyne: I object unless he offers the publicity in evidence, questioning the doctor about anything that is not produced.

Mr. Goodrich: This is a preliminary question.

Judge Goldsborough: Will you repeat the question?

Mr. Goodrich: Was he familiar with the seven danger signals of cancer that are now being so widely publicized by the Ameri-
326 can Cancer Society.

Judge Goldsborough: The witness testified in his examination in chief and his cross examination: (1) that this Nutrilite would not cure cancer. Cancer is not involved in this case, as I see it.

Mr. Rhyne: I object on the further ground, your Honor, that not only did he so testify in his direct examination, but he is asking him about something he is not showing the witness. It is not marked in evidence at all.

Mr. Goodrich: I simply asked the preliminary question if he was familiar with it as a predicate to asking him about it. The Court has pointed out that the book does not deal with cancer. It is, of course, our theory that it does.

We refer to the third paragraph on page 1, where cancer is specifically mentioned. In a broad disclaimer, you will see, "consider, for example, our title, 'How to Get Well.' From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer," and so forth.

To my mind—and I believe I am reasonable; maybe I have lost my reason but I believe not—that means that at least some types

of cancer are affected by this product. Maybe not. But that is what the Administrator believed, and that is the reason I am inquiring.

327 We have, in addition to that, a number of testimonials that indicate symptoms which are common symptoms, which may indicate cancer. I am now attempting to inquire of this witness whether he is familiar with these widely publicized symptoms which are, according to the American Cancer Society, indications to the layman that he may have cancer.

That is the purpose of my inquiry.

Mr. RHYNE: The book states—the reference there is to show—that it has no relation to cancer.

Mr. GOODRICH: It doesn't say that—and I wish to be excused for addressing my remarks to counsel—but the book says——

JUDGE GOLDSBOROUGH: If you want to talk to counsel, the thing to do is look at the Court and then you can get away with it.

Mr. GOODRICH: I am glad to have that explanation. I believe, your Honor has addressed me once before about that. That is the reason I am being careful.

In the booklet, it says if he is on his death bed with cancer he will not be helped. If he is not on his death bed, maybe. A reasonable person may arrive at that conclusion. The reader may. It isn't entirely unreasonable. At least, that is our interpretation.

If we are wrong in that, if the Court is now ready to rule——

328 JUDGE CLARK: Mr. Goodrich, this book is just as specific as it can be in saying that it won't cure cancer. It says: "From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration."

It just, in so many words, says that man concludes that he can be cured of cancer, he is absolutely wrong; or if he is in a diabetic coma or if he has got typhoid fever or if he is dying of old age at the age of 110. They hold out no hope whatever to those people of it being a cure or having their troubles alleviated.

Mr. GOODRICH: As I explained sir, our interpretation of that—and we believe it not unreasonable—is that if he is not on his death bed of cancer, if he has cancer of a lesser degree—and certainly there are many cancers of a lesser degree—then this will help.

In addition to that, the symptoms outlined in the testimonials are symptoms which are common symptoms to many diseases, including cancer. For that reason we respectfully submit that we are entitled to inquire about cancer.

The booklet is read by the uninitiated who presume
329 they are not as smart as your Honors, including the whole group of people, and for that reason the interpretation which is to be placed on the book is that interpretation that would be placed on it by the ignorant, the credulous, the unthinking, as well as the well informed and well initiated.

JUDGE GOLDSBOROUGH: Judge Tamm calls my attention to the fact that I didn't read all of that paragraph. I hastily glanced and didn't think it was material. It goes on to explain the purpose of this book:

> "What we have tried to do in this book is show the average American ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well."

That certainly is conclusive on the subject of cancer. The Court won't rule out the whole line of inquiry in regard to cancer. I don't think that is the case at all.

Mr. GOODRICH: Just note our exception for the record.

JUDGE TAMM: You don't need any exceptions for the record. This Court is functioning under the Federal Rules. Rule 46 eliminates the exceptions. You are protected on every objection you make.

Mr. GOODRICH: I understand that. It is a common failing of lawyers to note objections. Having not objected at that
330 time I thought it best to note an exception.

JUDGE CLARK: You may except.

Mr. GOODRICH: May we, your Honor, for the purpose of the record offer a document which I have marked Government Exhibit 1, which is the cancer pamphlet I was referring to?

JUDGE CLARK: You should offer it in your own case, Mr. Goodrich.

Mr. GOODRICH: All right, sir.

JUDGE CLARK: This witness is on cross examination. Mr. Rhyne was very meticulous in putting in his exhibits in his own case.

By Mr. Goodrich:

Q. You testified yesterday, I believe, that you limit your practice to internal medicine, endocrine disturbances and vitamin therapy?

A. Yes, sir.

Q. You are not a diplomate of the American Board of Internal Medicine, sir?

A. That is right, sir.

Mr. RHYNE: Did you understand his question? He is asking you about this board. Why don't you ask him what the board is?

Mr. GOODRICH: Yes.

By Mr. Goodrich:

Q. Would you explain what the board is?

331 A. The American Board is a group of physicians who have set themselves up to certify those men who are interested in carrying on a specific line of work, but primarily to indicate to people who are looking for doctors in distant cities or some place, that you would recommend, and to be placed in a register of recognized specialists, let us say. If you want to go somewhere you say, "I would like to know a specialist in endocrinology." And you look it up in this book and you see that this man has passed a board examination for internal medicine in this specialty and it kind of puts you in a class of Who's Who.

JUDGE CLARK: Kind of like lawyers?

THE WITNESS: Yes, sir.

A. (continuing) I asked one of the men on the American Board of Surgery who happened to be my patient—he happened to be the man with the bad eyes—and a member of the National Research Council whether he thought I should take the time to take the examination. It was mostly a nuisance examination as far as I was concerned: I had all I could do anyway. So I just didn't take it, that is all. I have plenty of work and am not interested in being put in Who's Who to get more work to do.

By Mr. Goodrich:

Q. What is the scope of internal medicine?

332 A. It covers all of those diseases associated with diseases of the body, leaving out those in which we apply medication or supplementation to their diet and control metabolic arrangements, anything leaving out surgery, pediatrics, I mean being the study of childhood diseases, maternity work—things that you and any of us here would be likely to complain of before we ended up in the hands of a surgeon or specialist.

Q. What particular diseases within that field do you treat with Nutrilite?

A. As I mentioned before, I don't treat any specific diseases with Nutrilite. Nutrilite is a base, a supplement to the diet, and is used entirely as such to supply, in a general way, those factors that I could not do specifically by picking out crystalline things, and I especially chose Nutrilite in some of these cases where I was not getting the results I wanted, because it had this base—the thing that differentiates Nutrilite from all of the other vitamins in that one specific way.

These people have attempted to put into it not only the crystalline vitamins that the experimentalists have found to be helpful in specific cases, but have added a concentrate of parsley, alfalfa, and

watercress, very carefully concentrated to produce those things that we do not know about. They are so small that we cannot trace them. We know that they are specific and essential, but
333 we do not know how or why they fit into the picture.

I have here before you another example to show you that we do not know what these things are.

JUDGE CLARK: I think the witness has answered.

Mr. RHYNE: I think you have answered the question, Dr. Myers.

JUDGE CLARK: The Court will take a 5-minute recess.

(Whereupon a short recess was taken. The following then occurred:)

By Mr. Goodrich:

Q. Will you read the last question?

(The last question and answer were read by the reporter.)

JUDGE CLARK: Did you answer that?

THE WITNESS: Yes, sir. I was just going to show you this differentiation so you could see that the base did have things that we didn't know about, but you didn't want that, and that is all I wanted to show.

JUDGE TAMM: The label on the page of Plaintiff's Exhibit 8 indicates that there are certain vitamins and minerals needed that were not known to the profession at that time. That is on Plaintiff's Exhibit No. 8.

By Mr. Goodrich:

Q. Do you know how this concentrate of parsley, alfalfa, and watercress is prepared?

334 A. No, I do not.

Q. Do you know whether insolvents are used?

A. I know nothing about that.

Q. Which of the dietary deficiency diseases that are the subject of this litigation are within the realm of internal medicine?

A. All of them.

Q. By that what do you mean?

Mr. RHYNE: I think the question is so broad it would have to go over the entire testimony of the doctor to cover that. I submit he has answered it and reanswered it.

Mr. GOODRICH: I have carefully been over the record for yesterday and I have not found an answer to that question.

JUDGE GOLDSBOROUGH: What is the question.

Mr. GOODRICH: What are the common deficiency diseases that are the subject of this litigation?

JUDGE CLARK: He testified to that almost all day yesterday, Mr. Goodrich.

Mr. GOODRICH: If your Honor please——

JUDGE CLARK: I don't know whether he answered that specific question the way you state it now, but you stated it four or five different ways the other day.

Mr. GOODRICH: I was not able to get an answer, your Honor.

JUDGE CLARK: You did get an answer.

335 Mr. GOODRICH: Your Honor, at one time summed up the testimony to say that the witness testified that this product would simply put you in good condition so that a disease that came along would not get hold of you.

JUDGE CLARK: That is exactly what the witness did testify.

Mr. GOODRICH: And I didn't find in that answer a statement of what these common deficiency diseases are that the book continuously talks about, and I am asking him that within the field of his own specialty. He says all of them are within, and having answered that way I would like to know specifically what they are, if I may be permitted to inquire.

JUDGE CLARK: Doctor, can you answer that?

THE WITNESS: Yes.

A. I think I gave some beautiful examples in my direct testimony for Mr. Rhyne. Judge Barker was one of the most beautiful cases I have ever seen of vitamin A and vitamin B_2 deficiency.

I think a second-year medical student just having heard, of course, of vitamin deficiency diseases would certainly recognize it.

My own case of scurvy was as classical as they ever get, and the one of the surgeon with vitamin B_2 deficiency also. The pictures that have been exhibited by all of the companies to show
336 samples of B_2 deficiency never look any better. And the only one that I didn't tell you about or show you a picture of was rickets, but I have some pictures here that you can see. I can show you x-ray diagrams of rickets if you would like to see them. I don't treat rickets because it occurs in children.

The physicians give vitamin B even before the child is born, and we don't have rickets even to show our medical students any more.

The only other thing that I have to say is that we see only a few of these very classical pictures which I pointed out to you, and the remainder of them are so difficult to diagnose that it really racks my brain sometimes to really know what to call them, and I have to just kind of test them as I pointed out to you, to see what they respond to.

And because of our lack of nomenclature, if they respond to these things I have to name them with the classical disease. But I think eventually we will change our nomenclature to the more descriptive

subclinical disease. Instead of calling it beriberi, we will have some other name for it, but at the moment that is all we can do.

Q. Are there any endocrine disturbances within the field of your specialty that are due to nutritional causes?

A. Yes, sir.

Q. Which ones, please, sir?

337 A. In the booklet I just mentioned, that was the basis of Dr. McCarrison's work, to show that the dietary disturbance almost immediately, in just mild degree, led to deficiency in the glands of internal secretion. It happened that his specialty was thyroid because he had seen so much goiter develop in pregnant women in Great Britain, but his work got far afield. And the most striking thing that he found was that the first gland that went bad was not the thyroid but the generative organs. The testicle and the ovary almost became completely obliterated.

In vitamin E deficiency, of which I have some beautiful pictures, the testicle goes from a perfectly normal organ to nothing but scar tissue from a lack of vitamin E.

In the first disease that vitamin E studies were made on—beriberi in pigeons—Dr. McCarrison has some very beautiful pictures to show that the testicle of the pigeon would shrink down from an organ about an inch long to about a quarter of an inch in diameter and completely obliterated in size. And the adrenal gland which carries the load of life and is supported by vitamin A, as I mentioned before, would swell up to a large organ nearly three times its size, tending to support life in this terrific deficiency.

Every gland in the body is weighed and measured in these subclinical deficiencies that he worked on, and they are completely illustrated in the book that I brought here to you, the studies
338 of vitamin deficiency by Dr. Robert McCarrison.

By Mr. Goudrich:

Q. Do you prescribe Nutrilite for atrophy of the testicles?

A. I did not prescribe Nutrilite for atrophy of the testicles. I supplied Nutrilite for a supplement to the diet.

Q. In cases of the atrophy of the testicles?

A. Well, I don't see atrophy of the testicles. I just told you we do not see cases that far. Our experimental pictures took the disease that far so that it would not take a medical student to understand what we were looking at.

Q. In your practice as a specialist in endocrinology, you never saw a case of atrophy of the testicles?

A. Yes, I have. Every once in a while somebody slips on a chair and pinches it, and he gets it caught in something and it will become atrophied. It will always atrophy if he gets mumps—it swells up under pressure and he will get atrophy of the testicles—but that does not necessarily mean it is due to vitamin deficiency, sir.

Q. Do you treat hypo- or hyperthyroidism by vitamins?
A. Yes, sir.
Q. In what way?
A. Hypothyroidism is very greatly affected by vitamin therapy. Vitamin C and vitamin B are very much associated
339 with it.

In hyperthyroidism it has been shown time and time again that vitamin A has a great deal to do with the over-activity of the thyroid, and by giving large doses of thyroid you can help control the patient.

More than this, we have shown that in hypothyroidism in a patient deficient in vitamin A, the patient cannot use the vitamin A unless you give him thyroid. Actually, if you give him thyroid in the tremendous doses, as I have mentioned before—100 milligrams or something—100,000 units—you could actually not get any results. You would have to start out giving him doses similar to what you see in Nutrilite, small doses, and build him up. And by adding the thyroid to it you could make it a little more effective, if the hyperthyroidism was inactive.

In other words, the thyroid actually activates the vitamin A in the body.

Q. And the two elements are required in hypothyroidism?
A. For therapeutic control, yes, sir.
Q. I believe you testified you treat diabetes mellitus in your practice?
A. That is right.
Q. That is an endocrine disturbance?
A. I testified before that we believed for a long time that that was due to a change in the insulin requirement of the patient.
340 Now, we believe that it is not so much insulin requirement as it is something wrong with metabolism in the liver.

Mr. Goodrich: May it please the Court, yesterday I inquired of this witness as to the names and addresses of some patients. Your Honor referred me to the D. C. Code, and over the evening I have looked that up.

I respectfully submit that the D. C. Code does not preclude me from inquiring into names and addresses. I have the Code here. May I approach the Bench?

Judge Goldsborough: We will be glad to look at it.

Mr. Goodrich: (Handing to Judge Goldsborough.)

Mr. Rhyne: Even aside from the Code, there is a confidential relationship that exists between doctor and patient which would prevent him from revealing anything without the patients' consent.

Mr. Goodrich: Of course, your Honor is well aware that that confidential relationship is no bar to testimony in a Federal Court, in the absence of a statute of this kind, which I think is well settled.

Judge Clark: I think this section to which you have referred

us clearly does prevent the doctor from disclosing this confidential information.

Mr. GOODRICH: Then I am wrong in my contention. I had in mind that that precluded not the names. All I was asking
341 was names and addresses for purposes of further investigation.

JUDGE TAMM: The doctor has already testified with reference to the treatment, the nature of the disease and so on. Now, to give the name of the patient would constitute a complete renunciation of the confidential relationship with the patient.

The only thing that remains, insofar as the confidential relationship is concerned, is the identity of the patient. He has told of the disease, the symptoms, the treatments, the response to the treatments; the only thing that is not on the record insofar as the relationship between the physician and patient is concerned is the name of the patient.

Mr. GOODRICH: If your Honor please, he testified yesterday, I believe, that he had used Nutrilite with over 30 patients.

JUDGE TAMM: No. His testimony on this treatment of diabetes we reduced down to the treatment of two patients. He testified that he had seen Nutrilite help diabetes patients, that the insulin treatment had been reduced 30 percent and so on. He testified as to the symptoms and so on. The only thing that is not on the record is the name and address of the patient—of the two patients.

Mr. GOODRICH: It is my understanding, your Honor, that the confidential communications are those communications given
342 in the history of the patient, when he comes in. That, of course, I do not wish.

JUDGE CLARK: Mr. Goodrich, the Court ruled on this yesterday, and there is certainly nothing in this section that you have produced here that would induce the Court to change its ruling.

Mr. GOODRICH: That is the reason I apologize for bringing it up again this morning.

JUDGE CLARK: It is directly opposite to your contention.

Mr. GOODRICH: If that is the Court's ruling, I will not pursue that.

JUDGE CLARK: Very well.

By Mr. Goodrich:

Q. Your testimony was that in using Nutrilite you also used injection with it; is that right?

A. That is correct.

Q. What type of injectible material?

A. All of the crystalline materials that are available to us, and they are all that we have mentioned before: thiamin, riboflavin, nicotinic acid, pyridoxine, cevitamic acid. I did mention nicotinic

acid. Then we have, of course, the oil solubles being made available to us now, vitamin A and vitamin E. Vitamin E I have never used injectively.

Q. I am unable to inquire about specific cases but would
343 you give me a typical case and indicate the injectible material given and the purpose for which it was given?

A. I gave that to you, sir. I gave you the case of Judge Barker in injectible.

Q. I am attempting to inquire about the 28 other cases that you inquired about yesterday.

JUDGE TAMM: A typical case of what. I think stating your question as to typical cases is improper. Typical case of what. Your previous question related to diabetes.

Mr. GOODRICH: I am getting away from the diabetes, because, as your Honor has pointed out, the disease was mentioned, and there is nothing further to pursue there. As to the other 28 patients, I was not informed as to the conditions for which they were treated except in a general way. The witness has testified that he used injectible materials together with Nutrilite as a general practice, and not being able to inquire into specific cases, I was leaving it to the doctor to give me a typical case.

Mr. RHYNE: Your Honor, I object to this line of testimony on the ground that it could only go to the doctor's qualifications. The contents of Nutrilite are not on trial at all. As they themselves have repeatedly argued, it has nothing to do with this pamphlet. I don't see what can be accomplished by going into all this.

JUDGE CLARK: I think the question is highly repetitive.
344 We have been over and over it for two days now.

Mr. RHYNE: I object to the question.

JUDGE CLARK: Objection sustained.

By Mr. Goodrich:

Q. You testified yesterday, I believe, that the medical literature is full of references as to the use of vitamin B_1 and B_2 in connection with heart disease.

Mr. RHYNE: I object on the ground it is repetitious. We have been over it and over it.

Mr. GOODRICH: This is a preliminary question. I have another question.

JUDGE CLARK: Ask the other question, but don't repeat again and again questions you asked yesterday.

By Mr. Goodrich:

Q. Can you refer me to any publications in medical literature explaining this?

Mr. RHYNE: This what?

By Mr. Goodrich:

Q. The relationship of vitamin B_1 and B_2 to heart disease.

JUDGE GOLDSBOROUGH: This member of the Court thinks the doctor answered that yesterday.

JUDGE CLARK: I think so, too.

JUDGE GOLDSBOROUGH: He said, in addition to specific diseases which you mentioned, there were certain symptoms of
345 heart trouble which were not sufficiently characteristic to have any particular name, and that they were very significant, and that he thought that proper diet and keeping the body built up, would tend to prevent, in many cases, those symptoms of heart trouble. Is that what you said?

THE WITNESS: Exactly, sir.

Mr. GOODRICH: If your Honor please, the witness testified that there were volumes written, if you will recall, on heart disease and relationship of vitamin B_1 and B_2 to heart disease. I am simply inquiring at this time as to the identity of some of the publications so that I might see them.

Mr. RHYNE: That is so far afield, your Honor, that it seems like we will be here forever. It has nothing to do with his direct examination.

JUDGE CLARK: Are you asking that question for the purpose of testing the credibility of the witness?

Mr. GOODRICH: Yes, sir, I am.

JUDGE CLARK: All right. You may ask it.

By Mr. Goodrich:

Q. Some particular publications that you had in mind?

A. I don't have any particular publications in mind. I mentioned the statement to show that a great volume of literature was available. I don't recall any at the moment, any names. I don't have occasion to remember any specific ones.

346 Q. Have you published papers in the medical literature explaining the theory you have propounded here?

A. No, I have not.

Q. You have not?

A. I have found so many corroborating my own ideas that I didn't think it was necessary to put any of mine in the literature.

Q. But you are unable to refer me to any of those that I might check?

A. Yes, I think I have one here in my folder by Dr. Jolliffe in the American Medical Association. Here is a publication by Dr. Jolliffe in the Journal of the American Medical Association, 29 May 1943, Volume 122, No. 5. I will read this to you, and I think you will find the same as I have just said:

"Conditioned Malnutrition

"The terms 'malnutrition,' 'nutritional deficiency disease,' 'nutritional failure,' 'beriberi,' 'pellagra,' 'scurvy,' 'riboflavin deficiency' and similar terms, signify to many persons disorders arising solely from an inadequate diet. This is not true, because all of these disorders may occur in the presence of an adequate diet. These terms should denote a deficiency in the bodily tissues rather than in the diet alone, and certain tissues may be more susceptible to deficiency than
347 others.

"If a tissue deficiency arises from an inadequate diet, it is known as a primary deficiency. If the tissue deficiency is caused by factors other than an inadequate diet alone, it is known as a conditioned or secondary deficiency. Conditioned deficiencies are caused by factors that interfere with the ingestion, absorption, or utilization of essential nutrients, or by factors that increase their requirement, destruction, or excretion.

"The importance of these conditioning factors as a cause of deficiency disease has not been generally recognized. In surveys of the nutritional status of population groups, there has been a tendency to neglect the importance of these conditioning factors and attribute all malnutrition to dietary inadequacies alone.

"The prevention and treatment of these conditioned deficiency diseases are often the decisive factors in determining recovery after surgery and in severe infections. Likewise, their prevention and treatment often decide the success of other therapeutic measures directed toward alleviating the conditioning disease.

"It is necessary to point out, however, that with few exceptions, the findings characteristic of malnutrition are non-specific.

348 "Some lesions attributable to malnutrition may be produced by local tissue deficiency as a result of circulator restriction; infection, or trauma. These local conditioning factors may produce lesions identical with those of a systemic deficiency. Other lesions may not be related to either systemic or local tissue deficiency, but may be due to some factor other than malnutrition. These facts indicate that all the diagnostic skill and clinical acumen employed by physicians in any of the other branches of clinical medicine must be employed in the interpretation of lesions usually ascribed to malnutrition.

"The blood level of vitamins does not necessarily reflect the state of the tissues and cannot be used as a criterion for the

absence of a deficiency disease, particularly a chronic deficiency anatomically manifest. In this type of malnutrition, the blood reflects only the recent intake of the vitamin.

"Also, to designate specific lesions as 'senile changes,' with the implication that senility per se, is responsible for them, is unsatisfactory. This merely identifies the condition with a population group in which it is frequently found, but does not explain its cause. As William Boyd has stated, 'The advance in years merely permits some slowly acting cause to
349 produce the effects in the vessels.'

"In discussing the lesions of chronic malnutrition, Kruse states that 'not all elderly persons show the changes. On the other hand, they occur in children. Time, not senility, is the essential point, and time does not start the changes, it is simply a dimension over which they progress. They are specific avitaminoses in a state of chronicity, due usually to respective dietary deficiencies running over a period of years; many of them beginning even before birth. Their prevalence and severity vary with the number and degree of deficient diets and structural damage. Most important of all, they are often reversible, yielding slowly, but completely; to appropriate therapy.'

"It is important to remember that a long period of varying degrees of inefficiency usually precedes actual failure of a metabolic function. Under certain circumstances the metabolic processes can still go on, but more slowly and less efficiently. It might well supply sufficient energy for existence at rest; but if demands were made for further energy, they could not be met. Usually, it is not until failure of function is almost complete that anatomical changes are observable. These lesions will, of course, be manifest in those tissues which are least supplied with vitamins, but when they oc-
350 cur it may be assumed with certainty that other tissues are also functioning inefficiently. In other words, the appearance of anatomical lesions is a late phenomenon, occurring only after a long period of impaired function has culminated in complete failure in certain tissues.

"Consequently, the trend of modern medicine toward the early diagnosis of disease has led to an increased interest in functional disturbances which may precede, or even cause, organic changes in structure."

By Mr. Goodrich:

Q. Do you gather from that that heart disease is in large measure due to nutritional deficiency?

A. No. It did not say that, sir.

Q. I asked: Did you gather from that that is what the author is talking about?

A. No, I did not.

Q. Can you refer me to any other publication, without reading them and taking the time of the Court——

JUDGE CLARK: Mr. Goodrich, if you ask about these things the only way the doctor can answer you is by reading whatever——

MR. GOODRICH: I have no objection to that, if the Court wishes them read. I was trying to save the Court's time.

JUDGE CLARK: You are not anxious to save the Court's
351 time. You have wasted a great deal of time.

MR. GOODRICH: I am simply trying to defend my client to the best of my ability, your Honor. I hope that I have not failed.

JUDGE CLARK: You may answer the question.

THE WITNESS: I didn't get the question.

MR. GOODRICH: There was no question.

JUDGE CLARK: You asked him whether he gathered from that——

MR. GOODRICH: He said he did not. I believe you were right. The next question was:

By Mr. Goodrich:

Q. Can you refer me to any other medical literature that I might check that advances the theory that you have advanced?

A. Yes. You will find lots of it in Dr. McCarrison's book. You will find pericarditis and all of those big names you listed yesterday, hydrops of the pericardium, a lot of them. I can't remember them all.

Q. All of those are due to nutritional causes?

A. Yes, he shows that experimentally, sir.

Q. With what type of animal?

A. I don't recall at the moment.

Q. Can you recall any others?

A. No. I beg your pardon; he brought these pieces of
352 information to save the time of the Court. I don't remember all the details. There is just too much of it.

Q. What, in your opinion, is the relationship of Nutrilite, taken as directed, in preventing hemolytic streptococcus infections in children?

MR. RITYNE: His direct examination had nothing to do with that whatever.

MR. GOODRICH: This is directly related to rheumatic heart disease.

JUDGE CLARK: You have already examined the doctor about it. What is the use of going over it again?

MR. GOODRICH: I don't think I have asked that type of question, sir. If I have, I don't recall it.

JUDGE CLARK: What was the question again?

By Mr. Goodrich:

Q. What, in your opinion, is the relationship of Nutrilite, taken as directed, to the prevention of hemolytic streptococcus infections in children?

Mr. Goodrich: The doctor will understand, of course, from that that those are the infections that cause heart disease. He has testified, in his direct examination, that a streptococcus infection of the blood was a primary reason for rheumatic heart disease.

Judge Tamm: I think the doctor answered this question yesterday. He testified that rheumatic heart disease followed
353 debilitation due to vitamin deficiency, that properly fed children would not get a streptococcus infection, that severe streptococcus infections depleted the body of vitamins and minerals, that all rheumatic children are given vitamin substances. I think the question has been answered.

Judge Clark: Objection sustained.

By Mr. Goodrich:

Q. Is it not a fact, Doctor, that rheumatic heart disease is practically nonexistent in the tropical regions where vitamin deficiencies are quite prevalent?

Mr. Rhyne: I object that that has nothing to do with Nutrilite, nothing to do with this pamphlet, nothing to do with this case. We are not trying the tropical regions. Nothing has been said about the tropical regions. It is beyond any possible interpretation of his direct examination.

Judge Clark: Objection sustained.

354 By Mr. Goodrich:

Q. What are the deficiency diseases developed by modern therapeutic methods that you referred to in your direct examination?

Judge Clark: That has been answered five or six times. It was answered just a little while ago.

Mr. Goodrich: Deficiencies developed by modern therapeutic measures, that is measures taken by doctors that cause malnutrition.

Judge Clark: He testified all day yesterday about certain cases of certain things that he found in a patient to be defective and the vitamin that he injected to correct that, notably the case of this Federal judge down in Florida.

Mr. Goodrich: What I am inquiring about, sir: he testified that certain therapeutic measures taken by doctors, as I understood him, caused malnutrition. I haven't inquired about that.

Mr. RHYNE: The doctor wouldn't testify to that.

Mr. GOODRICH: He testified to that.

JUDGE CLARK: Did you testify to that?

THE WITNESS: Yes I would testify to that.

Mr. RHYNE: Do you understand the question? I didn't understand it quite that way. Will you rephrase the question or read the question?

Mr. GOODRICH: I will be glad to.

355 JUDGE CLARK: Read the question.

(The question was read.)

Mr. RHYNE: That is the question to which objection was sustained. You asked another question after that. You changed it.

THE WITNESS: I understand what he means and I can give you some examples if you care to.

Mr. GOODRICH: Was the objection sustained?

JUDGE CLARK: The objection was sustained to that. I thought you asked another question after that.

Mr. GOODRICH: I don't believe so, your Honor. I attempted to explain my theory of the question and to explain to your Honor why I thought it had not been answered.

JUDGE CLARK: The question in essence is whether these modern therapeutic measures adopted by the medical profession cause these deficiencies.

Mr. GOODRICH: Yes, sir.

JUDGE CLARK: Doctor?

THE WITNESS: Yes, I can answer that. I remember what I said yesterday.

JUDGE CLARK: Very well.

THE WITNESS (Continuing): I will be glad to give you a couple of illustrations. What I said was that certain of the therapeutic approaches used to help patients in certain states of symptomatic disease, actually make a vitamin deficiency worse than it
356 was before, or it might even start one where it was not present, and the most notable one of that that is used in the literature is the use of the old time Sippy diet for gastro-intestinal. It has been used for a long time and still is used to some degree, not as much—it was modified later—but in that diet the person suffering from gastro-intestinal distress was fed cream and a large number of pills of sodium bicarbonate and magnesium carbonate to quiet down the so-called excess acidity in his stomach and I with my own eyes have seen a patient brought to the hospital and treated by this regimen in the early period of our knowledge of vitamin deficiency and develop the most acute scurvy I have ever seen.

His gums were so puffed up you could hardly see his teeth and I personally packed his gums with sodium perborate, supposedly

curing the symptoms of Vincent's disease when we did not actually recognize that the boy had scurvy.

There were other ones. Many times in times past we gave large doses of intravenous glucose. It is now known that glucose given intravenously cannot be burned in the body except in the presence of a sufficient quantity of B-complex.

It is now known that excessive use of these materials is likely to throw a patient into severe deficiency by giving him too
357 much of these materials to burn, and not having a sufficient amount of materials to burn them with. So today we actually have available intravenous glucose either with the B-complex added to it or many doctors added to it by direction of the interne on the service after surgery or otherwise.

In fever therapy where you have to put a patient in a fever box and raise his fever to a very high degree and make him sweat, we have actually found that we have induced serious deficiency states by loss of water soluble vitamins through the skin or by the excess burning up in the body of these materials by maintaining his metabolism while his fever is raised to 104.

That is about as high as we go. Many times we have to tap a person to take off fluid from his lungs or his abdomen and in removing that fluid we actually remove materials that have been dissolved in this tremendous amount of fluid and without supplying more of these materials the patient actually develops a deficiency picture.

In diabetes mellitus—we mentioned that disease a few moments ago—the patient is put on a diet to control his carbohydrates, and many times if there is not great care given to see that he has a vitamin intake, I myself have seen patients develop a severe scurvy because the doctor tells the patient to be very careful of sugar
358 and so the patient avoids orange juice because he knows that there is sugar in it—orange juice and lemon juice are a main support of Vitamin C unless it is given therapeutically—so the patient develops severe scurvy.

I could give you many others but I think that is sufficient.

Mr. Goodrich: May I see the paper from which the witness is testifying?

The Witness: This is just my own memory paper here. This paper from which I am reading here is one from which I actually made a slide and showed it in the lectures I told you about in discussing these things before doctors.

Mr. Rhyne: Mr. Goodrich, you never did show the doctor any of the papers from which you were reading.

Mr. Goodrich: I would be glad to. May I have a minute to examine this, your Honor?

Judge Goldsborough: Certainly.

THE WITNESS: This paper also, by the way, is published and available in the literature that I am reading from.

Mr. RHYNE: You didn't actually read from it, did you? That is just a check list, isn't it?

THE WITNESS: That is right, yes, sir. I did not read from that.

Mr. GOODRICH: Would you mind identifying where this
359 page came from so I won't have to stop at this time?

THE WITNESS: Would you let me see it, sir? I don't remember either.

Mr. GOODRICH: Yes.

(Handing to witness.)

THE WITNESS: You will read down at the bottom here that this came from a paper published by Jolliffe and Smith in "Nutrition in the Practice of Medicine" in the medical clinics of North America, Volume 27, page 567, March, 1943.

By Mr. Goodrich:

Q. This is a reprint from that article, is it not?
A. That is right.
Q. Do you know where this particular page came from?
A. Yes, sir. It tells you right there.
Q. What book was this taken out of, do you know?
A. You mean what did I cut it out of?
Q. Yes. So we might get a check on it.
A. Why not go back to the original, sir? I don't remember what I cut it out of. I just got a copy of it. You can get the original.
Q. That will be available, will it not?
A. The Medical Clinics of North America, Volume 27, page 567, in March, 1943, you will find it available as the original.
Q. Let me ask one further question: Under the category this paper is headed "Conditioning factors that may contribute
360 to nutritional failure".

Mr. RHYNE: I object to questions about the paper because the doctor has said he didn't read it. It was just something he had in front of him.

Mr. GOODRICH. Am I entitled to cross examine on this paper?

JUDGE CLARK: I don't think you are. The doctor has testified that he did not read the paper. He said he used it as a check list to refresh his memory.

By Mr. Goodrich:

Q. What was the technical name you used for night blindness yesterday?
A. Nyctalopia is the proper term, sir.

Q. I would like to read you a statement from "New and Unofficial Remedies", pages 530 and 531, discussing Vitamin A and nyctalopia.

Mr. RHYNE: May I object to his inquiring of the witness about any writing which the witness has not said he relied on in his direct testimony?

JUDGE GOLDSBOROUGH: He can read a paragraph and ask the witness whether he agrees with that statement.

Mr. GOODRICH: I will first have to qualify this as a proper book. I am sorry I didn't do that.

By Mr. Goodrich:

Q. Is "New and Unofficial Remedies" a recognized work
361 in the medical profession?

A. I think so.

Q. It is a standard work, is it not?

A. I wouldn't say standard. It is a published book that we read. We don't have to agree with it.

Q. Do you consider it a reliable source of information with respect to vitamins?

A. I think it is a voluminous source.

Q. A reliable source?

A. Yes, I think it is fair.

Q. Do you agree or disagree with the statement I am about to read from the book, on page 30, at the bottom, under paragraph number 2:

"It is generally agreed that the first symptom or at least one of the first clinical symptoms of Vitamin A deficiency is night blindness or nyctalopia. For this type of night blindness Vitamin A is a specific.

"Cases of nyctalopia exist which do not respond to treatment with Vitamin A. These may be due to congenital defects, or to other diseases than a vitaminosis A.

"In view of the present knowledge the claim is not acceptable that the administration of Vitamin A to drivers of
362 automobiles would diminish their chance of accident when driving a night."

A. I agree with that most wholly. I think I agreed with that several times. That is exactly what I said myself.

JUDGE CLARK: It is in his testimony.

By Mr. Goodrich:

Q. Then your testimony is that all cases of night blindness or nyctalopia will not respond to treatment by Nutrilite?

A. Most assuredly.

Q. And it is not your opinion then that all persons who are blinded by headlights at night are suffering from night blindness?

A. That could be possible, yes.

Q. I suppose also you agree with the statement that all persons who walk into a darkened theatre and are unable temporarily to find their seats are suffering from night blindness?

A. They are suffering from night blindness but it could not be cured by Vitamin A.

JUDGE GOLDSBOROUGH: When going, for instance, from bright sunlight into a darkened theatre, isn't every individual, temporarily at least, partly blinded?

THE WITNESS: Yes, sir.

JUDGE GOLDSBOROUGH: Don't you have to accommodate yourself?

363 THE WITNESS: Yes, sir.

JUDGE GOLDSBOROUGH: Everybody would have to do that?

THE WITNESS: Yes, sir. But what we actually mean to say is that in these people who are night blinded the length of time it takes them to adjust is very long. It may take them as long as twenty minutes, whereas the person with normal reaction time may be only a few minutes and then you could walk down the aisle.

By Mr. Goodrich:

Q. Then these mere temporary blindings are not necessarily due to Vitamin A deficiency?

A. No, sir.

Q. It is true, is it not, that night fighter pilots during World War I were given Vitamin A for night blindness without success?

A. That I do not know.

Q. Are you familiar with any of the writings in the medical literature on attempts to treat night blindness in night fighter pilots with Vitamin A?

A. Sir, I was so busy during the war taking care of my own stuff that I did not have time to check up on the night fliers.

Q. You never read of Vitamin A as a therapeutic measure with night fighter pilots?

A. No, sir.

364 Q. Was it your testimony that a woman's sterility or inability to conceive was due in part to Vitamin A deficiency?

A. I said that in our experimental work it has been shown that severe Vitamin A deficiency has some relationship to fertility, so by inference we assume that it would also have something to do with fertility in carrying her baby, in a human.

The first work that Dr. McCollum did in his work out at Wisconsin was on Vitamin A deficiency and it was the difficulty of

the animals carrying their babies that brought him to the realization that there was something missing in the diet, and it was by the addition of small amounts of materials carrying Vitamin A that he was able to make them carry them. This was the most classical picture in the entire literature.

It was the beginning of his knowledge of Vitamin A, and you can find it in many places under Dr. E. V. McCollum's name, right at the beginning of vitamins in 1910.

Q. What type of animal did he use?

A. Cattle?

Q. Cattle?

A. Cattle. The United States Department of Agriculture sent him out there with an idea of trying to find out how to develop a concentrated feed that the animals could be fed on without letting them go to pasture and in these experiments he was suddenly brought to the fact that you could not concentrate the food beyond a certain amount before you would have trouble with the fertility of the animals and their ability to carry their young, and it was in trying to analyze this picture that he ran into this knowledge of vitamins and Vitamin A was the first one.

Q. Do you carry those results over into the human field?

A. Not wholly, but as we have progressed in our knowledge we have found them to exist in the human, as you will see in McCarrison's work.

Q. Are you aware of any experimentation recorded in the medical literature that indicates that Vitamin A is a factor which will produce sterility in women, or make them able to carry their children?

A. No, I do not.

Q. Do you agree with the statement on page 16 describing vitamin A—page 16 of the booklet?

Mr. Goodrich: The second and third paragraphs, your Honors.

A. What was the thing.

By Mr. Goodrich:

Q. Do you agree with the statements made in the second and third paragraphs?

A. Are you going to read them?

Mr. Goodrich: I shall if it please the court. Would you prefer that I read them? If I didn't it would save some time.

Judge Clark: You are referring to what paragraph?

Mr. Goodrich: Those two paragraphs discussing vitamin A, the second and third, your Honor.

A. I agree with all that that says there and I have so testified and put it into the record yesterday.

By Mr. Goodrich:

Q. That is true and correct and not misleading in any respect?
A. It wouldn't confuse me.

JUDGE GOLDSBOROUGH: Sir?

THE WITNESS: I say it wouldn't confuse me, reading those two paragraphs.

JUDGE GOLDSBOROUGH: Of course, the word "keratinization" and also the word "epithelial" might require a lay person to go to a dictionary of some kind but there are not other words to use, are there? You have got to use those words.

THE WITNESS: I explained those words yesterday.

JUDGE GOLDSBOROUGH: They would only be confusing because they are not words that are generally used by the lay men, isn't that correct?

THE WITNESS: But they are explained in the first paragraph, your Honor. It says "keratinize—that is to become scaly and horny instead of smooth and moist": That is exactly what it means.

JUDGE GOLDSBOROUGH: I see.

By Mr. Goodrich:

Q. Is it your testimony then that vitamin A always raises the body's resistance to infection, especially infections of the respiratory tract?

Mr. RHYNE: That is not what the book says. He is trying again to put words in the witness' mouth.

Mr. GOODRICH: This witness testified that this book is not false or misleading in any particular.

JUDGE CLARK: The book doesn't say that.

Mr. RHYNE: It doesn't refer to all cases and I object to the question on that ground.

JUDGE CLARK: Objection sustained.

Mr. GOODRICH: I would like the record to show that I would like to ask the same question on night blindness, and the same ruling may go, I assume.

JUDGE GOLDSBOROUGH: You asked him about all cases of night blindness and vitamin A already.

Mr. GOODRICH: And he has testified——.

Mr. RHYNE: That it wouldn't be good in all cases.

JUDGE CLARK: There is no use going over what the record says. You have heard his testimony. I would like to know if you intend to pursue this repetitious and irrelevant line of investigation.

Mr. GOODRICH: I intend to go through the direct testimony that this witness gave. I have about an hour more on that. I intend to go through the booklet if I may.

JUDGE CLARK: The amount of cross examination is discretionary with the court.

Mr. GOODRICH: I understand that.

JUDGE CLARK: And the Court is not going to tolerate the kind of examination you have been putting on so far.

Mr. GOODRICH: How long would your Honor allow me?

JUDGE CLARK: I think you have covered the ground now, Mr. Goodrich.

Mr. GOODRICH: Is it the ruling of the Court that I am to cross examine no further?

Mr. RHYNE: May I say to the Court that I believe—of course, this is exactly what Mr. Goodrich is trying to do, to exhaust
369 the witness' patience and the Court and everyone else.

Mr. GOODRICH: I have no such intention.

JUDGE CLARK: That has nothing to do with what the Court thinks. The Court would not cut off cross examination or any other kind of examination when the whole field hasn't been covered, but not to go over all the testimony of yesterday and to go over this book in detail.

The booklet is before the Court; all the Court have read the booklet. The Court just thinks that is an abuse of the cross examining privilege. You have been over a number of pages in the book already.

Mr. GOODRICH: I have only been over a few selected pages. I have in mind starting, and this witness has testified that everything in this book is true and correct. I have not previously asked him a single question.

JUDGE GOLDSBOROUGH: He has testified that as far as he could tell, in his judgment there was nothing in the book that was misleading. That was his testimony as I remember it.

Mr. GOODRICH: I phrased it incorrectly then. I had the same understanding your Honor did of those words. There is in this booklet—I would like to point out to your Honors before you rule on eliminating the cross examination—there is on the first seven pages an explanation of why you should take Nutri-
370 lite.

There are some medical questions in there that are in my opinion a proper subject of inquiry of this Doctor. There are on page 7 and following some more medical questions and I have in mind if I am permitted, especially on pages 7 through 22, a large number. Part of it is what the Doctors say.

JUDGE CLARK: That is part of your case, Mr. Goodrich.

Mr. GOODRICH: As I understood it, your Honor, the burden is on the plaintiff, and this witness having gone through the book, I felt that I was entitled to go through it on cross.

JUDGE CLARK: You are not entitled to go through it to such interminable lengths as you have been doing and then backing up and asking the same questions over again. I think that you have abused the patience of the Court.

Mr. GOODRICH: I apologize if I have. I had no intention of doing so. I respectfully submit that the cross examination is proper, sir.

JUDGE CLARK: We think the cross examination ought to be terminated.

Mr. GOODRICH: Is that the ruling of the Court?

JUDGE CLARK: Yes. That is the ruling of the Court.

Mr. RHYNE: May the Doctor be excused?

JUDGE CLARK: Do you have any re-direct?

371 Mr. RHYNE: I have no re-direct.

JUDGE CLARK: Yes, the Doctor may be excused.

(Witness excused.)

JUDGE CLARK: The Court will take a recess until 2 o'clock.

(At 11:55 A.M. a recess was taken until 2:00 P.M. of the same day.)

372 AFTERNOON SESSION

(The trial was resumed at 2:00 p.m., upon the expiration of the recess.)

JUDGE CLARK: All right, Mr. Rhyne, I suppose the cross examination of Dr. Casselberry is next.

Mr. RHYNE: Dr. Casselberry, will you take the stand, please?

Whereupon DR. WM. S. CASSELBERRY was recalled as a witness, having been previously sworn, was further examined and testified as follows:

Cross examination.

By Mr. Kleinfeld:

Q. Dr. Casselberry, when were you born?

A. 1892.

Q. Is it true that in 1916 and 1917 you were a bookkeeper for the Phelps-Dodge Corporation at Douglas, Arizona?

A. That is correct, yes; the last part of 1916 and the first part of 1917.

Q. Then did you join the army?
A. I did.
Q. And how long were you in the army?
A. Approximately 2½ years.

Q. When you were discharged, did you become a credit
373 manager for the Phelps-Dodge Corporation?

A. Not immediately, but very soon after that.
Q. How long did you stay with the Phelps-Dodge Corporation?
A. You mean altogether or this last time?
Q. Altogether.
A. As I remember it, it was about 11 months before my army experience and possibly 16 months after that.
Q. When did you leave Phelps-Dodge?
A. I can't tell you exactly.
Q. During 1920 and 1921 do you recall being a real estate salesman with the Townsend-Van der Water Company?
A. That is correct; approximately that time.
Q. And during 1921 and 1922 were you a real estate salesman with Clifton Robbins Company?
A. Approximately that time, yes.
Q. And during 1922 and 1923 were you a real estate broker?
A. Approximately that time.
Q. When did you become a school teacher?
A. About 1923, along in there.
Q. About how long after that?
A. 5 years.

Q. What did you teach?
374 A. Mostly Spanish, French, and English.

Q. When you quit school-teaching, did you then become a research worker for the state of California?
A. Not immediately.
Q. Did you become a research worker in 1928 and 1929?
A. Along in there, yes.
Q. What kind of research work did you do?
A. It was with delinquent boys at the present School of Industry in Ione, California. That was a school for boys 16 to 21 who were too delinquent to be out on probation in their own communities, so they were sent there for further training.
Q. What university did you attend?
A. The University of California at Berkeley, and Stanford University.
Q. What degrees did you get?
A. A B.A. at the University of California, and M.A. and Ph.D. at Standford.
Q. When did you get your Ph.D.?
A. 1931.

Q. What was your thesis on?

A. Symptomatic factors in delinquency.

Q. How old were you when you got your Ph.D.?

A. Approximately 39 years old, wouldn't it be?

Q. About 39?

375 A. Yes. In 1892 I was born.

Q. Are you a member of the American Psychological Association?

A. Not at the present time I don't believe. I was formerly an associate member of the American Psychological Association, but I am not sure now. I debated with myself whether to pay my dues or not, since I was not active in my profession at the present time. I rather have an idea I am not a member at the present time.

Q. During 1942, 1943, and 1944, what kind of work were you doing?

A. '42, '43, and '44?

Q. Yes.

A. Well, I continued my psychological practice up until after 1945, so I was still in psychological practice, at least part time. I think I went to Douglas Aircraft Company in about 1942. I presume that is the period you are leading to.

Q. About that time. So, you were working for Douglas Aircraft Corporation?

A. Douglas Aircraft—I forget whether it was Corporation or Company—in Long Beach, California.

Q. What kind of work were you doing there?

A. I started in the education department. My first job was writing the script for a training movie they were about to
376 produce, for the training of new applicants, and I did considerable writing for the department, then transferred to engineering.

I transferred as what they call a liaison engineer. I had training in that for 2 or 3 months, but before I could actually do the work of a liaison engineer they made me personnel counsellor in the engineering department, and I continued with that until the end of the war.

Q. Did you do any mechanical work at Douglas?

A. Well, I don't think I did, in the way you mean. I presume you mean on the production line, or something like that.

Q. Yes.

A. I did mechanical work, but not on the production line.

Q. Did you get paid at an hourly rate?

A. When I started, yes.

Q. For how long did you get paid at an hourly rate?

A. I am not sure. It was likely about a year and a half. Roughly, the last year I was on a monthly basis.

Q. While you were getting paid at an hourly rate, what kind of work were you doing at Douglas?

A. As I said, I started—my first job was writing this script for the movie they were about to produce, and which we did produce.

377 As I continued, I was paid at an hourly rate while I did some directing of this movie, while I worked with the various processes in preparing it, while we were showing it later on.

I was paid at an hourly rate while I wrote technical papers for the instruction of various employees in the educational department.

I was paid on an hourly rate when I went out of the plant and put on what we called orientation programs in the various other sites of the Douglas Aircraft Company for the new employees in those locations.

Q. By the way, Doctor, do most people address you as Doctor?

A. By "most" do you mean strangers?

Q. No. Your associates in business.

Q. Practically all my associates in business call me Bill.

Q. Do you give talks before your salesmen?

A. Yes.

Q. And people who have used Nutrilite?

A. Our salesmen and distributors, not the customers?

Q. Do they address you as Doctor?

A. Strangers ordinarily address me as Doctor.

Q. When did you first meet Mr. Rehnborg, who invented Nutrilite?

378 A. Approximately 1937.

Q. How did you meet him?

A. In connection with a public-speaking class in Los Angeles, which we both attended.

Q. How did you come to take a part in the distribution of Nutrilite?

A. Mr. Rehnborg knew me, as I said, in 1937, and knew that I was a consulting psychologist. About that time, or some time between then and the early part of 1945, he had turned the sale of Nutrilite over to two men who had acted as salesmen or sales distributors for him, with a contract for the sale.

They had built the business up to fair-size volume around Los Angeles there, but due to a variety of reasons—we don't need to go into them, I don't suppose—they lost their contract, and Mr. Rehnborg then was left with the manufacture of Nutrilite and the sale.

The combination was too much for any one man, unless he happened to have very strong interests and abilities, both in research chemistry and, manufacturing and sales, so that he was

concerned—worried—about the progress of the business, and came to me in the first part of 1945 for help in getting himself straightened out in connection with the business.

That answers your question, I guess.

379 Q. You say he came to you for help in getting himself straightened out?

A. Yes.

Q. What do you mean by that?

JUDGE CLARK: He has already explained that, Mr. Kleinfeld. The man couldn't conduct the manufacturing end and the sales end both.

By Mr. Kleinfeld:

Q. Was Mr. Rehnborg ever a patient of yours in any way?

A. That would depend on how you would define a patient. Mr. Rehnborg would come and tell me his problems and I would give him advice and suggestions in the solution of his problems.

Q. His personal problems.

A. Mostly business problems.

Q. But some personal problems?

A. Some personal, yes.

Q. Of a psychiatric nature?

A. No, not at all. Worry—concern about the business.

Q. Did Mr. Rehnborg tell you about the product called Cal-Vitamins?

A. Cal-Vitamins?

Q. Yes.

380 A. Not to my knowledge.

Q. Or a product bearing any similar name?

A. Not that I remember of.

Q. When did you form a partnership with Mr. Mytinger?

A. In September 1945.

Q. How did you first meet Mr. Mytinger?

A. I met Mr. Mytinger in connection with my educational work in Douglas. He was in the same department.

Q. And you both got interested in Nutrilite?

A. Eventually.

Q. I wish you would take the three pamphlets which your counsel has marked for identification——

MR. RHYNE: May I ask you, before you go any further, Mr. Kleinfeld, whether you have compared the pamphlet that we have here with the one that you have; and find that the two lines that you have were the only difference?

MR. KLEINFELD: We are in the process of comparing them, if the Court please, and hope by another day to show what differences

if any exist, and if not of course we will not object to their being put in evidence.

Mr. RHYNE: We couldn't find any differences, and I was going to offer them in evidence, but I will wait until you——

Mr. KLEINFELD: I doubt that there are any, but I just
381 want to make sure.

By Mr. Kleinfeld:

Q. Do you have a copy of the criminal indictment that was brought against you in California?

A. With me?

Q. Yes.

A. No.

Q. Do you know of any of your associates who have a copy here?

A. No.

Q. I would like you to take the 58-page pamphlet and point out to the Court, in some detail, in order that we may save time later, the exact differences between the 58-page pamphlet and these other pamphlets.

A. Certainly. The 58-page book was the original book. Then when the first libel was made in Bellville, New Jersey, and we got the exhibit—I think that is the exhibit that shows that—we learned for the first time what the Food and Drug Administration objected to in this book, and at that time it was pages 36 on through 48. So those pages were deleted, and from then——

Mr. RHYNE: Do you mean 58 instead of 48?

THE WITNESS: Did I say 48? Pardon me. 58.

A. (continuing) From then on we published for a while, as the new books came out, as we had to supply additional
382 copies to our distributors, we supplies this 36-page book, which is the 58-page book without these pages to which the Food and Drug Administration had objected. So that is the 36-page book. I believe it is exactly the same up to and including——

JUDGE GOLDSBOROUGH: Do you mean, sir, that you eliminated everything after and including the page which says, "Is there a solution? There is."

THE WITNESS: Which page is that?

JUDGE GOLDSBOROUGH: 37.

THE WITNESS: Yes. We started on page—the picture page 37 was eliminated, and 38 and on.

JUDGE GOLDSBOROUGH: All right.

THE WITNESS: So the picture on Page 37 does not appear in this 36-page book. It only goes to Page 36.

A. (continuing) So that is the 36-page book. Then a little while afterwards, since that rather left the reader up in the air.

since the book wasn't planned to end on Page 36, we added then a few pages in subsequent editions to round out the book, to complete it, and that makes the 42-page book, which is the 36-page book plus these few pages on the end.

By Mr. Kleinfeld:

Q. Are those the only differences, so far as you know?

383 A. There might have been—as I say, I am not sure about this—the only important differences anyway.

Q. I am asking you, because, in order to save time later, if I ask you a question about a particular passage in the 58-page booklet, if that particular passage is not in either of the others, I wish you would tell us so we don't have to ask three questions instead of one.

A. You wish to have me do that each time you ask a question about the 58-page book?

Q. Yes, if it isn't in the others.

A. I will have to look each time.

Q. That will be fine.

A. All right.

Q. You said that the 58-page booklet was the original book?

A. The original of these three books; that is right.

Q. The 58-page book was preceded by the book involved in the criminal case pending in the Southern District of California?

A. It was preceded by another book; that is right.

Q. Then did you stop distributing that book?

A. It was along in the middle of 1948, as I remember it.

Judge Goldsborough: Before the first libel?

The Witness: Before the first libel, yes, sir; several

384 months before.

By Mr. Kleinfeld:

Q. Are you the editor of Nutrilite News?

A. Not at the present time.

Q. What is the Nutrilite News?

A. Nutrilite News is a weekly paper we print and send out to all our agents and distributors. It is a house organ to our salesmen.

Q. Who is the editor?

A. Mrs. Frances Bond at the present time.

Q. Did you prepare the booklet involved in the criminal case in California?

A. Yes, I did.

Q. Did anybody assist you?

A. I had much assistance, yes.

Q. Who?

A. Mr. Rehnborg, my partner Mr. Mytinger. I don't remember the others specifically, but I talked to a lot of people about it.

Q. Did you talk to any medical doctor?

A. Yes.

Q. Who?

A. The doctors in the clinic—not in the clinic but in the suite, where I had my psychological office.

Q. What are their names?

385 A. Dr. Spates is one.

Q. How do you spell that?

A. S-p-a-t-e-

Q. And his address?

A. I don't know. You can get in touch with him through the Brockman Building, Los Angeles.

Q. Rockman?

A. Brockman. B-r-o-c-k-m-a-n.

Q. And you say he gave you technical advice?

A. I didn't say that.

Q. What kind of advice did he give you?

A. I didn't say he gave me any advice.

Q. What connection did he have?

A. You asked me if I talked to him about it, and I did.

Q. Did he give you any advice on the criminal booklet?

A. No.

Mr. RHYNE: I object to his characterization of it as "the criminal booklet". He is talking about something that is not in evidence here or in controversy in any way in this case.

JUDGE CLARK: It hasn't been determined yet whether it is a criminal booklet.

Mr. KLEINFELD: I mean the booklet involved in the

386 criminal case.

JUDGE CLARK: Why don't you say that?

By Mr. Kleinfeld:

Q. Whom did you consult with respect to the booklet involved in the criminal case?

Mr. RHYNE: I really think it is "the case involved in the indictment." There is still no crime there.

By Mr. Kleinfeld:

Q. Will you answer the question?

A. I thought I already answered that. Mr. Rehnborg, Mr. Mytinger, and many other people.

Mr. RHYNE: I would like to ask the purpose of this line of questioning. Is he trying to tie in a lot of people with the criminal

case? It has nothing to do with his direct examination, nothing to do with this case.

Mr. KLEINFELD: Does the Court wish me to address the Court on this?

JUDGE CLARK: Yes.

Mr. KLEINFELD: We are just trying to prove the sequence of events leading to all these pamphlets, the various changes that were made. We want to know the differences and why they made these various changes. It bears on the good faith of the plaintiff, which over our objection has been made an issue in this case.

JUDGE CLARK: He may answer.

387 By Mr. Kleinfeld:

Q. Did you get any medical or scientific advice when you prepared the booklet involved in the indictment brought in the Southern District of California?

A. Do you mean advice in the writing of it or did I check with doctors? I didn't get any advice from any doctor in the writing of it. There was nothing of a medical nature that would cause me to go to a doctor, in that book. At least I didn't—put it that way.

Q. You did not?

A. No.

Mr. KLEINFELD: May I have this marked Exhibit 1 for identification?

(Defendant's Exhibit No. 1 was marked for identification.)

By Mr. Kleinfeld:

Q. I show you this paper, Doctor, labeled Defendant's Exhibit No. 1 for identification, and ask if you recall what it is.

A. Yes. This is the card we prepared for the use of our salesmen exclusively, on which they could make a check or comments—any note they wished—concerning the condition of the person as it was reported to him when the person started using Nutrilite.

Q. You say you gave it to the salesmen?

388 A. It was supplied to the salesmen for their own use. It did not go to the customers.

Q. Exactly what were they supposed to do with this list?

A. This was folded like this (illustrating). After the salesman would leave the customers, if the customer said he had brittle nails and tooth decay, he would check those on the card, he would write on the back the potency of Nutrilite that the purchaser was buying, when the delivery was made, file this away for his record. Then it would be in a particular box, and when the proper date came up at the end of the month he would take this card out, see that another delivery was due, he would go back to that customer. Then on the inside he would have his comments and the check,

and would be in a position to know what the customer had complained of when he started using Nutrilite.

Q. May I have the card?

A. (Handing to Mr. Kleinfeld.)

Mr. KLEINFELD: May this be marked for identification?

(Defendant's Exhibit No. 2 was marked for identification.)

389 By Mr. Kleinfeld:

Q. I show you this booklet entitled "Sales Manual, Nutrilite Food Supplement, Mytinger & Casselberry, Inc., Long Beach, California," and ask you to state what it is.

A. This is, as the title indicates, the sales manual of Mytinger & Casselberry, Inc.

Mr. RHYNE: Would you identify dates, Doctor, as you go along?

THE WITNESS: Yes.

A. (continuing) I was going to say this is, of course, the sales manual used at this particular time?

Mr. RHYNE: What time?

THE WITNESS: I can't tell, because there is no date on this.

A. (continuing) This book is constantly being revised, so that I couldn't possible say when it was used.

By Mr. Kleinfeld:

Q. But it was a book used by your organization, was it not?

A. Yes.

Q. May I have it please?

A. (Handing.)

Q. I should like to read you a passage—I find difficulty in referring to the page, but I will show it to you. Here is what the passage says:

390 "Good morning (gulp)."

JUDGE GOLDSBOROUGH: "Good morning" what?

Mr. KLEINFELD: "Good morning (gulp). Would you mind looking over this list of common American ailments printed on this page? We are looking for people who have any one of these troubles. Do you see anything there that bothers you or anyone else in the family?"

By Mr. Kleinfeld:

Q. Do you recall that this paragraph I read is in this booklet?

A. May I see the booklet, please?

Q. Yes. I will put a clip in it so we won't lose it again.

A. Yes. This is part of an experimental approach that was used by one of our salesmen and printed here. This was used for a comparatively short time, and then discontinued.

JUDGE CLARK: What is the "gulp" supposed to represent?

THE WITNESS: It was supposed to represent his self-consciousness in approaching the customers at the door.

By Mr. Kleinfeld:

Q. Is the list referred to the list marked Defendant's Exhibit 1 for identification?

A. We should note here that there is—since we are con-
391 sidering this paragraph, and the asterisk is in the paragraph, it also should be read at the bottom here that this phraseology was experimental—"for the best approach, see Page 15.20," which really, I think, should be read in connection with this, since it all ties in.

MR. RHYNE: I don't think that is necessary, Doctor.

THE WITNESS: All right.

By Mr. Rheinfeld:

Q. Is this the list that was referred to in that paragraph, the list marked Defendant's Exhibit 1 for identification?

A. In substance.

Q. I should like you to read to the Court the diseases specified in this list.

A. Of course you understand that this card was not the card that was used. For this particular experiment we had another card that was larger, that the person could look at. Whether the same ailments are on here that are on there or not I don't know. I think you have them on there possibly (indicating).

Q. Please read the list.

A. The whole list?

Q. Yes.

A. "Abdominal pain, acne, allergies, anemia, appetite poor, arthritis——"

392 MR. RHYNE: Just a minute. I object to this on the ground that it hasn't been connected at all with the booklets that are before him, or any issue in this case. It is something that has obviously been discontinued long, long ago.

JUDGE GOLDSBOROUGH: It is an attack on his good faith.

MR. RHYNE: It was discontinued so long ago. He is trying to dig all of this old stuff out of this ——

JUDGE GOLDSBOROUGH: It is said that "the doctor has tricks in his trade and the lawyer has tricks in his trade, but the salesman has no right to have tricks in his trade."

A. (continuing) I started with the list, but I didn't read the top. It gives the date, purchaser, a blank for the name, phone, address, purchaser's check list of disorders at start of program.

Then I had read down as far as "appetite poor."

"—arthritis, assimilation, asthma; biliousness, blood count abnormal, blood pressure low, blood pressure high, boils, bone conditions, breathing disorders, brittle nails, cancer, cold tendency, colitis, constipation, cuts heal slowly, deafness, diabetes, dizziness, eczema, fatigue, gas in stomach, hay fever, headache, heartbeat irregular, indigestion, infection resistance low, insomnia,
393 menstrual difficulties, mental depression, migraine, miscarriage tendency, muscle disorders, nervousness, neuralgia, nosebleed, over-age, ovary disorders, pellagra, pregnacy, prostate trouble, pyorrhea, rheumatic fever, rheumatism, rickets, sinus trouble, thyroid disorders, tissues flabby, tonsilitis, tooth decay, tuberculosis, tumors, twilight vision faulty, ulcers," and then: "weight, under and over."

Mr. KLEINFELD: I offer this in evidence, your Honor, as Defendant's Exhibit No. 1.

JUDGE CLARK: Do I understand, Doctor, that this is simply a list made for a report by the salesman, as to what he was informed?

THE WITNESS: That is correct.

JUDGE CLARK: It didn't go to the customer?

THE WITNESS: It didn't go to the customer.

JUDGE CLARK: And it was for the purpose of checking the progress of the medication?

THE WITNESS: That is correct. This was also useful to the salesman because he would have maybe 50, 60, or 100 different customers.

He could go back to a certain one and know what the person was complaining of, and he could talk about it more intelligently. He had to make a note some place. If he didn't have this, he wrote it out, so he could do it more conveniently.

394 JUDGE CLARK: Did the salesman go down the list with the customer and ask him whether he had these various ailments?

THE WITNESS: No. He would fill this in after he left. The customer would tell him what he thought was wrong with him and the salesman would write it down after he left and have it for his own check. The customer would never see or hear anything of it.

JUDGE CLARK: The reason I was asking: if the salesman read that list to the customer, it was an intimation to the customer that he had some of those things.

THE WITNESS: The customer never knew the agent had this card. The card was used entirely independently in his own files. He would write on here also, for example, "Two children, 6 and 9," the

boy's name and the girl's name, so he had the pertinent information, not just in regard to the complaints.

JUDGE GOLDSBOROUGH: May I see it?

THE WITNESS: Certainly (handing).

Mr. KLEINFELD: Would your Honor like to see another copy?

JUDGE CLARK: Yes.

Mr. KLEINFELD: (Handing.)

JUDGE GOLDSBOROUGH: Would the salesman have the privilege from you to ask the solicited purchaser if anybody in the
395 family had cancer?

THE WITNESS: Certainly not.

JUDGE GOLDSBOROUGH: What is the purpose of having it on here?

THE WITNESS: The salesman, when he would leave, would have a picture of what had gone on. Now, if the person told him—suppose it was a woman and she said, "Well, I am about to have a child. In maybe four or five months I will have a child." Then he would make a note in connection with that.

As the person used the Nutrilite and as he went back from month to month, he would know whether to talk to her about her pregnancy or about her brittle nails, or what not, or whether he talked about it or not at least he would know the condition when he went back.

JUDGE GOLDSBOROUGH: You have "tumors" here. Did he ask these customers whether the customer or anybody in the family had tumors?

THE WITNESS: No, sir. As a matter of fact, this list was only used for a short time, and we abandoned it. It was too bulky, too cumbersome. It wasn't useful anyway.

Mr. RHYNE: Did I understand you offered that in evidence?

Mr. KLEINFELD: Yes.

Mr. RHYNE: I object to it on the ground that it never came
396 to the public attention of anyone. As the witness said, it is something that was discontinued a long time ago, and has nothing to do with the issues in this case.

Mr. KLEINFELD: I urge your Honor that it certainly bears on the good faith of the plaintiff.

Mr. RHYNE: They have not shown it was used at all during the period these booklets were used.

JUDGE CLARK: The objection is overruled. It will be admitted subject to it being stricken later.

Mr. KLEINFELD: I am sorry?

JUDGE CLARK: The Court will at this time admit the tendered evidence, subject to it being stricken later if it appears that it is not germane.

(Defendant's Exhibit No. 1 was received in evidence.)

397 By Mr. Kleinfeld:

Q. Doesn't that paragraph you just read refer to a list?

A. Yes, it does.

Q. What does it say about a list?

A. It says "Would you mind looking over this list of common American ailments printed on this page?"

Q. To whom is that addressed?

A. The customer.

Q. Then he does see the list, does he not?

A. No, he doesn't.

Q. What else does it mean?

A. This isn't the only list in the world.

Q. Wasn't this the list? Didn't you just say that was the list?

A. Certainly not. I beg your pardon. I said it was not the list. Your confrere there presented you with another book that has another list in it.

Mr. RHYNE: The witness referred to a large list.

By Mr. Kleinfeld:

Q. I thought you said that this list I showed you was the list—didn't you just say a little while ago that this was the list referred to in that paragraph?

A. No, I did not.

Q. What list was referred to in that paragraph?

A. It was a list on the card about so large (illustrating).

398 The names of the ailments on that list were in large print so the customer could see it. You never could see that.

Q. It was never put in the page containing the vitamin preparation.

A. Not for the customer.

Q. But it went to the saleman.

A. It went to the salesman and the salesman used it.

Q. Of course there was some purpose you had in mind in giving it to the salesman.

A. Just as I have explained.

Q. In other words, was he not supposed to ask all the prospective customers whether they had all these diseases?

A. He certainly was not.

Q. Again please explain to us just what the salesman was supposed to do with this list?

A. Certainly. He would take the list, put it in his briefcase or leave it in his car. He would go in and talk with the prospective purchaser. As he would talk with the prospective purchaser, the customer would almost always say, "Well, what will Nutrilite do for this or do for this", or "I have this" or "I am about to have a

baby" and he would then say, "Nutrilite won't cure anything. This is what it does. It builds up the body", and so forth as we explain in the book. He would explain that to the person. Then in the course of the conversation, the little girl or the little boy
399 would run in.

He would meet the children, Bob and Susy, or whatever their names were, he would have their ages, other vital information he might want to talk about, maybe hobbies or things like that.

When he left he had to have some place to enter those items. Also he had to have a place to enter the date of delivery, so he would know when to go back and the potency of the product to take to the home the next month when he went.

So they were using a variety of different procedures and we needed a good business-like procedure that everyone could use so we conceived the idea of having a card like this that would meet all purposes. He could check off of it very easily anything they talked about if they talked about any ailment at all, and they might not. He put down the names of the children, ages of the children, hobbies, any other vital information they talked about, potencies to be delivered, dates to be delivered, folds it up, files it away in his particular box.

The customer never sees it or never even knows he has it.

Q. But the customer tells the salesman what ailments he has?

A. If he feels like it. You can't shut them off if they want to tell you.

400. Q. And the customer is checked off?

A. After he leaves.

Q. When he comes back, does he see if there is any improvement in those ailments?

A. Not for that purpose. When he comes back the next month the customer says; "Well, I don't notice much difference but I guess I will go on for another month," so he comes back at the end of the next month. The customer says, "You know"—whatever he complained of—"I don't notice that so much now; I feel quite a bit better".

So the salesman on his check list when he gets out to his car writes down, customer says he feels better. He goes back the next time. The customer says, "I think I feel a little better. I think I will go on and take it another month". That is the way it was used.

Mr. KLEINFELD: I request that this be marked defendant's exhibit 3 for identification.

(Defendant's Exhibit No. 3 was marked for identification.)

By Mr. Kleinfeld:

Q. I would like to show this to you Doctor, and ask you if it refreshes your recollection.

A. Yes. This is the list I mentioned—this size (Indicating) which was large enough that a person could look at it rather easily
401 while he is standing at the door and answer questions about it.

Q. Would you please read that list to the Court?

A. Certainly.

"Acne, allergies, anemia, asthma, bad skin color, biliousness, boils, colitis, constipation, cuts heal slowly, deafness, easily tired, eczema, faulty memory, faulty vision, flabby tissues, gas in stomach, hay fever, headache, migraine, nervousness, neuritis, neuralgia, nose bleed, overweight, poor appetite, pyorrhea, restlessness, sinus trouble, tonsilitis, ulcers, underweight, arthritis, (rheumatism) craving for sour foods, bad teeth, rickets, other bone conditions, high blood pressure, hysterical tendency, insomnia (sleeplessness), irregular heart beat, lack of ambition, lack of concentration, low blood pressure, mental depression, muscular twitching, night blindness, sensitiveness to noise, subject to cold, worry over small things)".

Q. And that went to the customers, did it?

A. It didn't actually go to the customer. This was held by the salesman in this experimental period when we were using this a short time, held by the salesman so the customer could see it. The customer said, "Well, I guess I have a little bit of this or a little
402 bit of that" or sometimes "I have this" or maybe nothing at all.

Mr. Kleinfeld: I offer that in evidence, if the Court please.

Judge Clark: It may be admitted. I don't see the pertinency of it. The witness testified it was only used for a short time. However it may be admitted.

(Defendant's exhibit No. 3 was received in evidence.)

Judge Goldsborough: Was it used at the time of this libel?

The Witness: No sir. We used it just experimentally for a long time. As you develop a business you try various approaches. Some work, some don't. This wasn't safe so we abandoned it and went on to other procedures that proved to be very much better.

By Mr. Kleinfeld:

Q. I believe you testified, Doctor, that you prepared the 58-page booklet.

A. That is correct.

Q. Did any persons assist you in that preparation?

A. Just how do you mean by assisting?
Q. Did you go to any medical doctor for medical advice?

JUDGE CLARK: We have been over that, haven't we?
Mr. KLEINFELD: Not on the 58-page booklet I thought.
JUDGE CLARK: All right.

463 By Mr. Kleinfeld:

Q. Did you go to any medical doctor to get medical advice or information on the contents of the 58-page booklet?
A. Yes, I did.
Q. What doctor did you go to?
A. Do you mean calling on the telephone as going? Would that be classified as going to a doctor?
Q. I asked you if you got any advice.
A. You asked me if I went to a doctor for advice. I asked you if telephoning would be going.
Q. I beg your pardon. Let me rephrase it.
A. I telephoned the doctor for one particular item as I remember. Would you like to have it?
Q. Just a moment if you don't mind. Did you get medical advice from any physician, from any medical doctor, on the medical facts contained in the 58-page booklet?
A. What would you consider medical facts?
Q. I will leave that to your judgment, sir.
A. I don't think there are any medical facts in here besides—if you want to call the description of the general activity of vitamin A, B, C and so forth, if you want to call these medical facts, then the answer is I didn't go to any doctor for advice in connection with them. I don't know of anything else in here that could
464 be considered medical advice.
Q. It is a fact, isn't it, Doctor, that this 58-page booklet at least refers to numerous diseases by name?
A. Where? Oh, in the front? Yes.
Q. All throughout the book.
A. As we found out in the testimony this morning, in explaining what we are getting at in this book, we mentioned certain diseases. From this title "Do you conclude that we offer every person the means of getting well whether he is breathing his last few breaths at the age of 110?"
"I wouldn't go to an expert in old age and discuss that with him. On his death bed with cancer". I wouldn't go and talk to the doctor about cancer in connection with that. There would be no need "Diabetic Coma". I wouldn't go to a doctor and talk about diabetes because this is just an illustration. Or about the typhoid fever. I would n't consult with a doctor about that.

This is just an explanation. The diseases are named, it is true, but just by way of explanation.

405 Q. Isn't it true that throughout the book—not only the passage you read—mention is made of particular diseases like rheumatism or nervous disorders?

A. I think if we were discussing in particular I could answer that better.

Q. We will come to that.

Mr. Rhyne: Can't you call the witness's attention to the part you are talking about?

Mr. Kleinfeld: We will come to that later.

By Mr. Kleinfeld:

Q. You did not go to any medical doctor and get advice on the contents of this 58-page booklet?

A. You mean on any part of it?

Q. Did you get advice on any part of it?

A. I did.

Q. On which part?

A. There is a place in here where I wanted to mention the amount of blood that flowed through the heart that was pumped around over the system. If was by way of illustration or explanation too. I don't know that I can turn to it quickly.

Mr. Goodrich: It is on page 3.

By Mr. Kleinfeld:

Q. Look at page 3. That may help you.

406 A. Yes. "While your heart is resting it pumps exactly one and a half gallons of blood through your arteries and veins every minute." I knew that the heart pumped a lot of blood through the system. I didn't know how much so I called up the doctor and asked him.

Q. On the telephone?

A. As a matter of fact, my secretary called him.

Q. On the telephone?

A. On the telephone.

Q. That is the sole medical advice you got?

A. Well, I don't know what you call medical advice. I discussed it with a variety of doctors, but I think in the scope of your question, and for the purpose of the answer, that would be the one, yes, and very likely the only one.

Judge Clark: Mr. Kleinfeld, what do you mean by medical advice? Do you think you have to have a doctor. What about Sister Kenny? She is not a medical doctor or any other sort of doctor but she has achieved some amazing cures of poliomyelitis

Mr. KLEINFELD: It was only my idea.—

JUDGE CLARK: You keep saying medical doctor. Somebody might want to go to Sister Kenny, who is famous for the cure and treatment of poliomyelitis but is not a doctor at all. The doctors have had her up several times for practicing medicine without a license.

407 Mr. KLEINFELD: If your Honor please, I don't think Sister Kenny is writing booklets like this or selling vitamin pills.

JUDGE CLARK: I didn't say she was but you are mentioning in your questions medical doctors.

Mr. KLEINFELD: I am trying to find out what doctors he got help from in a book concerning numerous diseases.

By Mr. Kleinfeld:

Q. Did you get advice from anybody else?

A. Yes.

Q. From whom?

A. Mr. Rehnborg.

Q. Anybody else?

A. Mr. Myers.

Mr. Myers is an attorney. I mentioned him in direct examination, I believe. He is an attorney, he was in Los Angeles at that time, very familiar with food and drug activities and a very good lawyer.

Q. Is Mr. Myers a chemist?

A. I don't believe so. He studied very widely in this field but I don't think he is a chemist.

Q. Not a doctor of any kind, is he?

A. Not that I ever heard of.

Q. How about Mr. Rehnborg, what is he?

408 A. He is the president of Nutrilite Products and the chemist who originated the formula for the manufacture of Nutrilite.

Q. Did you get advice or assistance from anyone other than Mr. Rehnborg or Mr. Myers?

A. Any kind of advice?

Q. That is right.

A. Yes, my partner gave me advice and suggestions, my wife gave me many valuable suggestions in the writing of it, and friends and neighbors who read it over after it was finished gave me advice and suggestions.

Q. That is all?

A. All I think that would be pertinent.

Q. Did you personally prepare the 58-page booklet?

A. Will you explain just what you mean by "personally"?

Q. Well, there are a lot of statements in the 58-page booklet. Did you think them up, get them together, dictate them?

A. Maybe I'd better explain just how this was written. When you write an advertising pamphlet like this, as I explained in direct examination, first you go over the field and you make your outline, the points you want to make, then you begin to assemble material.

As I explained, some material will come from experts, some will come from literature, you think some of it up, you get ideas,
409 combinations are worked out, and in the preparation of this book the general material—well, the general material I can't say that I thought all of it up.

Some of these ideas are original, some few paragraphs would be absolutely original, possibly, others would be a reflection of what I had read and picked up in the course of my reading, restated in my own words.

This particular section here on Vitamins A, B, and so on, rather than take my time to go into the field particularly to get this down, I asked Mr. Rehnborg to do it for me since he had all the books handy in his library and was up in the field. He wrote this out and presented it to me.

Of course I checked it. We revised it both with him and with Mr. Myers, and the China story, of course, I had to get from Mr. Rehnborg, because it was a story of his experiences, and the part in the back, the statements from the people as to their use of Nutrilite and the results they got—I got those directly from the users.

We have the sworn statements in the office. I guess that covers most of it.

Q. Those sworn statements by the users which you say you used, did you attempt to verify them in any way?

A. How do you mean?

Q. Let's assume that a user came in to see you and said
410 "I had diabetes and I used Nutrilite and I was cured."

Would you accept that as a fact or would you try to verify it in some way?

A. Not necessarily. A good case of that was the young man who sold us insurance. When he started to work with us he could only work half a day, on his testimony, had to go home and rest the rest of the day, and we bought insurance from him.

He started using Nutrilite, he reported subsequently, after a few months, or less than that possibly, that he was able to work all day, that he had reduced the amount of insulin he was required to take, felt very much better and so on.

So we said "You are still under the guidance of a doctor, aren't you?" "Yes". So I believe we have—well, I am not too sure whether we actually have a statement from the doctor—Mr. Mytinger would likely remember. I think we have a statement from the doctor there

in addition—but anyway it was our endeavor as far as we could to check up.

We didn't always go to the doctor. Ordinarily we took the person's word. If he said he had a terrific pain every night in his stomach we took his word for it and didn't try to verify it.

Q. If he said he had a particular disease, did you try to
411 verify that?

A. If you will notice in this book they don't say they had particular diseases. They mentioned the symptoms that they knew they had beyond peradventure of doubt.

Q. I will renew my question. If they said they had a particular disease and were helped by Nutrilite did you try to verify it in some way?

A. If they said they had a particular disease, we asked them to describe it. We paid attention to their descriptions of what they felt and experienced, what they knew, and that was what we paid attention to and not to the name of the disease, because you can't tell where the name comes from, whether it is from the doctor—may be it isn't.

Even if it is from the doctor it might be wrong.

JUDGE CLARK: The Court will take a recess for five minutes.

(A short recess was taken.)

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412 By Mr. Kleinfeld:

Q. Doctor, is Mr. Myers, who you say helped you in writing this 58-page pamphlet, going to be a witness here?

A. I don't know.

JUDGE CLARK: I understood yesterday that they had his deposition.

Mr. RHYNE: We have his deposition. They cross examined him out on the West Coast. You recall his deposition.

By Mr. Kleinfeld:

Q. Is Mr. Rehnborg going to be a witness; do you know?

A. I don't know.

Q. When the 58-page booklet was revised, who did the revising?

A. You mean when the last pages were cut down?

Q. Whatever revisions were made, who did the revising?

A. When these last pages were cut out, the revisions were done by the agents and distributors—that is, part of them were done by the agents and distributors all over the country. These books were in the hands of all out——

Mr. RHYNE: Doctor, I don't think you understand the question.

JUDGE CLARK: That was just the physical action of cutting the pages out of the book?

THE WITNESS: Yes. Wasn't that what you meant?

Mr. KLEINFELD: No.

413 THE WITNESS: I am sorry.

By Mr. Kleinfeld:

Q. I meant: Who decided what deletions or additions to make?

A. That was really done by the FDA.

Q. You mean the FDA told your people to cut things out?

A. Told us to, virtually, by indicating to us in this exhibit, from the seizure in Belleville, that that was the part to which they objected.

That was the first representation we had from the Food and Drug Administration as to any specific objection. We assumed, consequently, that that was all they objected to in the booklet, since it was all they mentioned. So then we decided, since it wasn't decided definitely—of course, it couldn't be decided, but until it was decided—just a difference of opinion: We thought the last part was all right; they said it wasn't—so until that could be——

JUDGE CLARK: What was in the New Jersey libel suit?

THE WITNESS: Yes, sir.

A. (Continuing:) So until that could be settled Mr. Mytinger and I decided to take this out and not use it, because if we were wrong we didn't want to be using it, and if we proved to be right, of course, we could always put it back in and use it again.

414 By Mr. Kleinfeld:

Q. Then in answer to my question, it was you and Mr. Mytinger who decided to delete the last few pages and make any other changes that were made?

A. We make all the final decisions in the corporation.

Q. You made the decision——

A. I don't mean by that, you understand, that we decided entirely and completely on our own. We have advice and suggestions constantly from experts of all kinds, but we make the final decisions.

Q. Did you consult Mr. Myers in reaching the decision to change the 58-page booklet?

A. Yes, we did.

Q. When you changed the 58-page booklet, how many pages were in the second booklet—was it 36?

A. Do you mean how many pages were left?

Q. Yes.

A. 36, yes.

Q. Then you changed the 36-page booklet to add some pages, and I believe a prologue and an epilogue; is that correct?

A. I don't believe so.

Q. What changes were made?

A. You see, the 58-page book—the first part, the first 36 pages, were just the same, so we wouldn't need to add any foreword.

415 The foreword was already there. In deleting the last pages from the 58-page book, we naturally took off the epilogue, so we had to put with the 36-page book something that would round it out and complete it. And that is what is here now in the 42-page book. It is now a conclusion in the end there.

Q. You said you had to put it in. What do you mean?

A. Well, the person who writes something has what the Germans call a "gestalt." He likes to have the thing finished up properly, and you take a book he has written and you chop it in the middle and his gestalt isn't completed, so he wants to complete it.

In that respect, psychologically, we had to put something on the end.

Q. You put the 36-page booklet out without this epilogue, did you not?

A. Yes, for a period, because we had to have the books available to our agents and distributors after we had taken the last part out. Our agents and distributors still needed books. We had to send them out. It takes a little while to write a conclusion on a book like that, especially when we wanted to put something out that would be absolutely true and factual and stand up in a situation like this. It takes a little while, so in the interim the book was used by the people in the field and by us in the 36-page form.

416 Then we changed—the 36-page book page here is just at the top. We changed that so as to use that full page. We couldn't use an empty page in the middle of the book. We made a little change and we added the end just as soon as we could.

Q. I gather that you are saying that the 36-page booklet was simply an incomplete one from your standpoint?

A. From the writing standpoint, yes.

Q. I believe, Doctor, that on direct examination you stated that you began your study of the scientific literature in 1910; is that right?

A. If you call Dr. Tilden's book scientific, that is when it started.

Q. Don't you call it scientific?

A. That would be a matter of opinion. I think any M. D. at the present time studying that book would hardly call it scientific.

Q. What is the name of that book?

A. Food—Mr. Rhyne, do you have the rest of that title?

Mr. RHYNE: I did have it, Dr. Casselberry.

A. (Continuing:) The main title is Food—and some explanation underneath.

Mr. KLEINFELD: Your counsel says he will be able to supply the full name of the doctor and the full name of the
417 book.

By Mr. Kleinfeld:

Q. You began your study by reading Dr. Tilden's book in 1910; is that right?
A. That is correct.
Q. How old were you then?
A. In 1910 I was about 18.

Mr. RHYNE: I will give you the title now, Food: Its Influence as a Factor in Disease and Health, by Dr. Tilden of Denver.
Mr. KLEINFELD: What is his first name, please?
Mr. RHYNE: I don't have that.
Mr. KLEINFELD: Published in Denver, you say?
Mr. RHYNE: Yes, in 19— I don't have the date it was published.

By Mr. Kleinfeld:

Q. So when you were 18 you started becoming interested in vitamins?
A. No. No. Not by a long shot. Nobody knew about vitamins then. At least, nobody I knew.
Q. What did you become interested in at the age of 18?
A. In nutrition.
Q. What was your educational status at the age of 18?
A. I was just about to graduate from high school. Depending on the particular month, I was about to graduate or had
418 graduated.
Q. Are we to understand then that you continued your study of nutrition from 1910 to 1945?
A. That is correct.
Q. While you were a bookkeeper?
A. That is correct.
Q. Didn't you have a fulltime job as a bookkeeper?
A. Certainly.
Q. Did you work nights on nutrition?
A. I never did consider myself as working on nutrition.
Q. When did you study about it?
A. When you are a bookkeeper ordinarily you are working an 8-hour day. If you sleep 8 hours, you will have 8 hours left for eating and readi and exercising and whatever you wish, and you have—well, not as a bookkeeper you don't have Saturday off, but

you have Sunday off, which gives you ample time to read if you wish.

I wished to read, and I read quite a bit, not only in the field of nutrition but in many other fields.

Q. How about while you were in the Army? Did you continue your studies then?

A. I did.

Q. At what general times during the day?

A. In Douglas my office hours were about, roughly, 9 to 12 and 1 to 4, so I know I didn't read it then. But the rest of the
419 time was available if I wished to use it for reading.

Q. About how much time do you estimate you spent a week?

A. I haven't any idea. I read it when I felt like it, when I had a good book that I was interested in.

Q. And while you were going to school, did you continue your extracurricular studies in nutrition?

A. Not very much while I was in college. Occasionally, but usually my time was pretty well occupied with my assigned studies.

Q. I believe you testified on direct examination, Doctor, that you had talked to friends who during 1933 and 1934 told you about the crystalline vitamins; is that correct?

A. That is correct.

Q. Would you mind giving us the names and addresses of those doctor friends?

A. I am sorry; I can't. They were around in the building, and I can't even recall their names now.

Q. Do you remember what crystalline vitamins they spoke to you about?

A. I think the first one I became acquainted with was put out by the Vito Products, something like that, in Los Angeles. As I remember, it was mostly B complex with possibly some C in it, just a small array of vitamins anyway.

420 Q. What year was this?

A. Around '33, '34, '35, along in there.

Q. Did they speak to you about ascorbic acid or vitamin C?

A. I don't know.

Q. Did they talk to you about vitamin B_1?

A. We didn't discuss the individual vitamins very much. This product was brought to my attention. They told me something about the importance in vitamins and suggested I use it along with my psychology methods because they thought it would help my patients.

Q. I believe you testified that Mr. Myers advised you with respect to revising the book on different occasions?

A. The book is which?

Q. All the books.

A. No.

Q. Didn't you get advice from Mr. Myers?

A. You are talking about these three books (indicating)?

Q. That is right.

A. Yes. Mr. Myers advised us concerning changes in the 58-page book and also in connection with the preparation of the 58-page book.

Q. And he advised you when you changed the booklet involved in the criminal proceedings instituted in California, when you changed that to the 58-page book, did he not?

421 A. That is correct. That is included in this. The advice he gave was in the writing of this (indicating), which supplanted the book involved in that case.

Q. What advice did he give you with respect to changing the first book, that involved in the criminal case in California and changing that book to the 58-page booklet which you have before you?

A. The first advice was that I was not to use the name of any disease in connection with the person's use of Nutrilite. In other words, he explained that it was perfectly legal and proper and right that the person using a product be allowed to express his results, what he could feel and sense and see, but that it was not proper for him to say that he had any particular ailment, or for us to use the medical term, so that was the first—that was really the cardinal principle that he gave me in the revision of the book.

Q. Isn't it a fact that he told you that you would probably keep out of trouble if you called the product a food supplement rather than a drug?

JUDGE GOLDSBOROUGH: If he did what?

Mr. KLEINFELD: If he called the product a food supplement rather than a drug?

A. No, I don't think so, because it never occurred to us to call it a drug, since it isn't.

422 By Mr. Kleinfeld:

Q. But notwithstanding that it is not a drug, you do mention the names of various diseases in the various booklets, do you not?

A. As I explained, and by way of reference, making a covering point at first showing our intention, we mention the name of several diseases, that is true, but not at all in connection with Nutrilite, not at all in connection with recovery, or anything else of that nature.

Q. Then what you are telling the Court is that you are really not holding out Nutrilite as a drug at all for anything?

A. That is correct. Nutrilite is not a drug as I understand it.
Q. Is it a drug with respect to vitamin deficiency diseases?
A. I beg your pardon?
Q. Is it a drug with respect to vitamin deficiency diseases?
A. So far as I know, it is not a drug in any sense of the word.
Q. In connection with the medical experiments, medical treatises and literature which you looked at while you were drafting these pamphlets, can you mention any medical book, or any medical literature, where you found any statement that a vitamin
423 and mineral supplement such as Nutrilite is a cure for any of the serious diseases mentioned so far in this trial?
A. Certainly not, because no medical book is going to make such a statement.
Q. It would be false if they did, wouldn't it?
A. Not necessarily, no. It might be quite true, but they certainly wouldn't make it.
Q. Why wouldn't they?
A. Because they are medical doctors.
Q. Does your organization put dates on these various booklets when they are issued?
A. Well, if they do, the date is on there. Not ordinarily, no. These aren't dated.
Q. Is there any reason why you don't date them?

JUDGE CLARK: Mr. Kleinfeld, that is entirely irrelevant. People don't have to date a thing unless they want to. If it is dated, it puts a limit on the time it can be used.

By Mr. Kleinfeld:

Q. In the second page of the foreword of this book, the following statement is made:

"We have done our best to include only truthful and factual statements in this book. As statements that might be misconstrued or misunderstood are brought to my attention, they are changed. These changes are made monthly, as a
424 new printing of this book comes off the press every 30 days."

That statement is in the foreword, is it not?
A. That is correct.
Q. Don't you think, then, you ought to have a date on these booklets to show when they come out, when they are changed every month?
A. I don't see why. In the first place, we don't change them every month. If in a particular month no statement came to our attention that the particular statement was misunderstood or misconstrued we wouldn't make any change that month.

Q. Will you explain to the Court, Doctor, the precise method by which these booklets are used by your sales people?

A. Certainly. The booklet is used as an advertising booklet usually, to save the salesman's time, so that when a user has a friend, tells a friend he should use Nutrilite, the new person sees the distributor and says, "I want to get some Nutrilite." He may supply him with Nutrilite at the time. He may say, "Before you use Nutrilite I would like to have you know more about it. You should take this book and read it." Or it may be he is sitting at lunch with somebody and begins to talk about diet and mentions that he has to watch his diet on account of some ailment
425 or something and the distributor says, "Are you interested in improving your diet?" "Yes, I am." "Here, take this book and read it. If you like the idea, let me know; if you don't, pass it on to somebody else."

Q. Are your sales people urged to recruit other distributors of your product?

A. They are.

Q. What would they get, if anything, if they recruit a distributor?

Mr. Lev: I object to that as being immaterial, if the Court please, as having nothing to do with the issues, as to what compensation they get, if any.

Judge Clark: What point are you trying to bring out?

Mr. Kleinfeld: We want to bring out if the consumers of this product—and very many of them are; these alleged satisfied users—get other customers, not only do they get probably free Nutrilite for themselves but they get paid for it. I think it deals with the entire question.

Judge Clark: That is a pure assumption on your part, isn't it, Mr. Kleinfeld?

Mr. Kleinfeld: I am trying to ask him to explain all these selling methods.

Mr. Rhyne: I don't see why there is anything wrong *with* them getting paid for selling it, or how it can possibly have any connection with the issues here. I object to the question on that
426 ground.

Judge Clark: Isn't that a very common practice in nearly all trades and businesses, to reward their customers who take the trouble to go out and increase the business? I get letters from the Book-of-the-Month Club every two or three weeks, wanting me to send their blanks to my friends and offering me some free books if I would do it. I have never heard of them trying to put them out of business for using the mails or anything of that sort.

Mr. Kleinfeld: Your Honor, they have taken depositions of alleged satisfied users of these products, people who are going to

testify, or who have said in depositions that they took this product and they were helped by it. I want to bring out from this witness, if I can, that these people have a distinct financial interest in making such statements.

Mr. RHYNE: He can cross examine the users. Why can't he bring it out there, if we used the depositions? Why does he have to cover the same ground here in advance?

JUDGE CLARK: He may answer.

THE WITNESS: Will you repeat the question, please?

JUDGE CLARK: I don't think it has any relevancy; but go ahead.

(The last question was read by the reporter.)

A. You understand, we are talking about our salesmen and not our customers now. The salesmen are encouraged to get
427 other distributors, and they are rewarded in that as their volume and the volume of their group rises, they receive a somewhat higher discount—sales discount, yes.

In other words, they get a higher commission.

By Mr. Kleinfeld:

Q. For doing what?

A. For selling more Nutrilite. This is the salesmen we are talking about.

JUDGE GOLDSBOROUGH: The question, as I understood it, is whether the customers get anything, directly or indirectly, for giving endorsements?

THE WITNESS: The question he asked——

JUDGE GOLDSBOROUGH: I know, but that is the only question we are interested in, whether these customers——

JUDGE CLARK: That isn't what Mr. Kleinfeld said. He said the satisfied users might have a financial interest in it themselves.

Mr. RHYNE: He tied his question up with the users, rather than the salesmen. That is what caused the confusion.

JUDGE CLARK: Dr. Casselberry is talking about the salesmen and distributors.

Mr. RHYNE: But your explanation referred to the users.

Mr. KLEINFELD: I think it is all tied up. I want to ask several questions on that score.

JUDGE CLARK: He admitted that as to the commissions
428 paid. You are now going off on the commissions paid to the salesman, which is not at all the same question.

Mr. KLEINFELD: Your Honor is ruling, then, that I may ask the question so far as the salesman is concerned?

JUDGE CLARK: I say you have to confine it. You can't mix it up.

By Mr. Kleinfeld:

Q. What do your salesmen get, if anything, for getting further distributors or salesmen?

A. The benefit that comes to the salesman, the distributor, or agent, who adds other agents or distributors to his group, as I explained before, comes through an increased discount due to increased sales volume.

Q. And isn't it fairly customary for customers to become salesmen of Mytinger and Casselberry, Inc?

A. Many customers who never thought of selling anything at all begin to sell Nutrilite when they experience the benefits. They become enthusiastic about it. But I don't think it would be true that many—I mean a large proportion of our customers do not, no, not a large proportion. Many do.

Q. And those that do, of course, get paid as any other salesmen?

A. Certainly. They are salesmen then.

Q. Do these customers get discounts on purchases of
429 Nutrilite for themselves, for getting other customers?

Mr. RHYNE: Do you mean salesmen or customers?

Mr. KLEINFELD: Customers.

A. Not necessarily. I forget just exactly how we are handling that now. I haven't paid much attention to that. Mr. Mytinger and other members of the organization, our sales manager in particular, have been handling that. But I believe that the last word is that at the present time not very much of that is being done.

Ordinarily, the customers are perfectly willing to tell their friends and relatives, and send a distributor to their friends and relatives without any renumeration at all. And when you find it isn't necessary to pay them, as a matter of good business, you don't do it.

Q. What is a "high potentate"?

A. A "high potentate" is a slang expression we have in the organization for a distributor who continues to build his own organization and the sales volume of his organization until he gets up to the point where he is receiving the maximum discount. We wanted to have some name for them which would inflate their ego a little bit and give them something to work for besides money, so we called them "high potentate." That came, by the way, from the potency of vitamins. A high-potency vitamin is usually better than a low-potency and a high potentate is better than a low potentate.

430 Q. Do these high potentates get a discount on what they acquire from your outfit?

A. What they acquire from what?

Q. Do these high potentates obtain a discount on purchases of Nutrilite from your organization which they in turn sell?

A. Every distributor buys at a discount. That is how he makes his profit. He buys for less than he sells it.

Q. What percentage of a discount does a high potentate get?

Mr. RHYNE: I object to all this. I don't see how it has anything to do with any good faith or any issue before the Court—the amount of discount. I also think there are some trade secrets involved there that probably some of our competitors would like to know, and I don't see how it matters.

JUDGE CLARK: Mr. Kleinfeld, I think you have gone far enough with this line of questioning. I can't see any possible relevancy that the amount of commission that the plaintiff pays their salesmen or distributors—it is based to some extent on the efficiency of the distributors—bears to this book that you have been talking about.

Mr. KLEINFELD: With your indulgence, your Honor, I would like to ask one more question on this point.

JUDGE CLARK: If it is admissible, you may.

Mr. KLEINFELD: It is connected with the statement made
431 as to the method of sales.

By Mr. Kleinfeld:

Q. Is it not a fact that the major part of the sales of Nutrilite are made by agents who knock on the door of prospective customers and leave a copy of the pamphlet there?

A. Not at all.

Q. What is——

A. Most of the sales are what we call repeat sales. Nutrilite is sold on a yearly basis. The purchaser realizes it is a food supplement. If he is going to get any benefit, just as he does from his food, he has to use it over an extended period.

Consequently, he buys month after month as long as he is satisfied; as long as he wishes to continue, he buys month *month* after month. So most of our sales are made to people who have started and just continue to buy month after month as long as they are satisfied.

Q. On original sales, is it not a fact that they are almost universally made by having salesmen knock on the doors of homes and residences and leaving a copy of the booklet with the prospective customer?

A. No. That is not true at all. Ordinarily, we find that a distributor, as he starts—they are divided in two groups. Some start
and never knock at a door at all. They will go to their friends,
432 relatives, and their friends, after they use Nutrilite a while, will send them to their friends and relatives. And by being sent on from one person to another, pretty soon they have all the

business they can care for, and they never knock on a door for new business.

Other salesmen and distributors, when they start, especially if they go to a new community and don't know anyone, then to get started they will go from house to house looking for people who are interested in diet, and they will lend them a book. Then as those people get started and begin to feel the benefits of Nutrilite, they in turn send them on to their friends.

So we find that ordinarily a new distributor just simply doesn't have time to go for new business to a strange house, because he has a long list of people who are waiting for him to call on them, who have been referred by his other customers.

Q. Is the name of Oscar Sandager, of Rural Run, Minnesota, familiar to you?

JUDGE GOLDSBOROUGH: Is he what?

Mr. KLEINFELD: Is that name familiar to the witness—Oscar Sandager.

A. As I remember, that name figured in some report we had Monday here.

By Mr. Kleinfeld:

Q. You don't recognize who he is?

433 JUDGE CLARK: I remember about the name coming in here and some testimony that was offered.

Mr. RHYNE: Yes, it was in Exhibit No. 4 that it was referred to.

By Mr. Kleinfeld:

Q. ~~Do you know~~ whether Mr. Sandager is an agent or distributor for Mytinger and Casselberry, Inc.?

A. No, I don't.

Q. Do you know whether he is a high or low potentate?

A. I wouldn't know if he were a distributor——

Mr. RHYNE: Just answer the question.

THE WITNESS: Pardon me; I don't.

By Mr. Kleinfeld:

Q. You don't know?

A. No. Pardon me—I know he isn't—no. I can't answer it.

Q. Then you don't know what monies or discounts have been paid him for his efforts in selling Nutrilite?

A. I don't know anything about him at all.

Q. In your direct examination, Doctor, you referred to certain booklets which I believe you said you used in creating these pamphlets; did you not?

A. I don't know. If you will go on and give me the names of the books I can tell you whether I used them.

Q. I believe you referred to the following: New and Non-
434 official Remedies; Modern Home Medical Advisor; Pharmaceutical Basis for Therapeutics; Diseases of Metabolism; Rehabilitation Through Better Nutrition; Dietotherapy; Dispensatory of the United States; Chemistry of Food and Nutrition; Investigation of Human Requirements for B Complex Vitamins; Essentials of Nutrition; Principles of Nutrition; and Nutritional Value of Food; JAMA—I believe that is the Journal of the American Medical Association—June 22, 1946, Volume 131, No. 8; Record of Dietary Allowances; National Nutrition; Arthritis and Related Conditions; Diabetes and its Treatment; Facts you Should Know; Inadequate Diets; and Nutritional Deficiencies Bulletin 109; NRC.

JUDGE CLARK: I believe these were in the papers in this morning.

Mr. KLEINFELD: I believe they are in evidence.

Mr. RHYNE: What he is doing is reading off the titles of these things. They are not things that Dr. Casselberry talked about himself. He merely identified an exhibit that had reference to excerpts from those, so if you will ask him about Exhibit 6 he will understand what you are talking about.

By Mr. Kleinfeld:

Q. Will you look at Exhibit 6? Will you look at Plaintiff's Exhibit 6 and see if those documents are not mentioned there?

435 A. You mean the list you just read? Is that the same as this?

Q. Yes.

A. I wouldn't be able to tell because I couldn't tell you what you read.

Q. Would you mind looking——

A. It starts with Modern Home Medical Advisor, which is one I think you read.

Q. Yes, and go through the exhibit please, and see if I am correct in the names I mentioned?

A. I couldn't do it, as I say. I couldn't recall all those names you mentioned. I couldn't possibly remember.

Q. I am asking you if they are mentioned in Exhibit 6.

A. If you will call them off as we go along, I will be glad to tell you.

Q. All right. New and Unofficial Remedies?

A. On page 3, yes.

Q. Modern Home Medical Advisor?

A. Page 1.

Q. Pharmacological Basis for Therapeutics, 1941?

A. What page is that, please?

Q. Page 9.

A. The title again, please?

Q. The Pharmacological Basis of Therapeutics.

A. That is correct; that is on page 9.

436 Q. On page 9 is the date of that booklet 1941?

A. That is given.

Q. Diseases of Metabolism, 1947?

A. Page 11, correct.

Q. Rehabilitation Through Better Nutrition, 1943, on page 13?

A. Check.

Q. On page 18, Dietotherapy, 1945?

A. Right.

Q. On page 21, The Dispensatory of the United States, 24th edition, 1947?

A. Correct.

Q. On page 26, Chemistry of Foods and Nutrition, 1946 issue?

A. That is right.

Q. On page 28, Investigations of Human Requirements for B Complex Vitamins, June 1948?

A. That is right.

Q. On page 30, Essentials of Nutrition, 1943?

A. Yes, that is right.

Q. On page 31, Principles of Nutrition and Nutritive Value of Food, by Henry C. Sherman, supra Exhibit A, U. S. Department of Agriculture, Miscellaneous Publication No. 546?

A. That is correct.

Q. On page 33, the Journal of the American Medical
437 Association, Volume 131, No. 8, published 22 June 1946?

A. That is right.

Q. On page 40, Recommended Dietary Allowances, revised 1948?

A. That is right.

Q. On page 41, the National Malnutrition, by D. T. Quigley, supra, Exhibit A?

A. That is right.

Q. On page 45 of the exhibit, Arthritis and Related Conditions, 1948?

A. That is right.

Q. On page 47, Facts you Should Know About Vitamins, copyright 1941, by Boston Better Business Bureau, revised and reprinted 1942-1946 by the Better Business Bureau?

A. That is right.

Q. And the last one is on page 60, Doctor, Inadequate Diets and Nutritional Deficiencies in the United States, Bulletin No. 109 of the National Research Council, November 1943?

A. That is right.

Q. When was the 58-page booklet you have before you written?

A. The last part of 1947.

Q. The last part of 1947?
A. Yes.

438 Mr. RHYNE: Mr. Kleinfeld, you started this inquiry by asking him did he use this pamphlet in preparing the 58-page booklet, but you went on and read all the titles and did not give him a chance to answer that question I believe.
Mr. KLEINFELD: I am sorry.

By Mr. Kleinfeld:

Q. Do you want to answer the question?
A. Yes. I used some of it.
Q. But the 58-page booklet was put out in the last part of 1947?
A. No. What do you mean "put out"? Do you mean actually printed and disseminated?
Q. That is right.
A. No. That was January 1948, but the question before was when it was written. It was written the last part of 1947.
Q. And when was the 36-page booklet distributed?
A. I don't know. Well, it would be immediately after the Belleville libel or seizure, whenever that was.
Q. Would that be October of 1948?
A. I don't know. I think so.
Q. How about the 42-page booklet?
A. I couldn't answer that either. As soon as we could get that material out, we put it in.

Q. Did you say, sir, that you relied on these pieces of
439 literature or any of them in putting together the 58-page booklet?
A. Some of them.
Q. Which ones?
A. It is a little hard to answer that question, because the reading, the writing, and the checking were a continuous process. I read in the field, I got material from specialists, I checked it, then we discussed it, of course. Other material was brought to my attention; we checked again. Then after the book was published I continued to check because we always wanted this book—and still do—we want the book to be absolutely factual.

If new discoveries should be made which rendered any part of this book obsolete we wanted to know about it so we could change the book. It was a continuous process, and I never made any effort to remember what books I read before, the books I consulted while I was writing it or the books that the experts consulted when they gave me material, or the books I used to check afterwards.

Of course, we know these books that were published in 1949 couldn't possibly have entered the picture in 1947.

Q. Isn't it a fact, Doctor, that since the 58-page booklet was

distributed, during the last part of 1947, no reliance could have been placed on New and Nonofficial Remedies—the first one we have talked about in Exhibit 6?

440 A. The book wasn't distributed in the last part of 1947.

Q. When was it distributed?

A. January 1948.

Q. And you say you did rely on New and Nonofficial Remedies published in 1948?

A. No, I am not.

Q. Are you saying that in getting up and distributing the 58-page booklet you relied on Modern Home Medical Advisor, published in 1949?

A. Certainly not.

Q. Are you saying, Doctor, that in compiling and distributing the 58-page booklet you relied on the Pharmaceutical Basis for Therapeutics?

A. As I explained, the preparation, the writing, the checking, was a continuous process. I was writing and checking at the same time. Books as they were published after the 58-page book was written and as they came to my attention, as I learned about them, as I found them; any book that look- authoritative and had any bearing on the 58-page book, then I would immediately check to see if it agreed. If it agreed: fine; I was satisfied. I didn't pay any more attention then to the author of the book or anything else about it, so I couldn't answer that question.

441 Q. You couldn't have paid any attention to books that were not published, could you?

A. That is just what I explained.

MR. RHYNE: In his direct testimony he didn't testify that. He testified that this was a compilation to show that such statements existed in the medical literature. He didn't say that this was a compilation of the materials that he relied upon in writing this 58-page book.

This was offered for a very limited purpose, as you will recall: to show that such statements existed in the literature, not even to show the truth of the statements.

MR. KLEINFELD: It is my understanding that the booklets were offered to show good faith, and I am addressing my cross examination to that point.

JUDGE CLARK: The booklets?

MR. KLEINFELD: Exhibit 6 of the plaintiff.

JUDGE CLARK: He doesn't pretend that he read in 1947 a booklet that wasn't published until 1949. It seems to me that you are very captious trying to trip him up on a thing like that. He simply indicated in that exhibit, as I read the exhibit, that this literature was in existence. He didn't say that he read all of it before he wrote this booklet which is what you are trying to imply now.

MR. KLEINFELD: The witness testified on direct examination with reference to Plaintiff's Exhibit No. 6 that he did not rely
442 on all the authorities cited therein.

MR. KLEINFELD: I am trying to find out which ones he did rely on, and that was my understanding—if I am wrong, I want to be corrected—that it was put in evidence on the question of the plaintiff's good faith.

JUDGE GOLDSBOROUGH: As far as I am concerned, I understood Exhibit 6 to be a validation of the statements made in the pamphlet How to Get Well and Stay Well. That is what value I placed upon it.

MR. RHYNE: I object to all questions along this line on the ground the witness has not testified on direct that he did rely on all of them, and I don't think it really relates to the issues of the case.

JUDGE CLARK: He testified very positively this afternoon that he didn't rely on all of them.

MR. KLEINFELD: I didn't know that.

By Mr. Kleinfeld:

Q. Did you say that you did not rely on any of these documents?
A. No.

JUDGE CLARK: He didn't rely on all of them.

By Mr. Kleinfeld:

Q. Can you specify those that you did rely on, if you can?

A. I know positively that I was completely familiar with
443 Quigley's National Malnutrition at the time I wrote the book—before I wrote the book. Some of this material was published—well, let me put it this way: It was either published or it came to my attention soon after I had written the book—Dietotherapy, for example. That was used in checking the book, but that was after it had been published.

The material there from the American Medical Association gives the consensus of medical opinion in the field of vitamins, as we described them here, and which says practically the same as we do—that was used in checking. So that the only one that I am definitely sure—because I explained it was a continuous process—this book of Quigley's, National Malnutrition—I happen to remember that because our distributors used that in connection with our work, so naturally I was quite familiar with that around the office because we were using it all the time. We had it before.

The rest of them came and went. They were brought to my attention. Whether it was before I wrote the book, while I was writing it or checking it, while I was writing or checking it afterwards, I can't tell you.

Q. Can you mention any more of these books or publications which you relied on?

A. No.

444 Q. Can you mention any at all?

A. No more of these that I am sure I relied on in writing the book.

Q. The only one you have mentioned is National Malnutrition?

A. That is right.

Q. Is that the only one you can mention?

A. That is the only one I am sure I relied on when I wrote the book.

MR. RHYNE: You are talking about books now, Mr. Kleinfeld, not about Facts about Vitamins which is also contained in here?

MR. KLEINFELD: I am talking about the three pamphlets he has before him.

By Mr. Kleinfeld:

Q. I want to find out whether in writing the 58-page booklet which you have before you, or the 36-page booklet or the 42-page booklet, you can recall what medical literature or other literature you relied on?

A. You see, as I explained, that is almost impossible because it was all in there together. I had what I had read before, what I was reading at the time, what the experts gave me at the time, when I wrote, I had material I was using in checking, after it was printed I had material I was using for checking.

445 Had it occurred to me that such a question would be asked in a situation like this, I could have really kept a record of the whole thing, but never having anticipated anything like that, I never charged my memory with it, so I simply can't answer it.

Q. You are a well educated man, are you not?

MR. RHYNE: I object to that as arguing with the witness.

JUDGE CLARK: Objection sustained.

By Mr. Kleinfeld:

Q. So you can't remember these books even though the earliest pamphlet you have before you, the 58-page pamphlet, was distributed in 1947, only about 2 years ago?

A. You didn't ask me if I remembered these books, you understand? You asked me if I could tell you positively which of these books I used in writing the 58-page book, which is an entirely different question.

Q. You can't answer that question?

A. As I explained, I cannot answer that question.

JUDGE CLARK: I couldn't tell you what books I read the week before last.

MR. KLEINFELD: I urge, your Honor, this is a 6-million dollar a year business, based upon his reading.

By Mr. Kleinfeld:

Q. So that you cannot refer to any specific excerpts in
446 the exhibit you have before you, upon which you relied in preparing the 58-page booklet or any one of the others?

A. As I said, I am sure I was completely cognizant of the contents of Quigley's book—by completely cognizant I mean I had read it a couple of times and thought I knew the contents when I wrote the book. That I am sure of.

Q. But in answer to my question, you cannot point to any specific reference——

JUDGE GOLDSBOROUGH: He said he couldn't a half dozen times there.

By Mr. Kleinfeld:

Q. Do you find anything in the medical excerpts before you that convinces you that Nutrilite would prevent or cure most common diseases?

MR. RHYNE: I object to that because he has never testified on direct or any other time that it would.

MR. KLEINFELD: This was put in evidence by the plaintiff. I am asking him whether on his own evidence——

JUDGE CLARK: I understand, Mr. Kleinfeld, but this book which is the subject of controversy doesn't make any contention that it will prevent or cure.

MR. GOODRICH: He testified on direct that he did rely on literature. I want to find out which ones.

JUDGE CLARK: The book is to the effect that if he builds up his health it increases his resistance to these things. If you
447 read the whole book, instead of prying one sentence out of context, you will get that very distinct impression that the book does tell people that if they will pursue a course of building up their body and their general health, they are much less likely to have these various ailments.

MR. KLEINFELD: May I address the Court on that point?

JUDGE CLARK: Yes.

MR. KLEINFELD: Since the Court has made that statement I would just like to point out that it is the position of the administrative officials charged with the administration of this law, charged with the function of making the administrative determination involved in this action, that you cannot make 50 true statements

and 50 false or misleading statements in a booklet and have the booklet considered truthful. It is their position, the position of the Government and the defendants here, who are charged with the administration and enforcement of the Federal Food, Drug and Cosmetics Act, that these books do not merely say that this product will build you up. We believe that is the material issue involved in this case, that this book is materially false and misleading, and makes serious claims and we want to cross examine him on that point.

MR. RHYNE: You are not cross examining him on the booklet now. You are asking him the very obvious question as to
448 whether or not he found anything in Exhibit B that makes representations that Nutrilite will cure or prevent anything. It is obvious that Exhibit B doesn't refer to Nutrilite.

JUDGE CLARK: The Court will take a recess until 10 o'clock tomorrow morning.

(Whereupon, at 4:00 p.m., the Court was recessed to reconvene tomorrow morning at 10:00 a.m., October 20, 1949.)

448a Reporter's Certificate to foregoing transcript omitted in printing.

449 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

Washington, D. C.
Thursday, October 20, 1949.

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a. m.

APPEARANCES:

On behalf of the plaintiff:

Mr. CHARLES S. RHYNE and
Mr. LESTER L. LEV.

450-451 On behalf of the defendants:

Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and
Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

452 PROCEEDINGS

(Before the opening of court, the following proceedings occurred in the chambers of the Honorable Edward A. Tamm, all members of the Court and counsel for both sides being present.)

JUDGE CLARK: Gentlemen, we call you up here because we wanted to see how both sides would be disposed to a stipulation to discontinue the examination that is going forward and change your arguments on the question of unconstitutionality, with a stipulation that the other point wouldn't be in the case, and we would decide the question of unconstitutionality. You would, of course, have opportunity for arguments.

It is perfectly apparent from the trend of this case so far that it will take two months to try the case at this rate, and the Court hasn't got the time to put in on it.

JUDGE GOLDSBOROUGH: The situation is this, isn't it: that if this isn't agreed upon the plaintiff automatically loses on the arbitrary and capricious; the defendant automatically wins on the arbitrary and capricious. So we didn't think the defendant would have any objection. We didn't know whether the plaintiff would or not.

JUDGE CLARK: That is true.

MR. RHYNE: Speaking for the plaintiff, if the Court please, we would like to go forward with the issue of arbitrary and
453 capricious conduct. I may say to the Court that last night I added up the time that has been taken so far, and I find I have taken 3 hours 10 minutes of the time of the Court and the defendant has taken about 7 hours on cross examination.

JUDGE GOLDSBOROUGH: Is that all you had to do last night?

MR. RHYNE: I had a lot more to do, your Honor.

JUDGE CLARK: I may say, in all frankness to all concerned, that this Court has made up its mind that it is not going to tolerate this very discursive method of cross examination on totally irrelevant matters. If that is continued in further cross examination, the Court, of course, is going to clamp down on it.

MR. RHYNE: I can say to your Honor that I can finish my case rather quickly. I had thought that after Dr. Casselberry finishes his testimony I would offer certain of the admissions of the defendants.

JUDGE CLARK: How many more witnesses do you estimate that you have, Mr. Rhyne? I am not trying to tie you down.

MR. RHYNE: I can finish with Dr. Casselberry and call no more witnesses, except the reading of the deposition of this lawyer, which is very, very short. I have my trial outlined here. Of course, if necessary I am completely——

JUDGE CLARK: I understand. I am not trying to bind you.

454 Mr. RHYNE: Yes, sir. I can do that. I shall finish with Dr. Casselberry, offer the deposition of Mr. Lee J. Myers, read some very——

JUDGE CLARK: He is the lawyer?

Mr. RHYNE: He is the lawyer whose deposition they took out in California.

(Continuing:) —read some very short extracts from the depositions of the defendants, read the admissions, and close my case. Now, I am speaking without consulting with my counsel from California.

JUDGE GOLDSBOROUGH: It is just a question of whether you are willing to do or not to do it. We have no authority to cut off any ligitimate testimony you want to offer, of course. We have no right to do that.

JUDGE CLARK: Or any legitimate cross examination.

JUDGE GOLDSBOROUGH: Of course not.

JUDGE CLARK: The thing I object to very strenuously is this business of asking the man whether at some period in his career he was paid by the hour or paid by the month. I can't see that that is relevant in any way to the issues in this case.

Mr. RHYNE: Before the case started, at the pretrial, I stated to the Court that I would try to take not longer than two days. I have planned my case very meticulously and very carefully to try to get my testimony within that time. Of course, I

455 couldn't anticipate this type of cross examination or the length of it, but I have tried very hard to take as little time of the Court as I could. And I do think that I can finish very quickly on this issue of arbitrary conduct, and I would like to do it, because I would like to see the Court decide both issues, since you have before you—we had all this trouble of going to the Supreme Court to establish your right to decide both, and I think we can finish very, very quickly, and I will certainly endeavor to do so.

Mr. LEV: I may say that last night at our nightly council of war, we all agreed that the case so far has taken too long, and we are very anxious to get through with our case in chief. We went over and decided that if there were any more witnesses—two or three more witnesses—that they would be limited to but five minutes' worth of questioning on only one or two points.

JUDGE GOLDSBOROUGH: Why are we talking this over? If we are going on, let's go on. There is no use in chewing the rag about it.

Mr. KLEINFELD: The defendants are quite willing to do that and, of course, are most anxious to do that.

JUDGE GOLDSBOROUGH: Do what?

Mr. KLEINFELD: Decide the question of constitutionality. Because there are three judges it makes the case a very difficult one in its present status to try, and for your Honors to conduct.

456 JUDGE GOLDSBOROUGH: All right, gentlemen.

(At the conclusion of the above proceedings, the trial was resumed in the court-room at 10:20 a. m.)

THE CLERK: Mytinger and Casselberry, Inc., versus Oscar R. Ewing, et al.

Mr. RHYNE: Dr. Casselberry, will you resume the stand?

DR. WILLIAM S. CASSELBERRY resumed the stand, having been previously sworn, was further examined and testified as follows:

Cross-examination (resumed).

By Mr. Kleinfeld:

Q. Dr. Casselberry, will you look at the 58-page book and the 42-page book, and look at the page opposite the foreword? I ask you to look at the number of editions specified in each booklet. How many editions are indicated in the 58-page booklet?

A. Four editions.

Q. How many editions in the 42-page booklet?

A. Five editions.

Q. May I see that, please?

A. (The witness handed a book to counsel.)

Q. Dr. Casselberry, yesterday on cross-examination I asked you the following question, appearing on page 405 of yesterday's transcript:

457 "By Mr. Kleinfeld:

"Question: You did not go to any medical doctor and get advice on the contents of this 58-page booklet?

"Answer: You mean on any part of it?

"Question: Did you get advice on any part of it?

"Answer: I did.

"Question: On which part?

"Answer: There is a place in here where I wanted to mention the amount of blood that flowed through the heart that was pumped around over the system. It was by way of illustration or explanation, too. I don't know that I can turn to it quickly.

"Mr. GOODRICH: It is on page 3.

"By Mr. Kleinfeld:

"Question: Look at page 3. That may help you.

"Answer: Yes. 'While your heart is resting it pumps exactly one and a half gallons of blood through your arteries and veins every minute.' I knew that the heart pumped a lot of blood through the system. I didn't know how much so I called up the doctor and asked him.

"Question: On the telephone?

"Answer: As a matter of fact, my secretary called him.

"Question: On the telephone?

"Answer: On the telephone.

458 "Question: That is the sole medical advice you got?

"Answer: Well, I don't know what you call medical advice. I discussed it with a variety of doctors, but I think in the scope of your question, and for the purpose of the answer, that would be the one, yes, and very likely the only one."

Was your answer truthful?

A. It was.

Q. I now turn to page 407 of yesterday's transcript:

"Mr. KLEINFELD (addressing the Court): I am trying to find out what doctors he got help from in a book concerning numerous diseases.

"By Mr. Kleinfeld:

"Question: Did you get advice from anybody else?

"Answer: Yes.

"Question: From whom?

"Answer: Mr. Rehnborg.

"Question: Anybody else?

"Answer: Mr. Myers.

"Mr. Myers is an attorney. I mentioned him in direct examination, I believe. He is an attorney, he was in Los Angeles at that time, very familiar with food and drug activities and a very good lawyer.

"Question: Is Mr. Myers a chemist?

459 "Answer: I don't believe so. He studied very widely in this field, but I don't think he is a chemist.

"Question: Not a doctor of any kind, is he?

"Answer: Not that I ever heard of.

"Question: How about Mr. Rehnborg, what is he?

"Answer: He is the president of Nutrilite Products and the chemist who originated the formula for the manufacture of Nutrilite.

"Question: Did you get advice or assistance from anyone other than Mr. Rehnborg or Mr. Myers?

"Answer: Any kind of advice?

"Question: That is right.

"Answer: Yes, my partner gave me advice and suggestions, my wife gave me many valuable suggestions in the writing of it, and friends and neighbors who read it over after it was finished gave me advice and suggestions.

"Question: That is all?

"Answer: All I think that would be pertinent."

Was that answer truthful?

A. It was.

Q. Now I turn to the transcript of the testimony of the day before yesterday, page 74, on direct examination:

"By Mr. Rhyne:

"Question: Will you give us the qualification of Lee J. Myers in this field of food and drug?

460 "Answer: We hired him because we understood that he had had about twelve or thirteen years experience in connection with food and drug work. He was retained by various companies on a monthly retainer basis at the time, and he had made a further study of the field of nutrition, especially in connection with food and drug work.

"Question: Doctor, what other assistance did you have other than legal in writing this 58-page book?

"Answer: I derived much assistance from Mr. Rehnborg who is the manufacturer of our product, and of course from other experts like doctors and chemists, other people in the field."

Is that a truthful answer?

A. Yes.

Q. Then your answers on cross examination with respect to the assistance and advice you got from doctors was truthful?

A. It was.

Q. And the answer you gave your attorney was truthful?

A. That is right. I think possibly I should explain that you left the definition of medical advice to me. I believe I asked you for your definition and you said I could decide that as I wished. Of course, how you define medical advice is a nebulous thing, so
461 that according to the definition you take, a variety of answers can be correct.

Mr. RHYNE: Go ahead and finish your explanation, Doctor.

JUDGE GOLDSBOROUGH: This member of the Court thinks that what counsel for the defendant is now doing is arguing to the Court the consistency of the witness's testimony, and that should be done when your case is argued. That is my opinion.

JUDGE CLARK: The Court heard all of this testimony and there is no rhyme or reason in repeating it and repeating it. The witness testified and then on cross examination the witness elucidated what he meant in his direct examination. There is no point to be served by taking up the time of the witness and everybody else by reading the testimony of previous days. It is all before the Court. We have every bit of the testimony. It seems to me that what you are trying to do is argue the case in the guise of cross examination.

Mr. KLEINFELD: Your Honor, all I attempted to do was to show that the witness has indulged in misstatements which I think bear definitely on his credibility.

JUDGE CLARK: That is perfectly proper for you to bring out in argument.

Mr. RHYNE: And I could certainly, if I wanted to argue it now, point out that he was talking about the advice and things
462 that he got out of Exhibit B.

JUDGE GOLDSBOROUGH: Now, you are arguing.

Mr. RHYNE: I am sorry.

By Mr. Kleinfeld:

Q. Have you or any of your representatives since 1945, or any other time, ever submitted any edition of How to Get Well and Stay Well to any of the defendants in this action in Washington asking them to comment on the various booklets, or any of them, if you know?

A. We understood from——

JUDGE TAMM: Just answer the question.

A. No, sir.

JUDGE GOLDSBOROUGH: The Court doesn't think he has to answer it just the way the defendants want it answered. He can answer it in his own way. That is my judgment about it. We will have to wait and see whether his answers are pertinent or not.

JUDGE CLARK: Answer the question.

A. The answer is No, but it doesn't give the complete explanation, because we had been informed by a man who was supposed to know all about this, that it would be absolutely of no avail to present any material to the Food and Drug people, because they had no provision for review of it, and consequently we would simply be told that we would have to go ahead, study the law, obey it, and then
463 after we had used the material, if the Food and Drug Administration believed it was not satisfactory, they would take action.

By Mr. Kleinfeld:

Q. You never have submitted any pamphlets to the defendants?
A. Not that I know of.
Q. I ask you to look at the foreword on the 58-page booklet.
A. You have it there, Mr. Kleinfeld.
Q. And ask you to consider the fourth paragraph.
A. The foreword?
Q. The fourth paragraph of the foreword, which says, in part:

"Consider, for example, our title, How to Get Well and Stay Well. From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths * * * (and so on). If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well."

That paragraph refers to deficiency ailments, does it not,
464 Doctor?

A. Any part of this book, of course, has to be viewed in the light of what went ahead of it.

Mr. KLEINFELD: Pardon me. May I request the Court to direct the witness to answer the question?

JUDGE CLARK: The difficulty on that is that we went all over this yesterday. This is simply repetitive. We went over all of this paragraph yesterday.

Mr. KLEINFELD: I don't recall going over that yesterday. I am sorry.

Mr. RHYNE: This is in writing and the paragraph speaks for itself. It is in writing and it is in an exhibit.

JUDGE CLARK: I recall the examination on that paragraph yesterday because I read it into the record myself.

Mr. KLEINFELD: I didn't think I asked it of this witness, your Honor, but if I am wrong——

JUDGE CLARK: Isn't that true, Dr. Casselberry?

THE WITNESS: Yes, sir. We discussed this at length.

By Mr. Kleinfeld:

Q. I ask you to read the title of the 58-page booklet and the others. The title is How to Get Well and Stay Well; is that right?
A. That is right.
Q. To be perfectly honest about it, should not the title have been How to Get Well and Stay Well From Diet Defi-
465 ciencies?

JUDGE GOLDSBOROUGH: Isn't that a matter for the Court to decide?

Mr. RHYNE: I object. That is arguing with the witness rather than a question.

Mr. KLEINFELD: We are trying to show your Honor many misleading statements in this book. That is all we are trying to do.

JUDGE CLARK: I don't see the slightest difference between your attempt to rephrase it and telling what the book says. The book says, "If your problem is the result of dietary deficiencies, and if you want to get well and stay well, be sure to read this book."

Now, you have rephrased it in other words. You take exception to the title, but part of the title is this matter underneath it.

Mr. KLEINFELD: Our point, your Honor, is that one truthful statement does not make up for one false or misleading statement.

JUDGE CLARK: There is no false statement that I can see. That is a matter for the Court to determine and not for you.

Mr. RHYNE: Can't he argue that, your Honor?

JUDGE CLARK: Your attempts to rephrase the same thought seem to me to be entirely gratuitous. The objection is sus-
466 tained.

By Mr. Kleinfeld:

Q. I ask you to look at page 1 of the 58-page booklet, the third paragraph.

JUDGE GOLDSBOROUGH: Page 1?

Mr. KLEINFELD: Page 1, third paragraph of the 58-page booklet.

By Mr. Kleinfeld:

Q. It begins: "On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy."

Are you not claiming, from that statement, that if people take Nutrilite they will not be weak or lacking in energy?

Mr. RHYNE: I object.

JUDGE CLARK: That is a matter for the Court to decide, Mr. Kleinfeld. You are just standing there indulging in argument all the time instead of cross examining. It so happens that that paragraph has been read into this record three or four times.

Mr. KLEINFELD: Your Honor, throughout the course of this trial, apparently the issue has been as to whether this pamphlet makes or doesn't make false or misleading statements.

JUDGE CLARK: That is precisely the question that this Court has to decide.

467 Mr. KLEINFELD: And the doctor who testified for the plaintiff was permitted to give his opinion as to whether there was anything in the book that was false or misleading. We are trying to show, in order to help the Court make its final ultimate decision

as to whether it was false or misleading by various statements. We think various parts of it are false and misleading, and we want to ask him why they were put in the book. We think it is proper cross examination.

JUDGE CLARK: It is not part of your cross examination when he testifies positively that they are not false and misleading. As part of your case in chief, if you want to put on somebody to testify that they are false and misleading that is entirely your privilege, but you can't argue your case, though, in the plaintiff's case.

Mr. KLEINFELD: For the sake of the record, may I state that we wish to ask numerous questions, going through the entire 58-page booklet, asking him with respect to the specific items which we think are false or misleading?

JUDGE CLARK: We can't pass on a question until it is asked.

Mr. KLEINFELD: Then I will ask my questions and if your Honor will say they are not proper I will stop asking them.

By Mr. Kleinfeld:

Q. In the same paragraph the statement is made, "having trouble digesting their food or suffering with actual stomach pains,"
468 I want to ask you: Does not that claim that people taking Nutrilite will not have trouble digesting their food or suffering with actual stomach pains?

Mr. RHYNE: I object on the ground that this is in writing and speaks for itself.

JUDGE CLARK: Sustained.

By Mr. Kleinfeld:

Q. In the same paragraph, the words "with decaying teeth": I ask you whether that does not claim that people who take Nutrilite will not suffer with decaying teeth?

Mr. RHYNE: I object on the same ground, and further, that this is an argument rather than cross examination.

JUDGE CLARK: Sustained.

By Mr. Kleinfeld:

Q. I ask you the same question on trouble with their hearts and other important organs?

Mr. RHYNE: Same objection.

JUDGE CLARK: Sustained.

By Mr. Kleinfeld:

Q. I ask you the same question with respect to aches, pains, and discomfort in various parts of their bodies?

Mr. RHYNE: Objection on the same ground.

JUDGE CLARK: Sustained.

469 By Mr. Kleinfeld:

Q. I ask you to turn to page 2 of the 58-page booklet, the last paragraph. The second sentence reads:

> "If your sense organs and your brain and nervous system have been supplied constantly with all essential materials for the growth, maintenance and operation, and your bodily chemistry is normal, then barring accidents you will be in full possession of your faculties."

I ask you if that does not claim that your body chemistry is normal if you take Nutrilite and your sense organs and your brain and nervous system will be in good condition?

Mr. RHYNE: I object on the same ground and on the further ground——

JUDGE CLARK: Mr. Kleinfeld, the objection Mr. Rhyne is about to make is sustained because I know what it is, and I again admonish that you cannot make your argument under the guise of cross examination.

Anything to further your case in chief has to be put in in your case in chief. You can disprove anything the doctor has said, if you have competent witnesses to do it.

Mr. KLEINFELD: In order to avoid taking the time of the Court, I wanted to make a general offer of proof and have it settled right now. I want to go through this booklet, if I am permitted to, and ask all these questions and all the things that we think what
470 these statements were put in the book for. For what purpose did he put in these statements about various diseases?

JUDGE CLARK: Mr. Kleinfeld, I can tell you now, without taking the trouble to refer to all these pages, that objections to them will be sustained on several grounds.

In the first place, it is a written document and speaks for itself. The witness has testified that he didn't put anything in the booklet that was misleading, or claiming cures for it. If you have got any witnesses you want to put on, you can put them on in chief to rebut the doctor's testimony, so the Court will exclude all such questions.

Mr. KLEINFELD: We just want to ask these questions in order to ask the witness what these various statements about particular diseases and ailments—why they were put in these booklets.

As I gather, the Court is objecting to all that kind of questions?

JUDGE CLARK: The Court will sustain objections to any such questions. You can embody them in an offer of proof if you want to.

Mr. KLEINFELD: I would like to ask that type of question. I

intended to go through the entire booklet, literally dozens of similar questions where statements are made with respect to ailments, diseases, and so on, and find out why they were put in the book.

471 JUDGE CLARK: You say they are put in there as a representation of this, that and the other thing. I read English fairly well, and I am unable to put any such interpretation on them. The doctor says he isn't. If you want to put somebody on to testify that those statements would be misleading to them, that is perfectly all right, you have a perfect right to do it.

Mr. KLEINFELD: We urge that the questions are relevant on two grounds: (1) on the question of the good faith of the plaintiff which has been made a part of the case over our objection, and (2) to test his credibility and to find out the reasons why the plaintiff, who is suing us here—why these statements were put in the book.

By Mr. Kleinfeld:

Q. Do you have a copy, Doctor, of the New York Times clipping——

JUDGE CLARK: Mr. Kleinfeld, you can make the offer of proof any time you want to.

Mr. KLEINFELD: May I go through the booklet and indicate which passages?

JUDGE CLARK: The Court is not going to waste time letting you go through the booklet. You can make your offer of proof in writing and the Court will consider it.

Mr. KLEINFELD: I will submit it, then, in writing.

JUDGE CLARK: This method of questioning that you adopted
472 and Mr. Goodrich adopted before you is simply wasteful of the time of the Court.

By Mr. Kleinfeld:

Q. Doctor, do you have available a copy of the New York Times clipping printed 29 June 1945, to which you refer on page 3 of the 58-page booklet?

Mr RHYNE: I object that this is really along the same line. He hasn't said in his direct examination that he has a copy of it.

JUDGE GOLDSBOROUGH: This is a preliminary question, Mr. Rhyne. We don't know what he is going to ask.

A. You mean, do I have one right now, with me?

By Mr. Kleinfeld:

Q. With you, or do any of your associates have it with them, as far as you know?

A. Not as far as I know.

Mr. KLEINFELD: Will the clerk please mark this for identification?

(The document referred to was marked for identification as Defendant's Exhibit No. 4.)

By Mr. Kleinfeld:

Q. Doctor, this is a photostatic copy of page 20 of the New York Times of Saturday, 30 June 1945.

A. What date, please?

473 Q. There is an item on the fourth part of it, "Third Who Applied Rejected by WAC." I ask you if that is a clipping from the Times which you refer to in your booklet on page 3?

A. This would hardly be, Mr. Kleinfeld, because the date of this paper is June 30, and the date given in the book is June 29.

Q. What is the dateline of the story?

A. June 29.

Q. Isn't that the same thing you refer to?

A. I don't know. Apparently it is not the clipping from which this was taken because it doesn't all seem to be there.

JUDGE GOLDSBOROUGH: What is that?

THE WITNESS: Apparently it is not the clipping—the exact one from which this is taken—because a cursory glance doesn't show it all to be there.

By Mr. Kleinfeld:

Q. I would like you to give it a careful glance and tell us what is missing.

Mr. RHYNE: I suggest, Mr. Kleinfeld, that you just offer the entire thing, and then it can be compared for the purpose of argument. Most of it appears to be there, but it is a long article and you have to read it word for word and compare it.

474 Mr. KLEINFELD: I offer it in evidence.

JUDGE CLARK: Any objection?

Mr. RHYNE: I don't object.

JUDGE CLARK: Very well. It may be admitted.

(The document referred to was received in evidence as Defendant's Exhibit No. 4.)

By Mr. Kleinfeld:

Q. On page 4 of the 58-page pamphlet you refer to a survey made at Pennsylvania State College, I believe—a large eastern college, rather. What was that large eastern college?

A. I don't remember at the present time.

Q. Was it Pennsylvania State?

A. I don't remember.

Q. Could you find out from any of your associates here?

A. Not here, I don't believe.

Q. You will see that certain statistics are referred to with respect to that survey. We are trying to find out what survey you had in mind. We have no way of knowing unless you tell us. Is there any way of finding out what survey you had in mind when you wrote this booklet?

A. Yes, I could look it up for you. I could get the information, but I don't remember it now.

Q. Could you get it during the course of this trial?

475 A. I think so.

Q. Will you try to do it?

A. Yes, sir.

Q. Dr. Casselberry, I refer you to page 6 of the 58-page booklet and ask you what the source of your information is as to the percentage of rejections under the Selective Service System in World War II.

A. I don't remember this particular one, but there are many statements that have been published as to the number of rejections.

Q. Do you remember where?

A. I don't remember where this one came from.

Q. I ask you to look at Medical Statistics Bulletin No. 2, which I would like to mark for identification.

(The document referred to was marked for identification as Defendant's Exhibit No. 5.)

By Mr. Kleinfeld:

Q. I would like to show that to you and ask you if you have ever seen it?

A. I am not sure that I ever saw this particular one.

Q. You are not sure?

A. I am not sure, no.

Q. May I have it?

A. (The witness handed a paper to counsel.)

476 Mr. KLEINFELD: If the Court please, this is a booklet entitled, "Causes of rejection and incidence of defects. Local board examinations of selective service registrants in peacetime. An analysis of reports of physical examination from 21 selected states. Selective Service System, National Headquarters, Selective Service System, Washington, D. C. August 1, 1943."

I offer it in evidence.

JUDGE CLARK: Who puts that booklet out?

Mr. KLEINFELD: It was put out by the Selective Service System.

Mr. RHYNE: What is the date on it?

Mr. KLEINFELD: August 1943.

Mr. RHYNE: You say peacetime. What relevancy does it have here? We are talking about wartime.

Mr. KLEINFELD: It has the statistics of the reports of physical examination of those selective service registrants.

Mr. RHYNE: You said peacetime. Didn't you read that?

Mr. KLEINFELD: Yes.

JUDGE CLARK: I don't think that book itself is admissible in evidence at this time, and the Court doesn't think so. You can hand the thing to the witness and ask him if he agrees with the statements contained in that. It is well known by everybody that the requirements for admission to the Army under selective service vary
477 from time to time. They were much more strict in the early days than they became later. The time came when they would accept them if they had a wooden leg.

Mr. KLEINFELD: I will show you this booklet, marked Defendants' Exhibit 5 for identification and ask you to read the third paragraph on the first page.

Mr. RHYNE: I object that the witness has said he has never seen it before. It has no relation to his direct testimony or this booklet whatever.

JUDGE CLARK: He can answer whether he agrees with it or not. He may say he hasn't had any chance to investigate it if he wants to.

By Mr. Kleinfeld:

Q. Will you read that paragraph to the Court, please?

A. Which one.

Q. Third paragraph.

A. "Tooth defects were the leading cause of rejection, accounting for 16.5 percent of all rejections at local boards and induction stations. Other causes of rejections and the percentages they constitute of all rejections are: eye defects, 11.7 percent; mental and nervous defects, 10.4 percent; cardiovascular defects, 10 percent; musculo-skeletal defects, 8.9 percent; hernias, 5.9 percent; venereal diseases, 5.9 percent; ear, nose and throat defects, 5.5 percent;
478 tuberculosis and other like diseases, 3.8 percent; educational deficiency, 3.8 percent; defects of the feet, 3 percent; underweight, 2.9 percent; other causes, 11.7 percent."

Q. Do you disagree with those figures?

A. It would be impossible for me to disagree, because I have no facts to go on.

Q. Did you have facts to go on when you made this statement in this booklet about the rejections during the war?

A. Yes, sir, I did, and in discussing this we should realize that this, the same as all other parts of the book, should be read in conjunction with what has gone before, and that the whole argument here—and this is used by way of illustration, was to show that defects in our population actually do exist.

The whole purpose up to this particular point, as I remember it, was simply to call the attention of the reader to the fact that these defects—defects of various kinds in the health of our population, actually do exist. The endeavor was not to show any particular proportion, any particular kind or anything else, but simply in this advertising folder to have the people realize that we are not as healthy as we think we are, and not as healthy as we should be. And these statistics tend to bear that out.

Q. Why did you want to point out to the people of this country those facts you mentioned about general conditions? What
479 was your purpose?

JUDGE CLARK: That kind of figures frequently appears in the newspapers.

MR. KLEINFELD: I am asking his purpose in putting in this booklet general statements about the physical condition of various people and their various ailments.

By Mr. Kleinfeld:

Q. What was your purpose?

A. This is an advertising booklet. All advertising booklets are directed toward the sale of something. This particular one is directed to the sale of Nutrilite. One of the things Nutrilite does is put back in the body, or put into the person's body, important material for its regulation, and in conjunction with the food, for its growth.

Nobody is going to buy a product unless he has a feeling that there might be a need for it, so we start off in this book to show a general need on the part of the whole population for something.

We haven't stated up to this point—given any indication—what it is. We are just trying to show that the population of the United States, as a whole, as far as health is concerned, the population really needs something.

Q. At the bottom of page 6 you say, with reference to what went before:

"But before we tell you exactly how to do this let us
480 tell you a story."

When you say "we tell you exactly how to do this," do you mean by taking Nutrilite?

A. This again has to be read as it would ordinarily come in the context, as a person would read the book, starting at the first and going right down to that. And I believe that if you will read it that way, what we mean by "this"—pardon me—yes—what we mean by "this" is perfectly understood.

JUDGE CLARK: Mr. Kleinfeld, it seems to me that you are back to exactly the same line of questions that the Court ruled out a while ago.

MR. KLEINFELD: I am sorry. I thought this was somewhat different. I will try to be more careful.

JUDGE CLARK: In the meantime, the Court will take a recess for five minutes.

(Whereupon a short recess was taken.)

JUDGE CLARK: Very well, Mr. Kleinfeld.

By Mr. Kleinfeld:

Q. Dr. Casselberry, what is the relationship between Mytinger and Casselberry, Inc., and Carl Rehnborg?

A. The relationship—I suppose you would call it a relationship—well, maybe I better have a definition of what you mean by relationship.

Q. What is your *q*connection with Carl Rehnborg?

481 A. Mr. Rehnborg is the head of Nutrilite Products, but manufactures the product that we sell.

JUDGE CLARK: The sales end of the business?

The WITNESS: We handle the sales end and he handles the manufacturing end.

By Mr. Kleinfeld:

Q. Do you purchase all the output of Nutrilite?

A. We do.

Q. Is it true that Mr. Rehnborg provides you with counsel and advice in the preparation of advertising matter, circulars, and other sales promotional matters utilized by Mytinger and Casselberry, Inc.?

MR. LEV: If the Court please, we object to the question on the ground that it is not within the issues as to whether Mr. Rehnborg provides him with advertising matter, and apparently it is an attempt to embark upon a fishing expedition for the Los Angeles case.

JUDGE CLARK: He may answer.

The WITNESS: What was the question again, please?

MR. KLEINFELD: Would you read back the question?

JUDGE CLARK: He has already testified that Mr. Rehnborg did help him in the preparation and advised him in the preparation of this book, but if you want it in the record again, he may answer.

MR. KLEINFELD: This isn't the same thing. I am asking

482 him now about the advertising material, not the preparation of this. There was other stuff besides this.

JUDGE CLARK: This is the principle advertising material.

MR. RHYNE: This is the only thing involved in this case by their own direct admission.

MR. KLEINFELD: Will you read the question?

The REPORTER: (Reading) "Question: Is it true that Mr. Rehnborg provides you with counsel and advice in the preparation of advertising matter, circulars, and other sales promotional matters utilized by Mytinger and Casselberry, Inc.?"

A. Yes.

By Mr. Kleinfeld:

Q. You have the exclusive distributorship of Nutrilite, don't you?

A. That is correct.

Q. Under the terms of your contract with Mr. Rehnborg, he is presently your technical and scientific advisor, is he not?

A. I hardly think you would classify him that way. No. I think the answer would be No.

Q. Do you get technical and scientific advice from other people?

A. Yes, sir.

Q. Who are they?

483 A. Mr. Addison, for one.

Q. Anybody else?

A. Mr. Myers.

Q. Anybody else?

MR. RHYNE: I object that this is far afield from the direct examination.

JUDGE CLARK: This has been gone into repeatedly. The witness told you who he consulted with the prep-ration of this book, and that book is the only thing in issue in this case according to your own statement.

MR. KLEINFELD: I will withdraw the question.

By Mr. Kleinfeld:

Q. I ask you to turn to page 7, Doctor, of the 58-page booklet, the first paragraph below "the story of a remarkable discovery." It states that, "Carl Rehnborg, a young man of Swedish descent, majored in biochemistry in an eastern university." Is that correct.

A. That is the way it was given to me by Mr. Rehnborg, yes.

Q. Do you know whether he majored in biochemistry?

JUDGE CLARK: Mr. Kleinfeld, that question is perfectly irrelevant. What does it matter, whether he majored in biochemistry in an eastern university or not?

MR. KLEINFELD: I am trying to prove that the statement is false.

484 JUDGE CLARK: You can do that when you put on your own witnesses.

MR. KLEINFELD: I urge again, your Honor, that this is proper cross examination.

JUDGE CLARK: It is not proper cross examination just to wander all over the field. If you looked Mr. Rehnborg up in Who's Who you would probably find the answer to it.

Mr. KLEINFELD: The good faith of this plaintiff is an issue in this matter. I am trying to show that there is not good faith.

JUDGE CLARK: The witness has long since proved good faith, in my opinion.

Mr. KLEINFELD: We don't think so, and we would like to ask questions about his good faith, if we may. If we may not, we shan't.

JUDGE CLARK: Are you prepared to put on testimony that Mr. Rehnborg didn't major in biochemistry?

Mr. KLEINFELD: We think that we can get it from this witness. I think he knows Mr. Rehnborg's background. Otherwise, he wouldn't have put it in here. He has testified that everything in this book is true.

JUDGE CLARK: The Court is not going to permit you to go down and examine the witness as to every paragraph, every line and statement in the book. That is part of your case. The Court has already sustained objections to this whole line of questions,
485 and you are trying to do the same thing you were trying to do before.

Mr. KLEINFELD: Your Honor, before we were talking about various therapeutic claims. This is not a therapeutic claim, and I didn't think it was covered by that.

JUDGE CLARK: It seems to me to be entirely irrelevant. The witness has testified that everything in the book, so far as he knows, is true.

Mr. KLEINFELD: Not so far as Carl Rehnborg is concerned at any time, your Honor.

JUDGE CLARK: Answer the question, but don't ask any more like it.

THE WITNESS: May I have the question repeated, please?

Mr. KLEINFELD: Would you mind repeating the question?

THE REPORTER: (Reading) "Question: Do you know whether he majored in biochemistry?"

A. This information was given to me by Mr. Rehnborg: I wasn't there at the time.

JUDGE CLARK: You were not present when he majored in biochemistry?

THE WITNESS: No, I wasn't there at the time, so I couldn't possibly say absolutely that he did.

By Mr. Kleinfeld:

Q. You didn't check it, did you?
A. I checked with Mr. Rehnborg.

486 Mr. KLEINFELD: May I say for the record that our offer of proof will also contain an offer with respect to the witness's knowledge of Mr. Rehnborg and his qualifications?

JUDGE CLARK: All right.

Mr. KLEINFELD: And what attempts he made to verify them. I should like, if your Honor please, to ask a question with respect to the use of the general term "common ailments," if I may, because I have another question to ask where they have, I think, defined the term. So far it hasn't been defined. If I may, I would like to ask that question.

JUDGE CLARK: It has been gone over four or five times.

Mr. KLEINFELD: Not this particular part of it.

JUDGE CLARK: It is the same proposition about the definition of common ailments. Mr. Goodrich went over that all one afternoon.

Mr. KLEINFELD: Not with this witness.

JUDGE CLARK: Not with this witness, but it has certainly been gone over. If you are going to start out to read the great long list of ailments, as Mr. Goodrich did, we can't permit that.

Mr. KLEINFELD: In this 58-page booklet and the other booklets they do refer to common ailments, and there is apparently some dispute as to what common ailments are. They have said common ailments mean perhaps colds and minor things like that. We
487 would like to show, if we may, that in an early booklet, in the same sentence which now contains the term "common ailments," they actually listed diseases such as cancer and diabetes.

JUDGE GOLDSBOROUGH: Isn't that a matter of argmuent before the Court?

Mr. KLEINFELD: We thought we would like to put that in the record.

JUDGE CLARK: The earlier work is not in issue in this case.

Mr. RHYNE: Since they have admitted specifically that this pamphlet is the only thing they object to here, going back to the book involved in the indictment is really a fishing expedition I suppose. Although I don't think there is any substance to their complaint out there, I think I could object on the ground of self-incrimination and a lot of other things to their bringing it in here.

Mr. KLEINFELD: On page 33 of the 58-page pamphlet: "Think of our population and think of all the common ailments." All we would like to do is to show by what the plaintiff has himself said in other material what they believe common ailments to be. That is pertinent we think, your Honor. We have the evidence right here in writing.

Mr. RHYNE: Can't he offer that as a part of their evidence when he comes to it?

JUDGE CLARK: It is a part of your case, Mr. Kleinfeld.

488 Mr. KLEINFELD: I thought it more on the question of good faith, at least, because they testified as to their good faith at some length. We just want to ask them by their own words to define common ailments, that is all. That is the only question we want to ask on the common ailments, just one question.

There has been a lot of discussion as to whether they ever did represent Nutrilite for the treatment of cancer, tuberculosis, and so on.

JUDGE CLARK: We have before us the 58-page booklet or the 42-page booklet but we don't have a question of some statement that somebody made at some time before. This booklet that is before the Court, the only one in issue, specifically states that it won't cure cancer, diabetes, or anything of that sort. It mentions, for instance, old age—a man of 110. That statement is made in the booklet, and it is the booklet itself that is in issue in this case.

Mr. KLEINFELD: We are trying to explain the meaning of some of the terms. In this case there is a very important phrase they used, "common ailments."

JUDGE GOLDSBOROUGH: Because they committed a sin in years past, there is no reason why you should connect that sin with what they are doing now.

Mr. KLEINFELD: We are not trying to do that. We think when they say "all the common ailments," they mean just what

489 they said, common ailments, and they did specify that in other literature. We think that shows what they mean.

Mr. RHYNE: If they specified it at some time in the past, that doesn't mean they specified it in this pamphlet before the Court. We have an entirely different pamphlet before the Court.

Mr. KLEINFELD: May I hold this up for one moment, your Honor? I think I can tie it up by one other thing.

JUDGE CLARK: The Court rules that that question is inadmissible and will sustain objection to it.

Mr. KLEINFELD: I would like to have this marked. "Action Memo to All California Distributors, March 17, 1949." May I have it marked for identification?

(The document referred to was marked for identification as Defendants' Exhibit No. 6.)

Mr. KLEINFELD: Will you show it to the witness?

By Mr. Kleinfeld:

Q. Doctor, will you look at this pink sheet and tell us what it is?

A. This is a memorandum from our organization to all California distributors dated 17 March 1949.

Q. May I see it, please?

A. (The witness handed a paper to counsel.)

Mr. RHYNE: May I ask one qualifying question? Doctor,
490 doesn't this relate entirely to the criminal case?

Mr. KLEINFELD: Your Honor, may I object to the qualifying question? I want to cross examine this witness, and when I am through he may continue, if he will.

JUDGE CLARK: You have no right to go into the criminal case, if that is what you are trying to do.

Mr. KLEINFELD: We are not going into the criminal case.

JUDGE CLARK: That is what Mr. Rhyne asserts.

Mr. RHYNE: Could I have an answer to my question?

JUDGE GOLDSBOROUGH: I would like to see what it is first.

Mr. RHYNE: I would like to ask if this doesn't relate entirely to the criminal case, and I think Mr. Kleinfeld knows that himself.

Mr. KLEINFELD: I certainly do not know that.

JUDGE GOLDSBOROUGH: This is a paper in which the plaintiff is trying to prepare for the criminal case. It may have been that previously the booklet had been issued which contained references to cancer, tuberculosis, arthritis, heart trouble. He is asking his representatives to get all the evidence they can get to make a defense in that criminal case. This judge of the Court thinks that this is inadmissible. Of course, he is going to try to defend himself in a criminal case and get all the evidence he can. I know I did when I was defending anybody.

491 Mr. KLEINFELD: I urge, your Honor, this was issued after all this litigation had been in existence. It was issued in March 1949. I urge that it certainly deals with, one, it deals with the good faith of the plaintiff.

JUDGE CLARK: Mr. Kleinfeld, do you contend it is an evidence of lack of good faith for a man to get all the evidence he can together to defend himself in a criminal action? I have never known of it. I am like Judge Goldsborough: I would certainly do it. If I was defending anybody I would get any evidence I could get that was favorable to my client.

Mr. KLEINFELD: We are not quarreling with that.

JUDGE CLARK: That is all this is. This is a statement to his agents and distributors that he would like for them to get all the testimony they can from qualified witnesses and to come down there and testify in that criminal case.

Mr. KLEINFELD: We think, your Honor, that this does indicate that they are offering their product for use in the serious diseases and that it bears to that extent, at least, on the question of good faith of the plaintiff which is in issue here over our objection.

JUDGE CLARK: This booklet, Mr. Kleinfeld, I remind you again is the issue in the case. This memorandum seeking witnesses has

nothing whatever to do with what is in the booklet. The
492 booklet is explicit. So the Court sustains the objection.

By Mr. Kleinfeld:

Q. Doctor, what is a nutrilite?

A. A nutrilite, as I understand it, is a general term for all the microfood factors of importance in nutrition. It includes vitamins and vitamin-like substances. I am not enough of a chemist to give a better definition than that.

Q. Do you know whether the term is found in the textbooks, scientific publications, anywhere?

A. Some place I am sure.

Q. Do you know where?

A. Well, the work of the man who coined the word would undoubtedly contain it.

Q. Who coined the word?

A. I don't know.

Q. It wasn't coined by Mr. Rehnborg?

A. Not to the best of my knowledge, no. I know it wasn't.

Q. I ask you this question because you do say that these elements in our food are called in our textbooks of the biochemists nutrilites.

A. I know it wasn't invented by Mr. Rehnborg because he told me that he got permission from the scientist who developed this term to express all these vitamin-like substances, he got permission to use the trade name Nutrilite. He got permission
493 to use that from this man because he might have something to do about it, since he invented the word.

Q. Then vitamins are not synonymous with nutrilites?

A. As I understand it, it is the same as animal and cat. All cats are animals, but all animals are not cats. All vitamins are nutrilites, but I don't know for sure that all nutrilites are vitamins.

Q. On page 13 in the third paragraph you talk about vitamins and other nutrilites and on page 14 you talk about vitamins or nutrilites, and I am not quite clear which one you mean.

A. I think it is just as it says there. My understanding is that nutrilite is a generic term which includes vitamins. My understanding is that there are other important microfood factors which are classified as nutrilites which are not vitamins.

Q. What are these other factors?

A. I don't know.

Q. On page 25, Doctor, you talk about dental experiments in the use of fluorine in teeth. Does Nutrilite have flourine in it?

JUDGE GOLDSBOROUGH: Page 27?

MR. KLEINFELD: Page 25, sir.

A. I don't know. If it is on the label, it does.

494 By Mr. Kleinfeld:

Q. When the first seizure action was instituted in New Jersey, you testified that you removed the last number of pages, reducing the book from 58 to 36; is that correct?

A. Not exactly. It wasn't at that—may I hear the question?

Q. It was my understanding that you testified that when the first seizure action was instituted in New Jersey, the plaintiff changed the pamphlet so as to extract the pages from 58 to 36.

JUDGE GOLDSBOROUGH: What the witness testified to was that when that libel was instituted the best information they could get was that the Food and Drug Administration objected to the parts of the book beginning at page 37, and they immediately eliminated it, had to cut it out. That is what you testified to, wasn't it?

THE WITNESS: That is correct.

JUDGE CLARK: And the only way you could find out what the administration objected to was through that libel in New Jersey?

THE WITNESS: That is also correct.

By Mr. Kleinfeld:

Q. Those pages were all testimonials of satisfied users, were they not?

495 A. Not quite all, but almost all.

Q. Doctor, what is the name and address of the person involved in the first testimonial on page 41?

A. I have no idea now.

JUDGE GOLDSBOROUGH: Which number on page 41?

Mr. KLEINFELD: I asked for the name and address of the person involved in the first testimonial on page 41.

JUDGE GOLDSBOROUGH: "The first time I called upon this man he was propped up in a chair"?

Mr. KLEINFELD: "This story was told by a Nutrilite distributor: 'The first time I called upon this man,'" and so on. I just wanted to know the name of the Nutrilite distributor mentioned in this pamphlet.

THE WITNESS: I can't give it to you; I am sorry.

By Mr. Kleinfeld:

Q. Do you have a record of it somewhere?

A. We undoubtedly have it in the office, yes.

Q. Wouldn't any of your associates have it here?

A. I don't think so.

Q. Will you get it for us?

A. Certainly.

Q. Do you know the names and addresses of the other testimonial

writers whose testimonials appear on pages 41 through the end of the 58-page booklet?

A. No, sir, I do not.

496 Q. Do you know their names and addresses?

A. No, sir, I do not.

Q. Will you get us those, please?

A. Yes, sir.

Mr. RHYNE: I will say to the Court this: We have sworn affidavits in our files—we don't have them here, they are in California—that give the complete thing and most of those have been shown to their counsel out there, because we took the depositions of most of these people out there in California, and their depositions are on file here in this Court.

And all of those sworn affidavits—and I think their counsel on the Coast has seen all of them—have their names and addresses. I am sure Mr. Kleinfeld has them someplace.

Mr. KLEINFELD: No, I don't. They didn't take depositions of all these people.

Mr. RHYNE: Not all of them, but most of them.

Mr. KLEINFELD: If you will give us the names and addresses of those. You don't give us the names here so we don't know which ones are covered by the depositions. We can't tell.

Mr. RHYNE: I can give you the sworn affidavits. I will see which ones we have here. We will be glad to send a telegram to the Coast and get photostatic copies of each of the sworn affi-

497 davits which have the names and addresses.

Mr. KLEINFELD: Thank you. May I have just one minute, your Honor?

JUDGE CLARK: Yes.

Mr. KLEINFELD: Thank you.

Mr. KLEINFELD: No further questions.

JUDGE CLARK: Your next witness, Mr. Rhyne, unless you have some further direct.

Mr. RHYNE: I will just ask the doctor one question.

Redirect examination.

By Mr. Rhyne:

Q. You do have these sworn affidavits and you have seen them in your files?

A. Yes, sir.

Q. And all these are based on sworn affidavits?

A. That is exactly correct.

Q. Were you present when these depositions were taken out there and were shown to the Government counsel?

A. No, I was not.

Mr. RHYNE: That is all.

JUDGE CLARK: You may step down.

(Witness excused.)

Mr. RHYNE: At this time I would like to offer in evidence the deposition of Lee J. Myers. I will ask one of my associates, Mr. Bradley, if he will take the stand and I will read the questions
498 and he can read the answers.

These depositions were taken in California and are on file with the Court.

E. J. BRADLEY was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

Mr. RHYNE: This witness was sworn out there and Mr. Bradley is merely going to answer the questions.

JUDGE GOLDSBOROUGH: He will swear that he is reading them right, that is all.

Mr. RHYNE: This is entitled:

"Los Angeles, California, Wednesday, June 8, 1949, 2:30 p.m.

"Lee J. Myers,

"called as a witness on behalf of the plaintiff herein, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

"Direct Examination:

"By Mr. Simpson:

By Mr. Rhyne:

Q. "State your name and address."

A. "Lee J. Myers, M-y-e-r-s, 944 East Valley Boulevard, El Monte, California."

Q. "And your occupation?"

499 A. "I am an attorney at law."

Q. "How long have you been practicing law, Mr. Myers?"

A. "Tomorrow it will be 40 years."

Q. "And where have you practiced?"

A. "I practiced first in Ohio, and then in California."

Q. "You are, I take it, a member of the bar of the State of Ohio and also California?"

A. "I am."

Q. "Of what other jurisdictions and courts are you a member of the bar in good standing?"

A. "I am a member of the United States District Court for the Northern District of Ohio, Eastern Division; United States District Court for the Northern and Southern Districts of California; the

United States Circuit Court of Appeals for the Sixth Circuit and the Ninth Circuit."

Q. "How long have you been practicing in California?"

A. "I will have to do a little figuring on that. In 1935 I was admitted in California."

Q. "Now, during the time that you have been practicing law, have you specialized in any particular branch of the law?"

A. "Yes; I have specialized in food, drug, and cosmetic laws, beginning about 12 years ago."

Q. "And in specializing in the food, drug and cosmetic
500 law, did that include the Federal Food, Drug and Cosmetic Act, particularly the one of 1938?"

A. "Yes; most of my work is related to that."

Q. "Now, what, if anything, did you do to prepare yourself to specialize in the practice of food, drug, and cosmetic law?"

A. "Well, my introduction to this field came about 12 years ago when a client of mine, who was about to embark in the manufacture and distribution of vitamin and mineral products, came to me for advice on labels and labeling. At that time I had done some studying in the field of nutrition, but I had very little knowledge of the vitamin and mineral field; and at that time I began to search for literature on the subject and have followed it very closely from that time down to the present."

Q. "In the practice of the food, drug and cosmetic law in which you have specialized, have you paid particular attention to what is defined in the Act as labeling?"

A. "I have."

Q. "And to the preparation and revision of labeling of drug and food products?"

A. "I have."

Q. "In the practice of that specialty, has it been your study, your object, and your purpose to write or revise labeling so
501 that it will be in compliance with the Federal Food, Drug and Cosmetic laws?"

A. "It has."

Q. "In the studies made by you for the purpose of qualifying you to specialize in food, drug and cosmetic law, did you read or study any particular works?"

A. "Well, in the beginning, I found quite a dearth of material on the subject of vitamins and minerals by authorities in this country. A large part of the work, aside from some animal experimentation, at the time I first became interested in this field, had been done in Europe, particularly in England. I studied all the literature that I could find concerning the work done there by Funk, McCarrison, and, of course, the story of Eickman's discovery of the substance we now know as vitamins.

"That was the beginning of all this development. In 1939 the

United States Department of Agriculture published a very complete work on vitamins and minerals in connection with their Year Book of that year, and that was the first authoritative book that came to my attenion on this subject.

"Following that, in 1942, the Food and Drug Administration promulgated regulations and made findings concerning the so-called dietary supplements.

502 "Since that time there has been a vast amount of literature published on the subject in book form and research reports and in various scientific and popular publications; and I have tried to keep abreast with all of the work that has been done in this field."

Q. "You have read the Journal of the American Medical Association?"

A. "I have subscribed to that for a number of years and read it religiously, particularly as to all items pertaining to nutrition."

Q. "Have you read works written and published by Dr. Henry Sherman of Columbia University?"

A. "Yes, I have. I have his work on foods and chemistry and various other publications containing his work. By the way, he had an article on minerals in the 1939 Year Book of the Department of Agriculture, and I should say that I have used that as a guide because at the time of the publication of that booklet the administration of the Food and Drug Act was under the jurisdiction of the Agriculture Department."

Q. "Have you also read books and articles written by Dr. Barnett Sure of the University of Arkansas?"

A. "I have read his book. I think the title of it is 'The Little Things in Life.'"

Q. "Have you read any articles by Dr. Tom D. Spies?"

503 A. "I have followed very carefully all of Dr. Spies' work since he has become a national figure in this field. My interest is not only because of the work he is doing in this field, but I happen to have had the pleasure of meeting Dr. Spies several years ago when he was in the Lakeside Hospital in Cleveland."

Q. "And he is considered one of the outstanding, if not the outstanding expert in the field of nutrition in the United States?"

A. "I would say that he is, particularly as far as the B-complex vitamins, which includes his work in pellagra with niacin."

504 Mr. RHYNE: Now the Government's counsel Mr. Dickerman said this:—Do you want me to read that, Mr. Kleinfeld?

Mr. KLEINFELD: Yes, please.

Mr. RHYNE: Mr. Dickerman said:

"May I interrupt at this point? I hesitate, since an attorney is on the stand, to raise many objections, but are you attempting to qualify Mr. Myers as an expert in the field of nutrition or as an expert in the legal aspects?

"Our local counsel, Mr. Simpson, said:

"Well, we are laying the foundation to show how he became a specialist and competent and qualified to write and revise labeling, which we expect to show that he did in this Eastern case; it was under his supervision, and we will question him as to whether in his opinion it is or is not false or misleading. If I should just ask him as an attorney, as I would, for instance, Mr. Erickson or Mr. Lev, or if you had asked me six months ago about food and drugs and vitamins and Nutrilite and minerals and so on, I presume there would have been an immediate objection that I wasn't qualified or competent to pass on it."

Mr. DICKERMAN: "Whereas, today?"

Mr. SIMPSON: "What I am doing now is qualifying Mr. Myers as a specialist in this field.

505 "I excluded you, Mr. Dickerman, of course, from that assumption."

Mr. DICKERMAN: "I move to strike the answer given by the witness on the ground that the witness has not been qualified to state whether Dr. Spies is or is not an outstanding expert in the field of nutrition. I don't know whether he is or not. But it is just that this witness has not been so qualified."

By Mr. Rhyne:

Q. Then the question by Mr. Simpson:

"Mr. Myers, have you read the deposition of Dr. Butz, the medical officer of the Food and Drug Administration in Washington, D. C., given in this case?"

A. "Yes, I have."

Q. "Do you recall that in his deposition he stated that, in his opinion, Dr. Tom D. Spies was considered as probably one of the outstanding experts in the field of nutrition in the United States?

A. "That is my recollection."

Q. "And that is in accordance with your opinion also, isn't it?"

A. "That is right. I might say that he is frequently referred to and articles by him are carried in the American Medical

506 Journal and he is frequently referred to by other authorities and researchers in the field."

Q. "Now, are you familiar with a publication known as 'Dietotherapy, a Clinical Application of Modern Nutrition,' edited by Dr. Michael Wohl, and containing a number of articles written by doctors of medicine and doctors of philosophy and Ph.D's in chemistry?"

A. "I am. I have that in my library.

Q. "What other works having to do with nutrition do you have in your library which you have read?

A. "Well, I have, of course, the 'New and Non-official Remedies', which is a publication of the Council on Pharmacy and Chemistry

of the American Medical Association. I also have the 'United States Dispensatory', which is probably one of the oldest works of its kind in the United States. It is now in its 24th edition. I think it has been published for over a hundred years, and it is edited by some of the outstanding medical doctors. It deals with the origin and therapeutic value of drugs, vitamins, minerals, herbs, and so forth."

Mr. RHYNE: And Mr. Dickerman then asked:

"You are reading from a statement of books in your library, Mr. Myers?"

THE WITNESS: "Yes; I made a list here. I can't recall all of the authors from memory, so I made a list.

507 "I also have a book which is in the libraries of most doctors, called 'Diseases of Metabolism', by Dr. Garfield C. Duncan, M.D., Chief of the Medical Service of Pennsylvania Hospital, and Clinical Professor of Medicine, Jefferson Medical School, in Philadelphia; and among the contributors are Dr. Walter Bauer, M.D., Dr. Abraham Canterow, M.D., Dr. Hugh R. Butt, M.D., Dr. Tom Spies, Dr. Abrams, and others."

"I also have another book that is related to this field, called 'Tomorrow's Foods', written by Dr. N. Philip Norman, which deals with the lack of vitamins and minerals in the average diet and the lack of minerals in much of our soil, and this is substantiated by a work of the United States Plant, Soil, and Nutrition Laboratory of Cornell University."

"I also have Dr. Henry S. Sherman's Book on the 'Chemistry of Food and Nutrition', Dr. Sherman being a professor of chemistry in Columbia University."

"I have one of the earliest books on this subject, which is frequently referred to by other writers, 'Studies in Deficiencies', by Dr. Robert McCarrison, M.D., a Fellow of the Royal College of Surgeons of London, England."

"I have 'Vitamins and Hormones', edited by Dr. Robert S. Harris, Professor of Biochemistry and Nutrition at the
508 Massachusetts Institute of Technology, and Kenneth P. Thimann, Associate Professor of Plant Physiology at Harvard University."

"I also have 'Nutrition and Glands in Relation to Cancer', by Dr. F. E. Chidester."

"I have another work which is put out for medical doctors called 'The Pharmacological Basis of Therapeutics', by Dr. Louis Goodman, M.D., Professor of Pharmacology of the University of Vermont College of Medicine, and formerly Assistant Professor of Pharmacology at Yale University."

"I also have a work called 'Diet Daily or Die Early', by Dr. N. S. West, which contains a very exhaustive review of the work done in the field of nutrition."

"I have Dr. Spies' latest book, 'Rehabilitation Through Better Nutrition', Dr. Spies being with the University of Cincinnati College of Medicine at Cincinnati, Ohio."

"I also have the 'Handbook of Nutrition', which was put out in 1943 and is now in the process of revision, I believe. I think that was put out by the Council on Foods and Nutrition of the American Medical Association."

"I subscribe to Hygeia, which is another health magazine
509 put out by the American Medical Association, the Journal of Living, Journal of Nutrition, Science Digest, Science News Letter, and many other miscellaneous works."

Mr. RHYNE: Question by Mr. Simpson:

"Now, in addition to having those in your library, have you read them?"

A. "I have read them, yes; every one of them."

Q. "Did you attend a hearing held in the office of the Federal Food and Drug Administration in Los Angeles, in July, 1947, in connection with the citation that had been issued to Mytinger and Casselberry?"

A. "I did."

Q. "And that hearing was presided over by Leslie Hart?"

A. "I think the first one was."

Q. "Subsequent to that hearing, did you examine the labels and literature which was presented at the hearing by Mr. Hart as being used in connection with the sale of Nutrilite Food Supplement?"

A. "I did."

Mr. KLEINFELD: I object, your Honor, on the ground that it is irrelevant and immaterial to the issues in this case.

510 JUDGE CLARK: The objection comes too late. You have made no objection to the deposition.

Mr. KLEINFELD: I think when he puts this in as part of his direct case I can object to it.

JUDGE CLARK: The objection is overruled.

By Mr. Rhyne:

Q. Did you read the answer?

A. The answer is "I did."

Q. "Did you, subsequent to that hearing, undertake to revise and supervise the revision of both the labels and the labeling used or to be used for Nutrilite Food Supplement?"

A. "I personally revised the labels; I supervised the revision of the book, of the literature, the labeling."

Q. "Now, you are familiar with the fact that there was a booklet named or called 'How to Get Well and Stay Well'?"

A. "Yes."

Q. "I will show you a booklet, which we will ask the reporter to mark for identification, because they already have them on file in the case in Washington, having a red cover and entitled: 'How to Get Well and Stay Well', on the first page of which appears the
511 figure of a man and the statement: 'If your health problem is the result of dietary deficiencies', and so on."

Mr. RHYNE: The booklet referred to was thereupon marked by the notary as Plaintiff's Witness Myers Exhibit No. 1 for identification.

I assume that is attached to the original. Do you want me to produce that at this time or can we stipulate that that is the same 58-page booklet?

Mr. KLEINFELD: I think we can.

Mr. RHYNE: Can we now at this time offer Exhibits 1, 2 and 3. Have you checked them?

Mr. KLEINFELD: We will probably have them this afternoon. I am sorry.

By Mr. Rhyne:

Q. "Will you look at that, Mr. Myers, and state whether that is the booklet which was revised under your supervision following the hearing held before Mr. Leslie Hart in Los Angeles in July of 1947?"

Mr. RHYNE: —

Mr. DICKERMAN: "Which booklet is this one? How many pages does it have?"

Mr. SIMPSON: "58."

Mr. DICKERMAN: "Is there only one 58-page booklet?"

Mr. SIMPSON: "Yes. That booklet is the booklet which
512 is the basis of the first four libel cases filed in the Eastern District."

Mr. DICKERMAN: "What edition in printing is it?"

Mr. SIMPSON: "I don't know what edition."

Mr. LEV: "They didn't keep track of it by edition."

Mr. DICKERMAN: "This one is the third edition, first printing, 20,000 copies."

THE WITNESS: "Was the question, Is this the booklet?"

Mr. RHYNE: —

By Mr. Simpson:

Q. "Yes."

A. "It is."

Q. "Now, in supervising the revision of the booklet 'How to Get Well and Stay Well', which resulted in the booklet which you

now hold in your hand and which has been marked Witness Myers' Exhibit 1 for identification, what did you do in revising and supervising the revision of that booklet?"

A. "Well, in the first place, I gave instructions for the revision of the booklet that had been previously used, and then as it was revised it was submitted to me for approval or criticism. Certain parts of it were rewritten two or three times before I approved it, and when we finally got through, it was approved."

Q. "In the revision of the book and the supervision of its revision, did you rely upon the knowledge which you had ob-
513 tained in the study of nutrition and your experience in specializing in food, drug, and cosmetic law in connection with the statements which were made in that booklet, Exhibit 1?"

Mr. KLEINFELD: May I object, your Honor, to this question and this line of questioning on the ground that the main issue, as your Honor said before, was whether in your Honor's opinion the booklet was false or not. What this gentleman did I think is irrelevant and immaterial.

JUDGE CLARK: If this were new testimony your argument would be good but it is universal so far as I know that if you permit the taking of the deposition and don't save your objection, it comes too late at the time of the trial.

Mr. KLEINFELD: I have the Rules of Civil Procedure and Rule 26-E says: "Objections to admissibility subject to the provisions of Rule 32-C. Objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testified."

JUDGE CLARK: The witness is not present and testifying.

Mr. KLEINFELD: I urge that the rule which I read says we may make the same objections as if the witness were here and testified and that is just what we are doing.

514 JUDGE CLARK: It has always been my understanding of the rule that you can object to a deposition, if it is improperly taken, or the party taking the deposition can read as much of the deposition as he pleases.

If he doesn't read everything that the other party thinks ought to be read, the other party can get to read it himself, but I have never heard that you could object after the deposition is taken unless the objection is made at the time of the taking of the deposition.

Mr. KLEINFELD: I submit that the rule seems quite clear that we can, your Honor, but if the objection is overruled——

JUDGE CLARK: Overruled.

515 A. The answer is:

"I not only did that, but in certain portions of it I checked with some of the works I have in my library that I consider reliable, that is, written by outstanding men, to make sure that there were no statements that were not supported by competent authority."

By Mr. Rhyne:

Q. "By the way, you were retained were you not, by Mytinger and Casselberry to advise them and to assist in the revision of their labeling, to be sure that their labeling did comply with both the State and Federal food, drug and cosmetic laws?"

A. "Yes. In June of '47 I was placed on an annual retainer basis and have been so employed by them ever since."

Q. "And one of your first tasks was to supervise the revision of this booklet, 'How to Get Well and Stay Well'?"

A. "That is correct."

Q. "Now, prior to the completion of the booklet, 'How to Get Well and Stay Well,' Exhibit 1, did you advise the Los Angeles office of the Federal Food and Drug and Cosmetic Administration that you were revising the booklet around a certain theme?"

516 A. "I did."

Q. "And did you advise them that the theme of the booklet 'How to Get Well and Stay Well,' which was being prepared and revised under your supervision, was that Nutrilite products are foods for use as a dietary supplement to the regular diet; they do not cure and are not offered as a cure for anything; their chief purpose is that of a food to nourish the body and to provide it with minerals for its proper growth and function?"

A. "I did."

Mr. RHYNE: Mr. Dickerman: "Is this direct examination?"

Mr. SIMPSON: "Yes."

Mr DICKERMAN: "You wouldn't consider that a leading question?"

Mr. SIMPSON: "Not at all. Would you?"

Mr. DICKERMAN: "I certainly would. I object to that question on the ground it is leading."

Mr. KLEINFELD: May I object to this question and once more call to the attention of this Court another provision of the Rules of Civil Procedure, Rule 32(c). I have the Code before me:

"Effect of errors and irregularities in depositions:

517 "(c) As to taking of deposition.

"(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony, are not waived

by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." I urge, therefore, that we can, under the rules, clearly object on the grounds of relevancy and materiality, just as if the witness were on the stand.

JUDGE CLARK: If you object on that ground, the Court overrules it.

Mr. KLEINFELD: I thought your Honor was saying that we couldn't——

JUDGE CLARK: I said both things.

By Mr. Rhyne:

Q. Question by Mr. Simpson:

"Was that statement in the form of a letter written by you and sent to the Food and Drug Administration under date of October 4, 1947, pursuant to a telephone conversation that you had with Mr. R. B. Born, Assistant Chief of the Los Angeles Station, which, by the way, the Government filed Monday in the criminal case in Judge Harrison's court?"

A. "Yes, that is the date."

518 Q. "And the last paragraph of that letter——"

A. "Pardon me. May I correct you? I think in your question you said 'provide it with minerals.' It would be 'materials for its proper growth.'"

JUDGE CLARK: We will suspend at this time and take a recess until two o'clock.

(Whereupon, at 11:57 a. m., a recess was taken until 2:00 p. m. the same day.)

519 Afternoon Session (2:00 p. m.)

E. J. Bradley resumed the stand, having been previously sworn, was further examined and testified as follows:

Direct Examination: (resumed)

Mr. RHYNE: This is Mr. Simpson:

"I should have read 'provide it with materials.' I was misquoted.

"Mr. Dickerman: What letter are you reading now?

"Mr. Simpson: The one Mr. Born has and which you have right there, that you filed in court Monday.

"Mr. Dickerman: The one dated October 4th?

"Mr. Simpson: Yes.

"Mr. Dickerman: There are two letters dated October 4th. Now, which one was this?

"Mr. Simpson: The one I just read from. The quotation is in the final paragraph, under what is numbered as 5th: 'The revision of the booklet has been built around one them which can be summarized as follows.' You have that letter there don't you—a copy of it?

"Mr. Dickerman: Yes."

Mr. RHYNE: Question by Mr. Simpson:

520 Q. "In supervising the revision of the booklet, How to Get Well and Stay Well, Mr. Myers, did you carefully check it against the scientific writings with which you were familiar, to determine whether the statements made in that revised booklet were in accordance with the statements made by the experts whose articles you had read?"

A. "I did."

Q. "Following the making of the last draft of the booklet, How to Get Well and Stay Well, did you approve it before it was printed?"

A. "I did."

Mr. KLEINFELD: I object to that and ask that it be stricken on the ground of irrelevancy to the issue here.

JUDGE CLARK: It is perfectly relevant.

By Mr. Rhyne:

Q. "In your opinion, is the booklet, How to Get Well and Stay Well, which has been shown by you, Exhibit 1, false or misleading?"

A. "In my opinion, it is not false or misleading in any particular."

Mr. KLEINFELD: I object to that, your Honor, to save the time of the Court, to the same line of questioning without getting up every time.

JUDGE CLARK: Overruled.

A. "In my opinion it is not false or misleading."

521 By Mr. Rhyne:

Q. "In your opinion, do the statements made in that book conform to the consensus of informed medical opinion on the subject of nutrition as reported in the scientific writings which you have read?"

Mr. RHYNE: "Mr. Dickerman: I object to that question because the witness has not been qualified to answer it."

Mr. KLEINFELD: Same objection on our part.

JUDGE CLARK: Overruled.

Mr. RHYNE: "Mr. Simpson: In what way do you say he is not qualified, Mr. Dickerman?

"Mr. Dickerman: It has not been shown that he is properly qualified to appraise the consensus of medical opinion.

"Mr. Simpson: Do you think Mr. Larrick is qualified?

"Mr. Dickerman: I am not on the stand.

"Mr. Simpson: I just wanted to get the point of your objection whether it was because Mr. Myers is not a doctor.

"Mr. Dickerman: I have the greatest respect for Mr. Myers as a lawyer.

THE WITNESS: "But not as a nutritionist? I have lost your question."

Mr. RHYNE: "(The reporter read the pending question.)"

A. "I assume you mean by consensus of opinion a majority
522 I would say that it conforms to more than a majority of the experts or authorities qualified in this field, and that the only authorities with which it does not coincide is that group of medical doctors who are still clinging to the drug theory of therapeutics."

Mr. RHYNE: Question by Mr. Simpson:

Q. "In your opinion, is Exhibit 1 misbranded within the meaning of the Food, Drug and Cosmetic Act?"

A. "In my opinion, it is not."

Mr. RHYNE: "Mr. Dickerman: That is objected to on the ground that the witness is called upon to state a conclusion. Now, that, of course, is a legal conclusion to be determined by the courts finally, not by the witness personally.

"Mr. Simpson: I am glad to get your objection in the record, because it might be the basis for striking much of the testimony of the Government witnesses that have already testified."

Q. "In your opinion, Mr. Myers, is the booklet, Exhibit 1, How to Get Well and Stay Well, fraudulent or misleading?"

Mr. KLEINFELD: Same objection, your Honor.

JUDGE CLARK: Overruled.

A. "In my opinion, it is not."

523 Mr. RHYNE: "Mr. Dickerman: The same objection"

By Mr. Rhyne:

Q. By Mr. Simpson: "And would that booklet, in your opinion, result in injury or damage to a purchaser or consumer?"

A. "In my opinion it would not, because I feel that reading the book in its entirety, without taking certain passages and lifting them

out of the context, can convey but one idea, and that is the fact that the average American diet is often deficient in vitamins and minerals which are absolutely necessary for health, and that the product merely supplies those factors which may be missing in the diet."

Mr. RHYNE: "Mr. Dickerman: I move to strike that answer because it has not been shown that the witness is qualified to testify as he has."

Mr. KLEINFELD: I join in that motion.

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. By Mr. Simpson: "Mr Myers, did you submit the booklet, How to Get Well and Stay Well, to any other persons who were laymen, for them to read and advise you the impression that they received from a reading of the booklet?"

A. "I have done that to a number of persons."

524 Q. "And did those persons, after reading the booklet, advise you of the impressions that they had received from a reading of it?"

A. "They did."

Mr. KLEINFELD: Your Honor, may I particularly object to this, because this is also hearsay?

JUDGE CLARK: I think that objection should be sustained.

Mr. RHYNE: The next question was: "What was the information that they gave you as to the impressions they received from a reading of the book?"

I take it under your ruling that the answer should not be read?

JUDGE CLARK: That is right.

Mr. RHYNE: The next question:

By Mr. Rhyne:

Q. "Now, you state that these people, including yourself, got the impression that there was a deficiency of certain essential vitamins and minerals in the American diet. Do you know of any particular authoritative published work stating in substance, that there is a deficiency of such factors in the American diet?"

A. "There have been many studies made on that subject, but our first information on that was contained in the Department of Agriculture's Year Book of '39, to which I have previously referred,

525 in an article written by Lela Booher, who at that time was Chief of the Foods and Nutrition Division of the United States Bureau of Home Economics, and Callie Mae Coons, who was the Senior Food Economist of the Bureau of Home Economics.

Mr. KLEINFELD: May I object at this point on the ground that what it was stated is clearly hearsay and, therefore, not admissible, your Honor?

JUDGE CLARK: I think it is hearsay. Objection sustained.

Mr. RHYNE: Mr. Dickerman said: "I move to strike all of the material read by Mr. Myers on the ground that it is hearsay.

"Mr. Simpson: By hearsay, do you mean that it is your material that was never read by Mr. Ewing or Dr. Dunbar or Mr. Kingsley, and not known by them, defendants in the action?

"Mr. Dickerman: If this material is to be presented to the court, it can be presented not through Mr. Myers but by calling those persons who wrote the articles, or by some other means. I don't know."

THE WITNESS: "I would like to add to that answer that the latest expression on the subject that has come to my knowledge is found in Dr. Tom Spies' latest book, Rehabilitation Through Better Nutrition. The first statement in the introduction reads as follows:

" 'Although the days in which great epidemics mowed down
526 large masses of the population seem to have disappeared, more people are starving today than ever before in the history of the world. We are face to face with the grim task of reconditioning and refitting physically and mentally men, women and children whose tissues are injured by poor nutrition.' "

Mr. RHYNE: Just a minute. He starts to read from the book, and I take it under your ruling we should not read in statements from the book.

JUDGE CLARK: That is right.

Mr. RHYNE: Then the next question by Mr. Simpson:

By Mr. Rhyne:

Q. "Mr. Myers, were you informed in the latter part of 1948, in October, that some seizures of Nutrilite and the booklet, How to Get Well and Stay Well, had been made in New Jersey?"

A. "I was."

Q. "And did you receive information to the effect that attached to the libel in the case filed in Belleville, New Jersey, were excerpts from pages 37 to 58 of the booklet, How to Get Well and Stay Well, Exhibit 1 in your deposition?"

A. "I did. I had a copy of the libel."

Q. "Upon the receipt of that information, did you then believe that the alleged misbranding that the Government was com-
527 plaining about were the excerpts contained in pages 37 to 58 of the booklet, How to Get Well and Stay *and Stay* Well?"

Mr. KLEINFELD: May I object on the ground that it is irrelevant?

JUDGE CLARK: I think that is clearly relevant because the nature of this whole case is such that it depends largely on the interpretations it so happens of various people. This Mr. Myers is just as competent to read the book and testify as to its contents as any medical expert the Food and Drug Administration may put on.

A. "As that was the only part of the booklet to which any objection was made in that libel, I naturally assumed that that was the only part to which the Food and Drug Administration had objected."

Q. "Were instructions immediately issued to various distributors to tear out of the booklet, How to Get Well and Stay Well, pages 37 to 58?"

A. "Well, that I would be unable to tell you from first-hand knowledge. I did instruct Mytinger and Casselberry to delete them, and told them that apparently that was the only part of the book that was objectionable."

Q. "Now, thereafter was it your understanding, that, in lieu of pages 37 to 58 of the booklet, How to Get Well and Stay Well, certain new pages were used, and that those new pages bore
528 numbers 36 to 42?"

A. "That is correct."

Q. "And they were added to a booklet the same as the previously revised booklet, How to Get Well and Stay Well, with the exception that a change was made on page 19 to contain the statement that the need for vitamins E, B-6, and pantothenic acid in human nutrition has not been established?"

A. "That is correct."

Mr. RHYNE: "Mr. Dickerman: Is the witness testifying to facts within his own knowledge? You asked him his understanding?"

THE WITNESS: "It is within my understanding."

Mr. RHYNE: "Mr. Dickerman: Did the witness revise those pages?"

Mr. Simpson asked: "Did you?"

THE WITNESS: "They were submitted to me for approval after revision.

By Mr. Rhyne:

Q. "To include that statement which I just read?"

A. "Yes."

Q. "How about pages 36 to 42? Were those submitted to you before they were printed in final form and used in the booklet?"

A. "They were."

529 Q. "And did you read and approve the revised pages?"

A. "I not only did that, but I collaborated on that revison with Mr. Dick Addison, the Food and Drug consultant."

Q. "Now, have you also read a book entitled Modern Home Medical Advisor, edited by Morris Fishbein, M. D., who is also

the editor of the American Medical Association Journal, which book contains a chapter by Drs. Russell Wilder and Hugh Butt of the Mayo Medical Foundation?"

A. "I have not read it thoroughly. I have glanced through that book."

Q. "Have you familiarized yourself with a chart which appears in that book, containing a resume of the known vitamins, their names, sources, purposes, and deficiencies?"

A. "Yes, I have seen that chart."

Q. "Are you familiar with the fact, Mr. Myers, that about six years ago the Food and Drug Administration required all food products containing niacin to carry a statement to the effect that the need for niacin in human nutrition had not been established?"

A. "I am not quite sure as to the dates, but early in my work in preparing labels for products containing niacin, the Administration required that statement."

530 Q. "Is the use of niacin in the treatment of pellagra well recognized?"

A. "Yes; that is recognized, I think, by all authorities without exception."

Mr. KLEINFELD: I object to that, your Honor, on the ground that the man is not qualified as an expert to testify on diseases.

JUDGE CLARK: It seems to me he is qualified as an expert, Mr. Kleinfeld; he testified to the very large extent of his investigations. A great many lawyers who are engaged in that specialty may know as much as a good many doctors.

A. "Yes, that is recognized, I think, by all authorities without exception."

By Mr. Rhyne:

Q. "And is it any longer necessary to make the statement on the labels that the need for niacin in human nutrition has not been established?"

A. "It is not."

Q. "Now, the statement which is contained on page 19 of the revised booklet to the effect that the need for vitamins E, B-6 and pantothenic acid has not been established, is that put in that booklet because of a requirement of the Food and Drug Administration?"

A. "Well, that was put in out of an abundance of caution. It is required on labels. In my opinion, it is not required in a
531 booklet such as that; but we put it in there so there would be no misunderstanding on the part of the reader on that point."

Q. "Mr. Myers, it is already in evidence in this case in the deposition of Mr. Wausat, and I believe Mr. Roe, that on November

19, 1948, Mr. Wausat, in pursuance of an investigation being made by him, examined a portion of a shipment consisting of 150 envelopes in the post office at Long Beach, which contained sets of replacements for customers' books, inserts for page 19 and pages 35 to 42, with an enclosure slip saying, 'be sure and destroy all pages removed,' that is, page 19 and pages 35 to 58, inclusive.

"Is it your recollection that it was about that same time, November 18, 1948, that those revised sheets were put out?"

A. "Yes; it was sometime in November, '48, right after we received copies of the Belleville, New Jersey, libel."

Mr. RHYNE: "Mr. Simpson: I believe it already appears in the record as to the date that the Belleville, New Jersey, libel was filed.

"You may cross examine."

Do you want to read your cross examination?

Mr. KLEINFELD: Unless you want to finish it. Do you want to finish it?

532 Mr. RHYNE: No. Will you read it? And Mr. Bradley will read the questions.

Mr. KLEINFELD: Surely, if he will.

Cross-examination.

Mr. KLEINFELD: "Cross examination, by Mr. Dickerman":

By Mr. Kleinfeld:

Q. "Mr. Myers, reference was made to some of the letters that you wrote to the Food and Drug Administration here in Los Angeles subsequent to the time that you participated in a hearing in response to a citation that was issued to Mytinger and Casselberry. I am not sure about this. Did you testify that you submitted either the 58-page revision that you had approved or the 42-page revision that you had subsequently approved, identified in this proceeding as Witness Myers' Exhibits 1 and 2, respectively, for identification? Did you submit those to the Food and Drug Administration?"

A. "I did not so testify."

Q. "Did you submit them to the Food and Drug Administration?"

A. "I was never asked to."

Q. "Mr. Myers, referring to the 58-page booklet entitled How to Get Well and Stay Well, identified as Myers' Exhibit 1 for identification, and this particular volume is identified as being the
533 third edition, do you know whether the first, second, and third editions were identical?"

A. "It is my recollection that there was no change made in that edition until we received the libel in the New Jersey case."

Q. "And at that time you produced this 42-page booklet, identified as Myers' Exhibit 2?"

A. "We deleted all of the pages which were referred to in that libel immediately. I have forgotten now how many were there. Then that book with that deletion was used for some time, and then there were several, seven or eight pages—I have forgotten how many—written and put in the book."

Q. "Then as far as this edition is concerned, you state that the third edition is identical with the edition that you originally approved?"

A. "That is my recollection, that there was no change in those."

Mr. KLEINFELD: Mr. Dickerman says: "I have no further questions."

Mr. Simpson says: "I have overlooked a question. I know it is direct rather than redirect, so I will ask leave to ask these questions, and you have a right to cross examine.

"Mr. Dickerman: Certainly."

534 Further Direct examination.

By Mr. Rhyne:

Q. By Mr. Simpson: "Mr. Myers, you recall that after the indictment was returned in the Southern District of California, the arraignment took place before Judge Pierson Hall?"

A. "I do."

Q. "And that a motion to dismiss was filed by you upon the grounds that the literature referred to in the so-called Stapenhorst counts of the indictment did not accompany the Nutrilite products, the problem which was involved in the case of Kordel vs. United States? You had a motion to dismiss on file?"

A. "I am trying to think whether I actually filed it or discussed with Government——"

Mr. RHYNE: Mr. Lev states: "It was filed."

THE WITNESS: "Was it filed? I know we discussed it. I had just forgotten. I can tell by going to my file."

By Mr. Rhyne:

Q. Question by Mr. Simpson: "Well, do you recall that after the filing of the motion to dismiss, Mr. Klinger, the Assistant United States Attorney, asked Judge Hall to continue the case because the Kordel case was pending before the Supreme Court, and it was continued a week, and that when it came up on the 25th of
535 October, the Supreme Court again had not handed down a decision, and Mr. Klinger again requested that the case be postponed until after the Supreme Court had ruled in the Kordel case?"

A. "I think either Mr. Klinger or myself called the attention of Judge Hall to the fact that that question was before the Supreme Court and would probably be argued very soon."

Mr. RHYNE: Mr. Dickerman: "I assume that counsel will tie this testimony in with the present case in some way.
Mr. Simpson said; "Yes."

By Mr. Rhyne:

Q. "Do you recall that when the last request for a continuance was made by the United States Attorney, that you and Mr. Lev stated that you would be agreeable to the continuance provided there were no more seizures of Nutrilite products during the period that the case was being continued?"

Mr. KLEINFELD: May I object on the ground that it is irrelevant and immaterial?

JUDGE CLARK: It seems to me it is just as relevant as it possibly can be as far as the plaintiff's complaint is concerned. What you have done—to follow these procedures and bring none of these libels to trial and then put them out of business before they could
536 get a day in court—seems to be highly relevant.

Mr. KLEINFELD: We urge that that is what Congress has authorized us to do, unless the law is unconstitutional.

JUDGE GOLDSBOROUGH: Congress authorized you to put them out of business without trying them; is that what you mean?

Mr. KLEINFELD: Congress said that we may make multiple seizures upon an administrative determination of probable cause.

JUDGE GOLDSBOROUGH: That is not what the Court understands. Proceed.

A. "I so advised Mr. Klinger, and I think Mr. Dickerman."

By Mr. Rhyne:

Q. "And did you receive information from either Mr. Dickerman or Mr. Klinger to the effect that the matter would be submitted to Washington and you would be advised?"

A. "I think Mr. Dickerman told me that he would submit it to Washington."

Q. "Did you subsequently receive advice from Mr. Dickerman or Mr. Klinger to the effect that Washington had stated that they did not contemplate any further seizures or any more seizures of Nutrilite?"

A. "Mr. Klinger advised me that the Food and Drug Administration would not stipulate. We were asking for a stipulation that there be no more seizures pending the decision in the Kordel
537 case. He advised me that the Food and Drug Administration would not enter into such a stipulation, but that he had been

advised by them that no further seizures were contemplated; and, acting upon that, we consented that it might go over."

Q. "Were you thereafter advised that further seizures of Nutrilite were made and further libels filed?"

A. "Oh, yes, there were several filed.

Mr. RHYNE: "Mr. Simpson: That is all."

Further cross-examination.

Mr. KLEINFELD: "By Mr. Diekerman":

By Mr. Kleinfeld:

Q. "Mr. Myers, did Mr. Klinger tell you that the Department of Justice would not make any more seizures of Nutrilite products?"

A. "I have told it just exactly as he told it to me, as I recall it; that they would not stipulate to no further seizures, but that no further seizures were contemplated. Those were his exact words."

Q. "When did Mr. Klinger so advise you?"

A. "Well, I keep no diary, and I can't tell you the date, but it was about a week after the time we were in Judge Hall's court when we made the proposal that we would consent to have it go over provided no further seizures were made."

Mr. RHYNE: Mr. Simpson: "Do you have the correspond-
538 ence here that we requested you to bring along those lines? Let's see what they told you from Washington. We are not blaming you fellows here. I don't know whether we were correctly or incorrectly informed as to what Washington said."

Mr. KLEINFELD: I may say that this is being asked by Mr. Simpson, one of counsel for the plaintiff in Los Angeles.

"Mr. Dickerman: I would be glad to have the record show that the telegram that I received from the Assistant General Counsel of the Federal Security Agency——"

"Mr. Simpson: Does that give the date?

"Mr. DICKERMAN: October 19, 1948.

"Now, the wire that I sent to Washington I don't think is at all pertinent to the record. This is the response that I received, and if you want it, I have no objection.

"This communication states that the Food and Drug Administration is unwilling to stipulate as Mr. Myers had proposed. It states: 'If the motion to dismiss is pressed, suggest United States Attorney advise the court that issue has been submitted to Supreme Court and that early decision is expected. If motion is granted, suggest right to appear be reserved.'

"Mr. Simpson: In your communication to the Food and
539 Drug Administration to which that is a reply, did you inform the Administration that a request for continuance had been

made for the hearing on the motion to dismiss, and that it had been proposed by counsel for Mytinger and Casselberry that they would so stipulate, provided no further seizures of Nutrilite were made?

"Mr. Dickerman: That is right.

"Mr. Simpson: And under what date was your—was yours a letter or a telegram?

"Mr. Dickerman: October 18; it was a wire, and the reply came the next day.

"Mr. Simpson: Now, is that the last communication on that subject that you have there?

"Mr. Dickerman: Those are the only communications I have on that point."

By Mr. Kleinfeld:

Q. (By Mr. Simpson) "As I understand your testimony, Mr. Myers, you were not informed of the contents of the telegram which Mr. Dickerman received as he has just read it?"

A. "That is right. It was a statement from Mr. Klinger."

Q. "And your conversation was with Mr. Klinger?"

A. "That is right."

Q. "As a result of the assurances contained in the conversation you had with Mr. Klinger, you consented to the continu-
540 ance of the hearing, which was then continued to December 5, 1948?"

A. "Well I am not sure about the date, but that was the condition on which we consented to have it continued until the Supreme Court had decided the Kordel case. I think it was less than a week after that that another seizure was made."

Q. "You don't know whether Mr. Klinger had communicated with the Department of Justice in Washington or not?"

A. "I do not. It was my understanding from what he said that he was relaying a message that Mr. Dickerman had received."

Mr. KLEINFELD: Mr. Simpson, counsel for plaintiff: "That is all."

541 Mr. KLEINFELD: May I request the Court to strike all the testimony on the point of any stipulation or continuances since any stipulations or continuances have nothing to do with the questions before the Court.

JUDGE GOLDSBOROUGH: What is your reason for thinking that that is the proper thing for the Court to do?

Mr. KLEINFELD: Because as I see it, your Honor, the issues before the Court are: (1) the constitutionality of the statute providing for multiple seizures without a hearing.

JUDGE GOLDSBOROUGH: Do you mean to say that the fact—if it is a factor if there is evidence of it—the fact that the Government, by implication at least, said that there would be no more seizures

if the manufacturer would agree to a continuance of that hearing and then deliberately violated the implied agreement, that that is evidence for the Court to consider, that the purpose of the Government—of the defendants at least, whether they are the Government or individuals—was to put the plaintiffs out of business by a multiplicity of suits, before any case was tried?

Is that relevant to this case as showing good faith and the fact that the defendants didn't think they had a case?

542 Mr. KLEINFELD: I urge that the only other issue in this case besides constitutionality is whether the Administrator, in making his determination of probable cause, acted arbitrarily or illegally and this has nothing to do with it.

JUDGE GOLDSBOROUGH: Suppose it appears, by necessary inference, that the defendants wanted to avoid a trial: isn't that evidence that the defendants didn't think they were justified in doing what they did?

Mr. KLEINFELD: I don't think so.

JUDGE GOLDSBOROUGH: I do.

JUDGE CLARK: I certainly do. One of the allegations in this case is that the Commissioner or whoever did this, acted in an arbitrary and oppressive manner. That is not only an issue in the original finding but it is the whole force of the case.

If they have done that—how many libel suits have you filed—eleven?

Mr. KLEINFELD: I believe ten, your Honor.

JUDGE CLARK: Whether it is ten or eleven, but they have gone around and filed suits all over the country, they have refused to bring them to trial, they refused to allow them to be consolidated and transferred into one case, and it seems to me that that whole business goes directly to the question of whether the whole course of action of the Food & Drug Administration was arbitrary

543 and oppressive. Don't you think so, Judge?

JUDGE GOLDSBOROUGH: Yes.

JUDGE CLARK: Don't you think so, Judge?

JUDGE TAMM: Yes.

Mr. KLEINFELD: There isn't any evidence at all that the Government didn't want to bring those actions on for trial. The law permits the plaintiff in this case at the present time to go to one of these courts and have the case removed as a matter of right.

JUDGE CLARK: It is my understanding that they did do that in the Jersey case and the Government came in and strenuously opposed it.

Mr. KLEINFELD: That was done in the Jersey case only a month or two ago and they asked that it be removed to Southern California, where we think they have no legal right to have it removed. We have been willing from the very first, when the suit was first

started, to have these cases started in any district where one of these ten seizure actions was instituted or any district adjacent to the Southern District of California, which is the home district of the plaintiff.

We have always been willing to do that and the record so shows:

JUDGE CLARK: Mr. Kleinfeld, the opening statement of
544 plaintiff's counsel was not in any manner denied by you in your opening statement. I have no personal knowledge on the circumstances whatever. Here was testimony going to that very point by a man who represented the plaintiff and I think it is an extremely material and relevant point as going to the question of arbitrary and oppressive conduct.

Mr. RHYNE: I would like to ask counsel for the defendants to stipulate that John P. Harvey, who signed the memorandum which I read into the record as a part of Exhibit 3 and who said in part that Myers is an astute attorney, a specialist in food and drug cases, and so forth, that he is the Director of Litigation in the Food and Drug Administration.

Mr. KLEINFELD: He is. John L. Harvey.

Mr. RHYNE: He is the one who signed that memorandum.

JUDGE GOLDSBOROUGH: Just remember John L. Sullivan and you will have no trouble.

Mr. RHYNE: Thank you. There was a reference made in Mr. Myers' reference to a deposition dated October 4. I have had copies of that made as I obtained it from your files, and I want to offer it in evidence as Plaintiff's Exhibit No. 17.

JUDGE CLARK: It may be admitted.

(Plaintiff's Exhibit No. 19 was received in evidence.)

545 Mr. RHYNE: I will not read it. If the Court please, I would like to read in evidence, as an admission, a sworn statement made by J. Donald Kingsley, the Acting Administrator of the Federal Security Agency, who made the decision condemning this pamphlet because he was Acting Administrator of the Social Security Agency. The statement is this:

"By Mr. Rhyne: Were you presented with any facts showing that Nutrilite or its labeling had injured or damaged any purchaser or consumer?"

Mr. Kleinfeld said:

"Same objection. Attempting to probe into mental processes."

And the witness:

"No, sir."

Then by Mr. Rhyne:

"Were you presented with any facts showing that and purchaser or consumer had complained of injury from Nutrilite or its labeling?"

Mr. Kleinfeld said:

"Same objection on the same ground."

The witness:

"Not to my knowledge, no, not to the best of my recollection."

Mr. KLEINFELD: Since Mr. Rhyne is reading from this
546 deposition we will want on our direct case to read the entire deposition.

JUDGE CLARK: You have a perfect right to do that, Mr. Kleinfeld.

Mr. RHYNE: Then I would like to read the sworn statement of Charles W. Crawford, Associate Commissioner of Food and Drugs, who made the initial decision—one of these three decisions that Judge Pine held unlawful—condemning this pamphlet.

He made this under oath in a deposition that is on file, and which we took on September 21, 1949. The question was this:

"Well now let me state by question another way. You didn't then have before you any facts showing that any purchaser or consumer had been injured by Nutrilite Food Supplement or its labeling prior to the time of your determination of 30 September, 1948?"

"A. No, I did not."

Mr. RHYNE: I may say that Mr. Crawford is, of course, one of the defendants in the case. I would also like to read the sworn statement of Mr. George P. Larrick, another one of the defendants and an Associate Commissioner of Food and Drug, in his deposition taken April 25, 1949. The question which was asked by me:

547 "But you knew of no facts showing that anyone has actually been injured by Nutrilite labeling?"

"No, I have no such knowledge."

He also made a decision condemning our pamphlet. I also at this time would like to read a sworn statement by another defendant, Dr. Paul V. Dunbar, Commissioner of Food and Drugs, on Tuesday, 19 April, 1949, when I asked him the question:

"Now, Doctor, you say 'likely to cause injury'. Do you have any knowledge of any facts which show that Nutrilite or its labeling has ever caused injury to any person?"

"A. No, I can't say that I personally have any knowledge of those facts."

"Q. No such facts have ever been called to your attention?"

"A. Not at all. But it is a fair conclusion that the make-up of this booklet is such as to appeal to a great many people who are suffering from very serious disease conditions and create in their minds the erroneous impression that this will cure a vast number of ailments for which it would not be effective in the judgment of our medical people."

"Q. Now, Doctor, have you seen any complaints from any users of Nutrilite?"

"A. No."

548 "Q. That they have been injured or damaged?"

"A. I have not.

"Q. Have you heard of any complaints from any users of Nutrilite that they have been injured or damaged?"

"A. I have not."

Mr. RHYNE: At this time I ask that there be marked as our next exhibit—I guess it is Exhibit Number 18—a copy of the reporter's transcript of proceedings in Los Angeles, California, on Monday, 6 June, 1949, pages 1 to 19.

JUDGE CLARK: Mr. Rhyne, excuse me. Did you offer this Exhibit 19?

Mr. RHYNE: Exhibit 17, yes I did, your Honor.

JUDGE CLARK: My copy is 19.

Mr. RHYNE: Lee J. Myers to the Food and Drug Administration. I suppose I am wrong in my numbering. I thought I was up to 17.

JUDGE CLARK: Judge Tamm calls my attention to the fact that the Court admitted it as Number 17.

Mr. RHYNE: I believe I offered it as Exhibit 17.

JUDGE CLARK: It has already been admitted.

Mr. RHYNE: The exhibit I now have would be Number 18, then, this transcript of the proceeding before Judge Harrison in the criminal case. I don't have extra copies of it. I will just have to offer the original. I am sure you have seen it.

549 Mr. KLEINFELD: For identification.

Mr. RHYNE: Yes.

JUDGE TAMM: Your Plaintiff's Exhibit Number 17 is a picture of the intestines of monkeys, for your information.

Mr. RHYNE: You are right, your Honor. I didn't have enough to keep one myself so you are correct. I am very sorry then. May I ask the privilege of renumbering my exhibits so that the Myers' letter will be Number 18 and this transcript of the proceedings before Judge Harrison——

JUDGE CLARK: Isn't there a Number 18?

Mr. RHYNE: Am I still wrong?

THE CLERK: I have the deposition of Myers as Exhibit 18.

Mr. RHYNE: We read all of that in. I didn't know I was offering it as an exhibit.

THE CLERK: I took it as an offer, your Honor.

Mr. RHYNE: All right, then. We will make the Lee Myers letter Number 19—you are correct, your Honor—and the Judge Harrison transcript Number 20. I hope I am straight now.

JUDGE CLARK: Very well.

(Plaintiff's Exhibit No. 20 was marked for identification.)

550 Mr. RHYNE: I will offer the transcript—no, I will just mark it for identification so it will be part of the record. I suppose it is all hearsay but at least it will be a part of the record if I have it marked for identification.

Then on this latest question about what happened in Newark when they opposed by motion for consolidation and removal. I offer the transcript of the argument before Judge Fake on Monday, September 19, 1949.

Will you mark that?

(Plaintiff's Exhibit No. 21 was marked for identification.)

JUDGE CLARK: It may be admitted.

Mr. KLEINFELD: Did you Honor admit that in evidence?

JUDGE CLARK: Yes.

Mr. KLEINFELD: I object to that, your Honor, as being irrelevant

JUDGE CLARK: It is certainly relevant.

(Plaintiff's Exhibit No. 21 was received in evidence.)

Mr. RHYNE: At this time I would like to ask Mr. Kleinfeld whether they are willing to agree that the 58-page book, Exhibit Number 1, which we offered in evidence is admissible within our stipulation that it is identical with your——

Mr. KLEINFELD: Yes.

551 Mr. RHYNE: And the 36-page Exhibit Number 2?

Mr. KLEINFELD: We so stipulate.

Mr. RHYNE: And the 42-page which we will give to the reporter for inclusion in the record?

Mr. KLEINFELD: Yes.

Mr. RHYNE: Thank you. May all three be admitted?

JUDGE CLARK: Yes.

(Plaintiff's Exhibits Nos. 1, 2 and 3 were received in evidence.)

Mr. RHYNE: It is called to my attention that this Exhibit Number 11, which is this telegram, was never formally admitted into evi-

dence. It was the telegram sent out to the distributors which I read into the record and offered as an exhibit.

JUDGE CLARK: That may be admitted.

(Plaintiff's Exhibit No. 11 was received in evidence.)

Mr. RHYNE: At this time I would like to read into the record certain admissions made by the defendant in response to our request. I am reading from our second request for admission. The first request that I asked the defendants to admit was this:

"Number 1. The records of the Food and Drug Administration disclose that the estimated value of Nutrilite and its labeling
552 which have been seized throughout the United States is as follows for the indicated cases."

May I merely read the total amount, Mr. Kleinfeld?

Mr. KLEINFELD: Yes.

Mr. RHYNE: "Total $6,822.17." And the response was: "Defendants admit the statements in Request 1."

Request 2 was that I asked the defendants to admit that:

"In December, 1948, the Food and Drug Administration was preparing to make further seizures of Nutrilite and its labeling in jurisdictions other than those in which seizures were actually made."

The response:

"Defendants admit the statements in Request 2."

Then Request 21: I asked the defendants to admit:

"All letters of the Food and Drug Administration to the various United States District Attorneys in the United States concerning Nutrilite have included the words 'immediate seizure is requested'."

The defendants' response:

"Defendants deny the statements contained in Request 21, except that Defendants admit that letters from the Office of the General Counsel, Food and Drug Division, Federal Security Agency to United States District Attorneys requesting the institution
553 of seizure actions against Nutrilite have included the words 'immediate seizure is requested.'"

Then from our first request to them for admissions, Request 32. They were requested to admit:

"The label of the package in which Nutrilite is sold is not violative of the Federal Food, Drug and Cosmetic Act of 1938."

Response:

"Defendants admit the statements contained in Request 32."

554 Request No. 33. "No copies of the September 30, December 2 and 9, 1948 and January 28, 1949, decisions authorizing the institution of multiple seizures were transmitted to or disclosed to the Plaintiff until January 17, 1949, and January 31, 1949, respectively, when copies of said decisions were filed in Court."

Response: "Defendants admit the statements contained in Request 33."

Request No. 34: "The Food and Drug Administration has never conducted any controlled experiment to determine the effect of Nutrilite upon deficiency diseases or any other ailment."

Response: "Defendants admit the statements contained in Request 34, but assert that the vitamins and minerals of which Nutrilite is composed have been the subject of controlled experiments with respect to deficiency diseases or other ailments, the results of which are known to the Food and Drug Administration."

Request No. 82: "With respect to Nutrilite, the Food and Drug Administration has never consulted any medical doctor who specializes in nutritional deficiencies."

555 Response: "Defendants admit the statements contained in Request 82 except that officials of the Food and Drug Administration have with respect to the ingredients and substances contained in Nutrilite consulted many medical doctors who specialize in nutritional deficiencies."

Request No. 83: "Deficiency or dietary diseases exist in fact."

Response: "Defendants admit the statements contained in Request 83."

Request No. 85: "The booklet 'How to Get Well and Stay Well' specifically suggests in a number of instances that people go to see doctors."

Response: "Defendants admit the statements contained in Request 85."

Request No. 64: "Nutrilite contains vitamins which could aid in the cure or prevention of a Vitamin A deficiency."

Response: "Defendants deny the statements contained in Request 64, but admit that Nutrilite contains Vitamin A which could aid in the cure or prevention of a Vitamin A deficiency."

Request No. 65: "Nutrilite contains vitamins which could aid in the cure or prevention of a Vitamin B_1 deficiency."

556 Response: "Defendants deny the statements contained in Request 65, but admit that Nutrilite contains Vitamin B_1 which could aid in the cure or prevention of a Vitamin B_1 deficiency."

Request No. 66: "Nutrilite contains vitamins which could aid in the cure or prevention of a Vitamin B_2 deficiency."

Response: "Defendants deny the statements contained in Request 66, but admit that Nutrilite contains Vitamin B2 which could aid in the cure or prevention of a Vitamin B2 deficiency."

Request No. 67: "Nutrilite contains vitamins which could aid in the cure or prevention of a Vitamin C deficiency."

Response: "Defendants deny the statements contained in Request 67, but admit that Nutrilite contains Vitamin C which could aid in the cure or prevention of a Vitamin C deficiency."

Request No. 68: "Nutrilite contains vitamins which could aid in the cure or prevention of a Vitamin D deficiency."

Response: "Defendants deny the statements contained in Request 68, but admit that Nutrilite contains Vitamin D which could aid in the cure or prevention of a Vitamin D deficiency."

Request No. 69: "Nutrilite contains vitamins which could
557 aid in the cure or prevention of a Vitamin K deficiency."

Response: "Defendants deny the statements contained in Request 69, but admit that Nutrilite contains Vitamin K which could aid in the cure or prevention of a Vitamin K deficiency."

Request No. 70: "Nutrilite contains vitamins which could aid in the cure or prevention of a niacinamide deficiency."

Response: "Defendants deny the statements contained in Request 70, but admit that Nutrilite contains niacin which could aid in the cure or prevention of a niacinamide deficiency."

Request No. 71: "Nutrilite contains minerals which could aid in the cure or prevention of a deficiency in iron."

Response: "Defendants admit the statements contained in Request 71.

Request No. 72. "Nutrilite contains minerals which could aid in the cure or prevention of a deficiency in calcium."

Response: "Defendants admit the statements contained in Request 72."

Request No. 73: "Nutrilite contains minerals which could
558 aid in the cure or prevention of a deficiency in phosphorous."

Response: "Defendants admit the statements contained in Request 73."

Request No. 74: "Nutrilite contains minerals which could aid in the cure or prevention of a deficiency in iodine."

Response: "Defendants admit the statements contained in Request 74."

Request No. 76: "Because of its vitamin and mineral contents, Nutrilite could assist in the cure and prevention of vitamin deficiency diseases."

Response: "Defendants admit the statements contained in Request 76 as qualified by Defendants' answers to Requests 64-74, inclusive, except that the need in human nutrition for Vitamin E, inositol, para-aminobenzoic acid, and pantothenic acid has not been established."

Request No. 77: "The Food and Drug Administration has no

policy which discourages people from using vitamins for deficiency diseases."

Response: "Defendants admit the statements contained in Request 77 only when such use is consistent with safety and efficaciousness. For example, Vitamin D, when taken in massive doses (50,000 units) is unsafe for lay use. Further, a layman
559 cannot determine whether the common symptoms referred to in the booklet 'How to Get Well and Stay Well' are in fact due to a vitamin or mineral deficiency disease."

Request No. 78: "Official Government publications, medical books, and the scientific literature in the field are considered by the Federal Security Agency and the Food and Drug Administration in determining whether or not labeling of drugs is misleading in a material respect to the injury or damage of the purchaser or consumer."

Response: "Defendants admit the statements contained in Request 78 except that such literature is only part of the total of materials and information utilized in determining that the labeling of a drug would be misleading in a material respect to the injury or damage of the purchaser or consumer."

Request No. 79: "In determining whether labeling complies with the Food, Drug and Cosmetic Act, the Federal Security Administrator and the Commissioner of Food and Drugs base their opinions upon the consensus of medical opinion."

Response: "Defendants deny the statements contained in Request 79 except that they admit that in determining
560 whether a drug will be efficacious in the prevention, treatment or cure of any particular disease the Federal Security Administrator and the Commissioner of Food and Drugs rely upon a medical doctor who advises them as to the medical facts."

Mr. RHYNE: Now I would like to read Admission No. 11 of the first request for admissions.

Request No. 11: "A deficiency of Vitamin A creates conditions known as 'night blindness' and xerophthalmia and that Vitamin A is a specific for the same; a deficiency of Vitamin A may cause certain respiratory infections to occur; although it has not been definitely established, it has been claimed that a deficiency in Vitamin A creates a lack of resistance to infection; and persons suffering from diarrhea require more Vitamin A than is normally required."

Response: "Defendants admit the statements contained in Request 11 through the word 'same', except that they deny the inference that night-blindness is always due to a deficiency of Vitamin A and further deny that Vitamin A is a specific for night-blindness unless such condition is in fact caused by a Vitamin A de-
561 ficiency. Defendants deny the statement beginning with the words 'a deficiency' and ending in the word 'occur.' De-

fendants admit the statement beginning with the word 'although' and ending in the word 'infection', but deny that there is any substantial evidence to support such claims. Defendants deny the last statement, since in such a condition the body requirements for Vitamin A remain the same as when normal, but admit that persons suffering from chronic diarrhea may evacuate some Vitamin A before it can be utilized by the body."

562 Mr. RHYNE: I wonder if, in order to save time in reading these, counsel for the defendants would agree that I can offer these without reading them in full, offer them for the record, and the reporter can just copy them in, or would you like for me to read them?

I will just call attention to the ones that I would like to have in the record. May I do that?

Mr. KLEINFELD: Surely.

Mr. RHYNE: Because they all relate to symptoms of various vitamin deficiencies. Is that agreeable with the Court?

JUDGE CLARK: It is agreeable to the Court.

Mr. RHYNE: I would like our requests for admission Nos. 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 27, 28, and 30 inserted in the record at this point.

Mr. GOODRICH: My understanding was that the objection to No. 19 was sustained.

Mr. RHYNE: I am sorry. That is with respect to Vitamin E, Mr. Goodrich?

Mr. GOODRICH: Yes.

Mr. RHYNE: That was what the biochemist claims Vitamin E prevents. Yes, 19 was an error. You are right. It should be 20 and 21. 21 is not exactly like the others. I will read it. The others are correct the way I gave them to you.

(The requests and responses referred to are as follows:)

563 Request No. 21: "Abnormalities unrelated to a deficiency of any single vitamin but commonly observed in persons who are malnourished are dryness of hair and skin, low blood pressure, anemia, and loss of muscle tone."

Response: "Defendants admit the statement contained in Request 21 but deny that these symptoms are found exclusively as symptoms of malnutrition."

Request No. 13: "A deficiency of Riboflavin (Vitamin B2 or G) may result in pellagra; one of the most characteristic clinical signs in Riboflavin deficiency is angular stomatitis and other special lesions; prominent among the symptoms of ariboflavinosis, and other B-Complex deficiencies are anorexia, weight loss, weakness, and inability to perform mental work; digestive disturbances, nervousness, vague pains in various parts of the body, hearaches, dizziness, mental depression, and insomnia and certain characteristic

skin lesions are common complaints of those suffering from a deficiency of Riboflavin and other B-Complex vitamins; subclinical pellagra is difficult to detect and has resulted in many errors in medical diagnosis."

Response: "Defendants deny the statements contained in Request 13 starting with the words 'a deficiency' and ending in
564 'pellagra.' They admit, from the words 'one of' to 'special lesions'; deny, from 'prominent among' to 'mental work.' Admit, from 'digestive disturbances' to 'B complex vitamins' but deny that these symptoms are found exclusively as a result of a deficiency of the B complex vitamins since some of the symptoms listed commonly are present in nearly every disease condition. Defendants cannot admit or deny the statement starting with the word 'subclinical' and ending with the word 'diagnosis' for the reason that subclinical pellagra may be difficult to detect in some cases and quite easily detected in other cases. Further defendants have no information nor can they obtain information with respect to the number of errors in medical diagnosis for this or any other disease."

Request No. 14: "A deficiency of thiamine (Vitamin B1) may result in the disease termed beriberi; a deficiency of thiamine usually causes a loss of appetite and the onset of nervous disorders; mild thiamine deficiencies are not uncommon in the United States; such mild deficiencies may be responsible for certain heart and nerve troubles; and there is definite evidence that thiamine is of value in the treatment of alcoholic neuritis, the neuritis of
565 pregnancy and the neuritis of pellagra."

Response: "Defendants admit the statements contained in Request 14 beginning with 'a deficiency' and ending in 'beriberi'. Defendants can neither admit nor deny statement beginning with the words 'a deficiency' and ending in 'nervous disorders', for the reason that the degree of deficiency and the specific type of nervous disorders are not stated but defendants admit that a severe deficiency of thiamin usually does cause a loss of appetite and the onset of a nervous disorder known as neuritis. Defendants deny the statement begining 'mild thiamin' and ending 'United States.' With respect to the statement beginning 'such mild' and ending 'nerve troubles,' defendants deny this statement as pertaining to certain heart troubles and admit it with respect to the nerve trouble known as neuritis. Defendants admit the statements beginning 'when there is' and ending in 'pellagra' only when such conditions are a result of the thiamin deficiency."

Request No. 15: "A deficiency in B-Complex vitamins has in certain clinical studies resulted in nausea, vomiting, constipation, loss of interest and ambition, impairment of appetite, lower-
566 ing of blood-pressure and slight edema."

Response: "Defendants admit the statements contained in

Request 15 but deny that these symptoms are found exclusively as a result of a deficiency of the B-complex vitamins since some of these symptoms are commonly found in nearly every disease condition."

Request No. 16: "Clinical observations indicate that niacinamide (nicotinic acid) is an essential dietary ingredient and the lack of it is closely related to the clinical condition known as pellagra; that one of the chief symptoms of a mild nicotinic acid deficiency (termed sub-clinical pellagra) are nervousness, indigestion, diarrhea, and headaches."

Response: "Defendants admit the statements contained in Request 16 but deny that the symptoms, nervousness, indigestion, diarrhea and headaches are found exclusively as a result of a nicotinic acid deficiency since they are commonly present in almost every disease condition."

Request No. 17: "Vitamin C (Ascorbic Acid) is acceptable for the correction and prevention of scurvy; dental caries, pyorrhea, certain gum infections, anorexia, and anemia may be concomitant signs of Vitamin C deficiency; a shortage of Vitamin C may result
567 in local hemorrhages; an adequate amount of Vitamin C will prevent certain types of anemia; Vitamin C is involved in the body's defense against infections and bacterial toxins; and the mild symptoms of Vitamin C deficiency may be defective teeth and gums, poor lactation, and loss of appetite."

Response: "Defendants admit the statements contained in Request 17, beginning with 'Vitamin C' and ending in 'scurvy.' Defendants admit the statement contained in this request from the words 'dental caries' to 'deficiency', but deny that such symptoms are found exclusively as concomitant symptoms of a Vitamin C deficiency. Defendants admit the statement contained in this request from the words 'a shortage' to 'hemorrhages,' but deny that local hemorrhages result exclusively from shortages of Vitamin C. Defendants admit the statement beginning 'Vitamin C is involved' and ending in 'toxins' but deny that Vitamin C in excess of the Food and Nutrition Board's recommended daily allowance assists in the body as a defense against infection and bacterial toxins. Defendants admit that defective teeth and gums and loss of appetite may be symptoms of Vitamin C deficiency but deny that poor lactation is a symptom of Vitamin C deficiency,
568 or that these symptoms are necessarily mild, or that such symptoms are found exclusively as a result of a Vitamin C deficiency."

Request No. 18: "Vitamin D is recognized as a specific in the treatment of rickets; there is clinical evidence to justify the statement that Vitamin D is important in tooth formation and that Vitamin D is a beneficial factor in arresting dental caries; during pregnancy and lactation the requirements of Vitamin D are greater

than that normally required; and the chief function of Vitamin D is to promote the intestinal absorption of calcium and phosphorus."

Response: "Defendants admit the statements contained in Request 18, but deny that Vitamin D is important in tooth formation and that Vitamin D is a beneficial factor in arresting dental caries except when the intake of calcium and phosphorus is liberal and the diet is adequate with respect to other nutrients."

Request No. 20: "It is clinically well-established that among persons suffering from biliary fistulas an abnormal tendency to bleed sometimes develops and that in these instances there
569 is an associated deficiency of prothrombin in the circulating blood which can be corrected by Vitamin K; that Vitamin K has proved to have an extraordinary protective effect against hemorrhagic diathesis in obstructive jaundice; that a symptom of Vitamin K deficiency is a tendency to bleed particularly from minor wounds."

Response: "Defendants admit the statements contained in Request 20 through the words 'circulating blood' but deny that such condition can be corrected by oral administration of Vitamin K. Defendants further deny from the words 'Vitamin K' through 'jaundice', when Vitamin K is administered orally. Defendants admit the rest of the statements contained in Request 20."

Request No. 24: "A deficiency in iron may result in a condition known as iron deficiency anemia; and an adequate supply of iron is essential to blood building."

Response: "Defendants admit the statements contained in Request 24, but deny that iron is the only essential factor in blood building."

Request No. 25: "Calcium is necessary to the coagulation of the blood; calcium is essential in regulating the action of heart muscle; and a deficiency in calcium increases the irritability
570 of all types of muscles."

Response: "Defendants admit the statements contained in Request 25, but deny that calcium is the only factor which is responsible for the results enumerated."

Request No. 27: "Phosphorus is essential in nutrition and that during pregnancy and lactation extra phosphorus is needed."

Response: "Defendants admit the statements contained in Request 27."

Request No. 28: "Iodine is of unquestionable need in the human body."

Response: "Defendants admit the statements contained in Request 28."

Request No. 30: "Vitamin B-complex is commonly employed in the supplementary treatment of arthritis where there may be clinical evidence of its deficiency shown by the presence of anorexia and peripheral neuritis."

Response: "Defendants admit the statements contained in Request 30, except that Defendants deny that a Vitamin B deficiency, anorexia or peripheral neuritis are commonly associated with arthritis."

571 JUDGE CLARK: The Court will take a five-minute recess.

(Whereupon a short recess was taken.)

JUDGE CLARK: All right, Mr. Rhyne.

Mr. RHYNE: Mr. Kleinfeld, in our first requests for admissions, we have some requests also relating to the symptoms of the various vitamin deficiencies. I wonder if we could handle those in the same way as the ones we just had inserted in the record.

Mr. KLEINFELD: Yes. Point out the numbers, please.

Mr. RHYNE: 6, 7, 8, 9, 10, 11, 12, 13, and 14.

My attention is called to the fact that these are in the second requests for admissions that we made. I will give those to the reporter.

(The requests and responses referred to are as follows:)

572 Request No. 6: It is true that symptoms of Vitamin B-1 deficiencies include low vitality, swelling of the lower extremities, enlargement of the heart, ~~over~~ fatigue, loss of appetite, gastrointestinal upsets in the more severe conditions and inactivity."

Response: "Defendants admit that the symptoms enumerated in Request 6 may be included among the symptoms of a vitamin B-1 deficiency, except that swelling of the lower extremities and enlargement of the heart as well as gastrointestinal upsets are symptoms of a severe vitamin B-1 deficiency. Further defendants deny that these conditions are exclusively symptomatic of a vitamin B-1 deficiency."

Request No. 7: "It is true that symptoms of iodine deficiencies include goitre and the slowing up of the processes of mental and physical growth."

Response: "Defendants admit the statements contained in Request 7 except that the slowing up of the processes of mental and physical growth do not necessarily occur as a result of iodine deficiency and are caused by many conditions other than iodine deficiency."

Request No. 8: "It is true that symptoms of calcium deficiencies include tetany, structural deformities of the bone, and nervousness."

Response: "Defendants deny that nervousness is a common symptom of a calcium deficiency. They admit that tetany
573 and structural deformities of the bone may be caused by a calcium deficiency but deny that these conditions are caused exclusively by a calcium deficiency."

Request No. 9: "It is true that symptoms of an iron deficiency include low color or paleness of the red cells (hypochromic anemia), lack of energy, numbness in the hands and feet, restlessness and palpitations of the heart."

Response: "Defendants deny that numbness of the hands and feet and restlessness are symptoms of an iron deficiency. Defendants admit that palpitations of the heart and lack of energy may be caused by an iron deficiency except that they deny that these conditions are commonly caused or are exclusively caused by an iron deficiency."

Request No. 10: "It is true that symptoms of niacin deficiencies include sore tongues and skin changes."

Response: "Defendants admit the statements contained in Request 10 except that they deny that sore tongue and skin changes are commonly caused or exclusively caused by a niacin deficiency."

Request No. 11: "It is true that symptoms of vitamin D deficiencies in children include poor bone development or defective shape of bone, poor development of the teeth, muscle soreness and numbness."

Response: "Defendants admit that symptoms of vitamin
574 D deficiencies in children include poor bone development, defective shape of bone and poor development of teeth except that these conditions are rarely found in children. Defendants admit that such symptoms may be found in infants. Defendants deny that muscle soreness and numbness are symptoms of Vitamin D deficiencies in children or people of other ages."

Request No. 12: "It is true that symptoms of vitamin B-2 deficiencies include a reddening and scaliness of the lips and sores in the angles of the mouth (perleche)."

Response: "Defendants admit the statements contained in Request 12 except that they deny that such sympfoms are found exclusively as symptoms of a vitamin B-2 deficiency."

Request No. 13: "It is true that symptoms of vitamin C deficiencies include soreness and bleeding of the gums, sponginess of the gums, X-ray changes on bone, small hemorrhages (ecchymosis) due to capillary permeability, greater susceptibility to infection, rheumatic pains, loose teeth, and swelling of the elbows and ankles."

Response: "Defendants admit the statements contained in Request 13 but deny that these symptoms, with the exception of X-ray changes on bone, are found exclusively as symptoms of a vitamin C deficiency."

Request No. 14: "It is true that symptoms of vitamin A deficiencies include inflammations of the skin, ulcerations of the cornea, gastrointestinal disturbances, night blindness, and greater susceptibility to infection."

575 Response: "Defendants admit the statements contained in Request 14 except that, with the exception of night blind-

ness, the conditions enumerated are rarely caused by a vitamin A deficiency.

576 Mr. RHYNE: The plaintiff has one other short deposition which I will not read at all if the attorneys for the defendant will concede that Mr. Truesdail, a chemist, testified that in 6 months Nutrilite would deteriorate and be unsalable.

Do you recall his deposition, or would rather I read it?

Mr. KLEINFELD: I will object to it on the ground that it is not relevant to the issues in this case, your Honor.

JUDGE CLARK: I think it is relevant. Mr. Truesdail is a chemist.

Mr. RHYNE: The only point I wanted to prove was the product became worthless. I will read the deposition then.

JUDGE CLARK: The objection is overruled, Mr. Kleinfeld.

Mr. RHYNE: It is only 7 pages long.

E. J. BRADLEY was recalled as a witness, having been previously sworn, was further examined and testified as follows:

Mr. RHYNE: Before I read this deposition I want to read the question and answer of one of the interrogatories submitted to the defendant:

"No. 50: Would not any slight deterioration below the amounts set forth on the label of Nutrilite make the product unsalable under that label?"

Response: "The product would violate the Federal Food, Drug and Cosmetic Act."

577 This is the deposition of:

"Roger W. Truesdail, called as a witness on behalf of the plaintiff herein, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

"Direct examination.

"By Mr. Lev:

The deposition is of record here and was taken on June 7, 1949, at Los Angeles, California. The direct examination is by Mr. Lev, as follows:

Direct examination.

By Mr. Rhyne:

Q. "What is your full name?"
A. "Roger W. Truesdail."
Q. "Dr. Truesdail, what is your occupation?"
A. "I am a consulting chemist."
Q. "You have your own laboratory?"

A. "Yes, I do."

Q. "That is located where?"

A. "4101 North Figueroa Street, Los Angeles."

Q. "Now, just to save asking a lot of questions, will you tell us your qualifications, education, and experience?"

A. "I have a Bachelor of Science degree in chemistry from the University of Redlands; a Master of Science degree from the University of Oregon."

578 Q. "Pardon me. This University of Redlands was when?"

A. "1921. The Master of Science, University of Oregon, was 1922. A Ph.D degree in chemistry from the University of Washington in 1926."

Q. "Have you had any experience in teaching chemistry?"

A. "Yes, I have. I have taught at the University of Redlands, University of Nevada, Pomona College, the University of Southern California."

Q. "Do you belong to any organizations of chemists or scientists?"

A. "Yes. I am a Fellow of the American Association for the Advancement of Science. I am a Fellow of the American Institute of Chemists. I am a charter member of the Institute of Food Technologists, and also a charter member of the American Council of Commercial Laboratories. I am a member of the American Chemical Society, and a member of the American Public Health Association."

Q. "Have you held any office in any of the scientific organizations?"

A. "I have been the chairman of the Southern California Section of the American Chemical Society."

Q. "What is the scope of that Society?"

A. "Well, it is a section of the national American Chemical Society, and with a present membership of about 1500

579 chemists."

Q. "Have you ever done any work for any of the public agencies such as Better Business Bureaus and so forth?"

A. "I have been a consultant for the Food and Drug Division for the Better-Business Bureau here in Los Angeles, yes."

Q. "Have you ever appeared in any of the courts of this State or Federal Courts as an expert witness in regard to foods or drugs?"

A. "Yes; on numerous occasions since 1931."

Q. "Have you ever had any connection with the California Bureau of Food and Drugs?"

A. "I have appeared in hearings and in court cases involving matters relative to clients who have been called by the California Department of Public Health, food and drug inspection."

Q. "Do you know whether there is such an office as a referee in the State of California Food and Drug Enforcement Division?"

A. "We have served several times as a referee in cases that did not go as far as court action."

Q. "You say 'we.' I take it that you refer to your laboratories?"

A. "I refer to our laboratories, yes."

Q. "Have you served in any post with respect to any other
580 State agencies?"

A. "Our laboratories are the official chemists for the California Horse Racing Board, and have been for 12 years."

Q. "How long have you had your laboratories here in Los Angeles?"

A. "Since 1931."

Q. You serve the public generally, not only on chemical matters in general but also nutrition matters?"

A. "Yes, we work in the field of biochemistry, which includes nutrition and industrial bacteriology as well."

Q. "Now, biochemistry, does that include the study of vitamins?"

A. "Yes, it does."

Q. "You and your laboratories have done that type of work for how long?"

A. "Our laboratories have been doing that since the time we were established. I have been working in the field of vitamins since 1925."

Q. "Vitamins were not very much older than that, were they?"

A. "Well, back in 1925 they were still talking about the vitamin theory."

Q. "Now, with your experience in the field of vitamins, biochemistry, and nutrition, do you have an opinion as to whether
581 or not the lapse of time has any effect in the potency of a multiple vitamin product?"

A. "Yes, I do have an opinion on that."

Q. "What would your answer be?"

A. "Well, my answer would be that there would be a gradual loss of certain vitamin factors with prolonged storage of the product."

Q. "Would the length of time, the relative length of time, have an effect on the relative loss, that is, the longer the time, the more loss?"

A. "Yes, that would be true."

Q. "So that if a multiple vitamin product were kept without use, without being used, for a period of a year or so, you would expect to find loss of potency; is that correct?"

A. "I would expect to find some loss of potency over its original potency when it was made."

Q. "Now, do you and your laboratory have any policy with respect to the length of time that multiple vitamins should be kept on store shelves before used?"

A. "Only to the extent that we advise our clients in general to try and move their stock so that there will not be any on the shelves, if possible, any longer than six months. We feel that

is a safety factor, and beyond that six months period
582 there may be a substantial loss of certain of the more unstable vitamins."

Mr. RHYNE: Mr. Dickerman, counsel for the defendant, stated: "I have hesitated to break in up to this point, but I would like to object to this entire line of inquiry on the ground that the issues that are being discussed are not, as I understand it, raised by the pleadings pending before the 3-Judge District Court, and there is no proper foundation laid for a hypothetical question such as that."

Since the Court has already ruled, I won't read all of this discussion between counsel unless Mr. Kleinfeld especially wants me to. I will go directly to Mr. Lev's next question:

By Mr. Rhyne:

Q. "Now, your statement to the effect that multiple vitamin products in your opinion should be moved to the consumer within six months, and I take it that means six months after compounding and manufacturing?"

A. "That is correct."

Q. "Do you apply that also to multiple vitamin products of similar nature to Nutrilite?"

A. "Well, we apply it to all vitamin products."

Q. "Including Nutrilite?"

A. "Including Nutrilite."

Q. "You are familiar with Nutrilite, are you not?"

A. "Yes."

583 Mr. RHYNE: Mr. Lev: "I think that is all.

"Mr. Dickerman: No questions."

DEFENDANTS' MOTON TO STRIKE ADMISSIONS

Mr. KLEINFELD: When Mr. Rhyne read these various admissions which the defendants made pursuant to requests for admissions, the defendants, of course, made the admissions. We at no time, however, were of the view—and are not of the view now—that those admissions with respect to the general effects of vitamins or vitamin products were relevant.

We believe that they have no relevancy in this case and ask that they be stricken from the record.

JUDGE CLARK: Motion is denied.

Mr. RHYNE: That completes the plaintiff's case.

JUDGE CLARK: Mr. Kleinfeld?

Mr. KLEINFELD: Will the Court entertain a motion to dismiss? May I address the Court on that?

JUDGE CLARK: Very well. You may proceed, Mr. Kleinfeld.

584 ARGUMENT ON MOTION TO DISMISS

Mr. KLEINFELD: May it please the Court, Section 304(a) of the Federal Food, Drug, and Cosmetic Act provides in clear and simple language that, when the Federal Security Administrator has probable cause to believe that the labeling of a drug product is misleading in a material respect, to the injury or damage of the purchaser or consumer, when he determines that, upon the basis of findings made without hearing by subordinate officials, multiple seizures may be made.

What, essentially, the plaintiff has claimed here, from the beginning, is two things:

The first is this: Since the statute provides that multiple seizures may be made upon that administrative determination, and since that administrative determination may be arrived at without a hearing, the plaintiff contends that, as far as the plaintiff's product is concerned, the law is unconstitutional.

Both sides have argued that point in briefs and in oral discussion before the Court on the motion to dismiss the amended complaint, so I will not go into that question at all. That perhaps might be reserved by the Court or decided by the Court independently of the other issue before this Court.

The second contention made by the plaintiff, as indicated in his amended complaint and in his prayer for relief, is this:

585 The plaintiff claims that, assuming that these multiple seizure provisions, which are set forth in the statute, are valid constitutionally, nevertheless the defendants, when they made that determination of probable cause, upon the basis of which these multiple seizures were instituted—and they could be instituted only upon the basis of such a determination—that the Administrator and the other defendants acted arbitrarily, illegally, and capriciously.

The defendants submitted interrogatories to the plaintiff and asked that the plaintiff list and set forth the illegal acts, the arbitrary acts, the capricious acts, which the amended complaint complains of.

Now, here is what the plaintiff claims is arbitrary or illegal. I urge that this is important, because it sets forth in some detail, what the plaintiff believes has been illegally done by the defendants here.

The first one is:

> "The rendering of three secret unlawful decisions in September and December 1948 that the labeling of plaintiff's product was misleading."

Well, "three secret unlawful decisions." Since the statute permits the decisions to be made without a hearing, they of course can not complain that they were done without a hearing, unless they complain of the constitutionality, so I urge that clearly Item 1 has no bearing on the second issue of alleged arbitrariness.

586 No. 2 is:

> "The carefully concealed fact from plaintiff that such secret decisions had been unlawfully made by the defendants, such fact being first revealed to plaintiff on January 17, 1949."

That again is a conclusion which was not borne out by the statutory provision. The law provides that the determination may be made without a hearing, and there is no requirement that any formal notification be sent to the plaintiff.

> No. 3: "The inflicting of irreparable injury on plaintiff by such decisions."

That is the result of any lawsuit. We admit that they were injured. The only question is whether the injury is an illegal injury. Stating that they were injured is merely stating that they have been sued.

> No. 4: "The deliberate increase in plaintiff's irreparable losses by the unreasonable failure to procure the dismissal of all but the first libel for condemnation or seizure action after all but the first thereof had been judicially declared void and illegal."

With respect to that, if any of these actions were, in the opinion of the plaintiff, illegal, the plaintiff could always at all times,

587 have any one or all of these alleged illegal suits dismissed.

The plaintiff doesn't claim that the plaintiff has ever moved to dismiss any one of these libel suits.

> No. 5: "The denial by the Acting Administrator of the Federal Security Agency of plaintiff's requests for opportunities to be heard upon the question of whether the labeling of plaintiff's product is misleading in a material respect to the injury or damage of purchasers or consumers."

As I have stated, the law provides that these administrative determinations may be made without a hearing.

No. 6: "The further rendering ex parte by the Acting Administrator of the Federal Security Agency of unlawful decisions that the labeling of plaintiff's product is misleading to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact, the case."

Now, Item 6, I urge is the only item upon which possibly some issue can arise. I want to leave that for a moment and come back to it.

No. 7: "The rendering of such ex parte decisions by the Acting Administrator of the Federal Security Agency that the labeling of plaintiff's product was misleading, with full knowledge of the total and ruinous consequences to plaintiff of such decisions."

588 This too complains that the decisions were made ex parte, without a hearing, and again, except with respect to the fundamental constitutional issue, which of course is before this Court, it does not bear on the question of whether the Administrator and the remaining defendants acted arbitrarily or illegally in reaching these determinations of probable cause.

No. 8: "The deliberate and arbitrary refusal of defendants to stipulate to the removal of the pending libel for condemnation or seizure actions to the district in which plaintiff does business."

Now, the law provides in section 304 of the Act that the plaintiff at any time may go to any one of the courts in which a libel suit was instituted, and have all the libel suits removed, consolidated for trial, and tried in any one of those districts, or in a district of reasonable proximity to the plaintiff's home district.

The plaintiff could at any time have had such a removal effected. It was only in the very recent past that plaintiff went to New Jersey where the first libel suit was instituted, and attempted to have it removed to his own district.

There is an unbroken line of cases which holds that a district of reasonable proximity does not include the home district of the person whose product is involved.

589 JUDGE CLARK: That was on the theory of consolidation, was it not?

Mr. KLEINFELD: I am sorry, your Honor?

JUDGE CLARK: I say that action on the part of the plaintiff was on the theory of consolidation. You yourself stated, at the previous hearing, that the plaintiff could move to consolidate those actions and move them any place he wanted to.

That is exactly what he did in New Jersey, as I understand it.

Now you say that he had no right to do that?

Mr. KLEINFELD: No. I say that plaintiff alleges that the arbitrary conduct of the defendant——

JUDGE CLARK: You had one libel against the defendant in California, didn't you?

Mr. KLEINFELD: Not in the Southern district of California, no, sir. The plaintiff claims we were arbitrary and illegal in not stipulating to remove these actions to the Southern District of California, but I have never heard it advanced that a refusal to enter into a voluntary agreement is an arbitrary act.

JUDGE CLARK: I don't think anybody can force you to stipulate unless you want to.

Mr. KLEINFELD: That is the allegation here, your Honor. That is what Item 8 of the answers says.

590 No. 9: "The unreasonable interrogation by defendants, or their agents and employees, of many of plaintiff's distributors and customers with the resulting damage to plaintiff's business and good will thereof and interference with and retardation of the efficiency and morale of plaintiff's sales and distribution organization."

Now, again, I say, as a legal matter, an interrogation of people to find out facts in connection with lawsuits has never been held to be arbitrary. The fact that the beginning of lawsuits, or an investigation with respect to lawsuits, may theoretically retard efficiency and morale is the natural result—or may be—of any lawsuit. That, too, I claim, can not be considered to be an arbitrary act by the administrative people in reaching their determinations of probable cause.

No. 10: "The placing, or causing to be placed, of embargoes upon plaintiff's product in widely scattered jurisdictions of the United States so deliberately planned and calculated as to injure plaintiff."

The Food and Drug Administration has always cooperated with state agencies, and state agencies have always cooperated with the Food and Drug Administration. Asking for assistance in connection with the product which defendants believe was mate-
591 rially false and misleading can not be said to be arbitrary in any way, your Honor.

No. 11: "The giving of untrue information to secure said embargoes."

That is a conclusion, just as much a conclusion as the epithets used in the amended complaint. No evidence at all has been offered

to this Court that any untrue information was ever advanced by the defendants or any of their representatives to secure said embargoes.

The record is absolutely void of any such evidence.

No. 12: "The carefully designed geographic pattern of the libel seizure actions so as to unnecessarily punish plaintiff."

The defendants commenced 10 seizure actions in separate parts of the country, where they happened to find the product. There hasn't been the slightest evidence offered to this Court that there was a carefully designed geographic pattern so as to unnecessarily punish plaintiff—no evidence whatever.

No. 13: "The deliberate and unnecessary punishment of plaintiff by inflicting unnecessary expense through the institution of numerous libel for condemnation or seizure actions in widely separated and far-flung jurisdictions in the United States."

There, too, it is merely an allegation that we have started
592 libel suits. There isn't the slightest evidence in the record——

JUDGE CLARK: Mr. Kleinfeld, isn't it evident from the record of the places that the libel suits have been filed that it puts an intolerable burden on the plaintiff to have to go around all over the country defending those things? Of course, the Food and Drug Administration doesn't care how much it costs to travel around over the country and defend these things.

They have got the United States Treasury behind them, and they are utterly careless of how much expense they run up, but a private defendant is in a very different situation. He is supposed to travel all over the country and retain counsel at various places and go to defend himself, to keep from being put out of business.

He is in a very different situation from an agency of the United States Government.

Mr. KLEINFELD: Except that the statute does provide for consolidation and removal by motion in any one of the districts, so that is no great burden there.

But there, too, I don't see how it is a legal claim of damage to have the Government do what Congress has permitted it to do, unless the Plaintiff has established, by evidence before this Court——

JUDGE GOLDSBOROUGH: Congress doesn't say they must do
593 it unnecessarily. Congress means they can do it reasonably.

You don't think any member of Congress would say that they could simply run around and institute multiple suits unnecessarily, do you?

Mr. KLEINFELD: That is correct, your Honor.

JUDGE GOLDSBOROUGH: All right.

Mr. KLEINFELD: But we say that the plaintiff's case has not

shown here that the defendants were unreasonable or arbitrary. Here is what the plaintiff's case has been so far:

Dr. Casselberry has testified of his various business experiences, that he consulted with a chemist——

JUDGE CLARK: Proceed.

Mr. KLEINFELD: The plaintiff has testified as to the plaintiff's good faith. We have urged to the Court that the question of the plaintiff's good faith is really not in issue, that it is the defendants' good faith. As your Honor Judge Goldsborough has said, if the defendants did act unreasonably and arbitrarily, they should be enjoined, we admit that, your Honor, but I urge that it is up to the plaintiff to prove that the defendants did, in fact, act arbitrarily or unreasonably.

If they did prove that, that is one thing, but I don't know of any evidence offered other than to prove their own good faith, that has been used on the question of the defendants' alleged
594 bad faith.

JUDGE CLARK: Mr. Kleinfeld, you have 10 different libel actions going in various parts of the country. That goes to the question of whether the Food and Drug Administration has been arbitrary and oppressive as to the value of the product.

Mr. KLEINFELD: What your Honor is saying, I think, is that the mere filing of the 10 different libel actions is an unreasonable act?

JUDGE GOLDSBOROUGH: You see, the plaintiff has offered evidence that the book doesn't misrepresent the value of the product. Now that evidence is evidence tending to show that the action of the Administrator was unfair.

Mr. KLEINFELD: If the plaintiff has sustained his burden of showing that.

JUDGE GOLDSBOROUGH: He has offered evidence tending to show it.

Mr. KLEINFELD: The only evidence I can recall is the fact that there was damage, which we admit. Of course there was damage. And (2) testimony of, I think, one witness, the doctor, and in his opinion there was nothing in the booklet which was false and misleading.

That is the only evidence, I believe, the plaintiff has offered on that point, and I urge that that evidence has no tendency to show that defendants acted arbitrarily.

595 JUDGE GOLDSBOROUGH: They offered evidence that the product is a valuable one, and evidence that the booklet doesn't misrepresent the product; is that evidence tending to show that the action of the defendants was arbitrary?

Mr. KLEINFELD: I think it does not, your Honor.

JUDGE GOLDSBOROUGH: I don't understand your reasoning at all.

Mr. KLEINFELD: My reasoning is this: So long as the adminis-

trative officials charged with the administration of this Act have acted in the manner they are supposed to, if the Federal Security Administrator and the remaining officials of the Food and Drug Administration, who made these determinations of probable cause, if they considered these documents, as provided by the statute, if they determined upon the basis of the medical findings made by their subordinate medical officials, and the booklets; that in their opinion, in their honest opinion, this booklet was materially misleading, then I say that they have not acted arbitrarily, even if they were wrong, because the statute doesn't provide for a review.

Of course, if they have said, in any way, "We are trying to——"

JUDGE GOLDSBOROUGH: What you are actually saying is that there is absolutely no protection for a plaintiff in a case of this kind.

596 That is what you are saying. That is the inference.

MR. KLEINFELD: The protection is the removal and consolidation, and bringing on these cases for trial. If, as soon as the second seizure action was started, these defendants had come in to one of those courts where two actions were pending and attempted to consolidate those two actions and have them tried at once, which they didn't do, and then after they had done that, the Government had stepped in and made 8, 10, or a thousand more libel actions, that might be one situation, but that isn't this situation. The plaintiff never attempted, until about a month or two ago——

MR. RHYNE: Mr. Kleinfeld, you know that is a misstatement of the fact. We filed that motion last April. I think you should not deliberately misstate the record on when we attempted to consolidate——

MR. KLEINFELD: I am not misstating it. They have never made a motion and attempted to have these cases consolidated and brought on for trial. As soon as two seizure actions were started they had a perfectly legal right to come in and have them consolidated and tried. They always said, "We want them tried in the Southern District of California, because that is where our witnesses are," but they can come to this Court in the District of Columbia and bring their witnesses here and attempt to settle the issues here.

597 They could at any time have consolidated, under the law, and tried their case in any one of the districts where one of the libel actions was brought, or in the District of Arizona, which is adjacent to their home district, or in the Northern District of California—San Francisco—which is also adjacent.

If they had made these moves and then the Government had clubbed them over the head with a dozen or two dozen more suits, that might be some indication of arbitrariness, but that isn't the situation here.

All they are saying is that we brought 10 libel suits, without showing that the Administrator has any malice toward them.

JUDGE GOLDSBOROUGH: Whose duty is it to press the case: the plaintiff's or the defendants'? You brought these libel actions.

Mr. KLEINFELD: It is this Court that stopped us from trying those out, I believe.

JUDGE GOLDSBOROUGH: There was an injunction, was there not?

Mr. KLEINFELD: We have always been willing to try this suit.

JUDGE CLARK: What effort did the Government make to bring them to trial?

Mr. KLEINFELD: We were enjoined from bringing them to
598 trial by this Court.

JUDGE CLARK: You had 10 or 11 more libel suits before we enjoined you.

Mr. KLEINFELD: That was in a short period of time, since we were enjoined we couldn't do anything more about it.

JUDGE CLARK: I understand that, but couldn't you before you were enjoined?

Mr. KLEINFELD: The suits were started within a period of a few weeks.

Mr. LEV: If the Court please, if I may say a word here.

JUDGE CLARK: Let Mr. Kleinfeld conclude his argument.

Mr. KLEINFELD: As a matter of fact, in several of these libel actions there could have been a trial if we hadn't been enjoined and if the plaintiff had gone to these districts and asked for a trial. We just couldn't. They could. They weren't prevented from having a trial. We were. We have always been willing, so I say there has been no evidence to show that any one of the defendants here, either the Attorney General of the Federal Security Administrator or the officials of the Food and Drug Administration, had any evil motive in mind, any evil purpose to harass these defendants, that the determination of probable cause upon which these multiple seizures were made, that that decision was reached with some idea, some malicious idea, some willful idea. There has not been the slightest proof.

599 JUDGE CLARK: It is not necessary to have an evil intent, Mr. Kleinfeld, in order to be arbitrary and capricious. These officials may have believed that they were doing right, but that doesn't have anything to do with the impact on the plaintiff's rights.

Mr. KLEINFELD: We agree that there has been a serious impact, but the only testimony as to any arbitrariness has been the testimony of this doctor, that he believes that the labeling was not false or misleading.

JUDGE CLARK: There is a rather eminent lawyer whose deposition is in evidence that says the same thing.

JUDGE GOLDSBOROUGH: The Court has had access to the document.

JUDGE CLARK: And all of us have read it.

Mr. KLEINFELD: The ultimate fact as to whether the defendants

were arbitrary, gathered by hearing the evidence and reading the booklets is, of course, before the Court.

JUDGE CLARK: We have the evidence in the form of this book which is the subject of controversy, and the Court can read and understand the English language just as well as anybody in the Food and Drug Administration. They have got no patent on understanding the English language.

Mr. KLEINFELD: Of course not, your Honor, but my only point is that Congress has given the function of determining whether the labeling is misleading in a material respect to—not to this
600 Court—but to the administrative officials. They haven't said that these administrative officials may make the determination and then a review may be made by this Court. They haven't provided for a review.

Of course, the Court can decide whether they have acted illegally or arbitrarily, but that is quite different from determining that your Honor's opinion differs from the opinion of the administrative officials concerned. I therefore believe that no prima facie case has been stated and that the complaint should be dismissed.

ORDER DENYING MOTION TO DISMISS

JUDGE CLARK: I don't think it is necessary to hear from the other side. The motion to dismiss is denied.

Mr. Kleinfeld, it is now a quarter to four. I assume you don't want to start in with your case at this hour?

Mr. KLEINFELD: We can, but we will suit your Honor.

JUDGE CLARK: I don't like to discommode any attorney at any time by starting too late for him to get into his case.

Tomorrow morning it will be necessary to meet at 11 o'clock instead of 10 o'clock. Judge Tamin has some other business. So we will reconvene at 11 o'clock, and we will take a recess now until 11 o'clock tomorrow.

(Whereupon, at 3:45 p. m., the Court was recessed, to reconvene tomorrow morning at 11:00 a. m., October 21, 1949.)

601a Reporter's Certificate to foregoing transcript omitted in printing.

601 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

[File endorsement omitted]

Washington, D. C., Friday, October 21, 1949

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United

States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 11:00 a.m.

APPEARANCES:

On behalf of the plaintiff: Mr. CHARLES S. RHYNE and Mr. LESTER L. LEV.

602-603 On behalf of the defendants: Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

604 PROCEEDINGS

THE CLERK: Mytinger and Casselberry, Inc., versus Oscar R. Ewing, et al.

COLLOQUY

Mr. KLEINFELD: May it please the Court, with the Court's indulgence I should like to make two references to what went on yesterday.

Yesterday on page 511 of the daily transcript Plaintiff's Exhibit No. 11 was received in evidence. Plaintiff's Exhibit No. 11 was the telegram sent out by the plaintiff to its distributors directing them, I believe, to delete the last pages of the 58-page pamphlet. I did not object—and I am sorry—to its introduction in evidence at the time.

JUDGE GOLDSBOROUGH: As I remember, you did object to it.

Mr. KLEINFELD: It doesn't appear in the transcript, sirs. For that reason, I should like to move it stricken on the ground that it isn't relevant or material to the question of whether the defendants acted arbitrarily.

JUDGE CLARK: Motion is overruled, Mr. Kleinfeld.

Mr. KLEINFELD: The second thing appears on page 549 of yesterday's transcript, and that deals with the transcript of the proceedings before Judge Harrison in the Southern District of California in the criminal suit.

I am not clear—and I spoke to Mr. Rhyne, counsel for the plaintiff this morning—as to whether that was offered in evidence
605 or admitted in evidence. I am not urging that it be, but I just want to know, if I can.

JUDGE TAMM: It was offered in evidence and admitted as Plaintiff Exhibit No. 20; pages 1 to 19 in the Judge Harrison transcript were offered and admitted.

Mr. KLEINFELD: What page was that?

JUDGE TAMM: I don't have the transcript before me.

Mr. RHYNE: I have the transcript. It shows it was marked for

identification. There is no statement by Judge Clark formally that it was admitted.

JUDGE CLARK: I remember admitting it. That is the exhibit about which we had some argument as to number. You offered it as Exhibit 17.

Mr. RHYNE: That is right. There was so much discussion. I think that all you want is the record corrected to show that it was admitted.

Mr. KLEINFELD: I want to understand whether it has been admitted.

JUDGE CLARK: It was admitted.

Mr. KLEINFELD: Then, your Honor, if it has been admitted in evidence, to bear on the question of the alleged arbitrary conduct of the defendants, I offer in evidence the booklet which is the subject of those criminal proceedings which were discussed in that transcript which has been admitted in evidence.

Mr. RHYNE: Am I to understand that you are offering at
606 this time, Mr. Kleinfeld, the evidence that you are going to submit in the criminal case out in California? We offered no evidence. We merely offered a statement of Judge Harrison.

JUDGE CLARK: Mr. Rhyne, you provoked this thing yourself by offering the extract from the judge's ruling in the criminal case. Therefore, it seems to me to be proper for Mr. Kleinfeld to offer the only thing the judge had before him while he was talking about it.

Mr. RHYNE: I object to it.

Mr. KLEINFELD: May I ask the Court's indulgence? This is the only copy we have. May we at some time in the near future have a photostatic made and show it to counsel for the plaintiff and have it substituted?

JUDGE CLARK: Certainly.

Mr. KLEINFELD: Is that all right, Mr. Rhyne?

Mr. RHYNE: Yes.

Mr. KLEINFELD: What exhibit is that, sir.

THE CLERK: Defendant's Exhibit No. 7.

JUDGE CLARK: As I understand it, Mr. Kleinfeld and Mr. Rhyne, this pamphlet that you have just introduced is neither of the pamphlets that the Court was furnished with but an earlier pamphlet; it that right?

Mr. RHYNE: That is right. It is one that is involved in the criminal case out there.

JUDGE CLARK: I know it is involved in the criminal case.
607 There have been so many of these pamphlets referred to that I am just trying to straighten out the chronology of them in my mind.

Mr. RHYNE: Rather than have them in here, which would just confuse the issues, I would like to move at this time to withdraw the statement of Judge Harrison.

JUDGE CLARK: I will overrule that motion.

Mr. KLEINFELD: Similarly, your Honor, if the Court please, since the plaintiff has raised the point that the defendants acted arbitrarily in the criminal action by introducing the transcript of the proceedings there, I offer in evidence once more the sheet entitled, "Action, Your Chance to Help, Action, Memo to all California Distributors, 17 March 1949," which deals with the problem involved in that criminal case, which deals with the diseases and conditions involved therein.

JUDGE CLARK: Is that from this book?

Mr. RHYNE: It was not before Judge Harrison at all.

Mr. KLEINFELD: It was not before Judge Harrison. This is the pamphlet which the Court examined yesterday and which deals with the attempt to get witnesses to testify for the plaintiff.

JUDGE CLARK: Is that the same thing as that yellow sheet?

Mr. KLEINFELD: Yes, sir, the pink sheet.

608 JUDGE CLARK: The Court ruled on that yesterday, and we still think it should not be admitted. You have the right to present witnesses if you want to.

Mr. KLEINFELD: Thank you.

Mr. RHYNE: His offer of that reminds me of what I should have said when he offered the original pamphlet. What he is doing is offering his evidence. This pamphlet was not before Judge Harrison at all. The particular pamphlet that he is offering now was not before Judge Harrison at all. It will be part of their evidence in the criminal case.

JUDGE CLARK: The pamphlet has been admitted in evidence.

(The document referred to was received in evidence as Defendant's Exhibit No. 7.)

Mr. KLEINFELD: May it please the Court, in opening our case I should like, first, to have marked for identification this letter from Mr. Charles S. Rhyne to the Honorable Oscar R. Ewing.

(The document referred to was marked for identification as Defendant's Exhibit No. 8.)

This letter from Mr. Charles S. Rhyne, who is counsel for the plaintiff, is dated 28 January 1949.

JUDGE GOLDSBOROUGH: Are you offering it?

609 Mr. KLEINFELD: I offer it in evidence, your Honor. Did you want to see it, your Honor?

JUDGE CLARK: Yes, sir.

Mr. KLEINFELD: I might say, if the Court please, that at the pre-

trial conference before Judge Tamm both sides agreed that this exchange of letters between plaintiff and defendants would be admitted in evidence.

Mr. RHYNE: Didn't we also agree at that time that the letters between Senator Downey and Congressman Doyle could also be admitted?

Mr. KLEINFELD: I don't so recall, Mr. Rhyne.

JUDGE GOLDSBOROUGH: Do you intend to follow this up with anything. Standing alone, this Judge doesn't think it is admissible. It may be admissible in connection with something else you are going to offer.

Mr. KLEINFELD: It is followed by a response, a reply to that letter, signed by Mr. Kingsley, the Acting Administrator.

JUDGE CLARK: I myself don't see what probative force it has, standing alone.

JUDGE GOLDSBOROUGH: It might have something to do with fairness of the whole situation.

JUDGE CLARK: You may be able to connect it up with a witness at that time.

Mr. RHYNE: I wonder if he is trying to contradict the
610 admission in the answer made to paragraph 18A of the complaint, that we twice requested a hearing and were twice denied before the Administrator made a decision.

Mr. KLEINFELD: On page 33 of the transcript of the pretrial hearing it appears:

> "The Court: It is stipulated that the letters enumerated by Government counsel representing an exchange of correspondence between the Federal Security Administrator and the plaintiff corporation and counsel will be admitted in evidence without proof."

Mr. RHYNE: Without formal proof.

Mr. KLEINFELD: Without formal proof.

Mr. RHYNE: It doesn't say they are admissible.

JUDGE GOLDSBOROUGH: The pretrial judge doesn't have anything to do with whether it is admissible or not as far as that is concerned. It is not his function to pass upon our function.

Mr. KLEINFELD: Mr. Rhyne said, by the way, on page 31: "Yes, I was really going to offer these myself." I never assumed he was going to object to them.

I urge that this entire exchange of correspondence, which I thought you might rule on when I finished reading them, bear on the arbitrariness of the defendants' conduct.

JUDGE CLARK: I see no objection to them if it helps the defendants' case.

611 Mr. KLEINFELD: I should like to read it to the Court:

"The Honorable Oscar R. Ewing,

"Administrator, Federal Security Agency,

"Washington, D. C.

"My dear Mr. Ewing:

"I believe that the Food and Drug Administration may request you to make a decision of probable cause which can be used as a condition precedent to multiple seizures under the Food, Drug and Cosmetic Act of 1938, against Nutrilite Food Supplement, a product for which my client, Mytinger and Casselberry, Inc., of Long Beach, California, is the exclusive distributor.

"I believe that the basis of the request by the Food and Drug Administration will be that certain labeling or advertising used by my client are misleading. We are certain that the Food and Drug Administration is incorrect in its claim that my client's advertising and labeling are misleading, and we, therefore, request that you give Mytinger and Casselberry, Inc., a hearing at which they may present their side of this dispute before you make any decision of probable cause in this case.

"Very respectfully yours, Charles S. Rhyne."

I now ask that there be marked for identification a copy of a letter addresed to Mr. Rhyne by J. Donald Kingsley, Acting Administrator, dated 11 February 1949.

612 (The document referred to was marked for identification as Defendants' Exhibit No. 9.)

JUDGE CLARK: Mr. Rhyne, do you have any objection to this, or is it covered by your stipulation?

Mr. RHYNE: I had thought, your Honor, that I wouldn't offer them, because they came after the decision. You see, I alleged in my complaint that we made two requests to him before the decision was made and they admitted that. Now, the requests were made not only by me but by Senator Downey and Congressman Phillips, so I didn't prove all of that, and I didn't think it was necessary since they admitted it.

In paragraph 18(a) we alleged this: "that the Administrator of the Federal Security Agency was twice requested to grant a hearing prior to his determination that there was probable cause to believe that plaintiff's product was misbranded, which determination under section 304(a) of the Federal Food, Drug and Cosmetic Act is a condition precedent to multiple seizures.

"In said written request plaintiff said that if officials or employees of the Food and Drug Administration requested said

Administrator to make a determination, that the advertising and labeling of plaintiff's product were misleading in a material respect, to the injury of purchaser or consumers
613 thereof, plaintiff most respectfully prayed that said Administrator grant a hearing so that plaintiff could present to him the full and true facts showing that the labeling of Nutrilite Food Supplement is not misleading in any respect.

"The Administrator was further advised that the consequences of an erroneous decision on the issue of probable cause would be that plaintiff would be put out of business completely and irreparably damaged by the multiple seizure so authorized and threatened by defendants prior to any opportunity plaintiff might have to defend itself against said erroneous decision. The Administrator twice denied this request for a hearing and made an ex parte determination that plaintiff's labeling for its product Nutrilite is misleading.

"The United States District Court for the District of Columbia has held that the language of section 304(a) of the Act requires no such hearing by said Administrator prior to said probable cause decision."

They admitted that. I don't know what the purpose of the present offer is.

Mr. KLEINFELD: If the Court please, I would like to read just one paragraph from what went on at the pretrial conference because we all assumed that if I hadn't wanted these put in evidence Mr. Rhyne would.

This is what happened on page 31 before Judge Tamm:

614 "Judge Tamm: Let me ask about any other documents. Do you have anything further in the form of documentary evidence?

"Mr. Kleinfeld: Only one thing, your Honor. The plaintiff's amended complaint refers to an exchange of correspondence on two different occasions between counsel for the plaintiff and the Federal Security Administrator. I would like to stipulate that the letters transmitted by counsel for the plaintiff and the reply, his reply from the Federal Security Administrator, are offered and admitted in evidence.

"The Court: Without formal proof?

"Mr. Rhyne: Yes. I was really going to offer those myself."

JUDGE GOLDSBOROUGH: All Judge Pine meant was that formal proof had been dispensed with. He didn't mean the trial court was bound to rule that that correspondence was admissible in evidence. In the first place, he had no authority to do it.

Mr. KLEINFELD: It was my understanding that Judge Tamm was at the pretrial conference getting an agreement between counsel.

JUDGE GOLDSBOROUGH: I thought you said Judge Pine was doing that.

Mr. KLEINFELD: Judge Tamm.

615 JUDGE GOLDSBOROUGH: Even if he was, he wasn't passing on their admissibility. He had no authority at the pretrial to pass on admissibility.

Mr. KLEINFELD: To get agreement between counsel?

JUDGE GOLDSBOROUGH: The agreement was that—without formal proof. In other words, if there was any difficulty about signatures or anything like that, that that was dispensed with, not that they were admissible before the pretrial court. The pretrial judge hasn't any authority to do that.

Mr. KLEINFELD: In any event, this exchange deals, if anything, with the alleged arbitrary conduct.

JUDGE GOLDSBOROUGH: I think it should be admitted, but I think that we are the ones to pass on its admissibility, not the pretrial judge.

Mr. KLEINFELD: Did your Honor rule on that?

Mr. RHYNE: I think this: that since they have admitted that they denied us the hearing twice before they made the determination, that this has nothing really to do with the issues. The letters themselves, I can say to your Honors, are just long letters that don't hurt us at all. I mean they really argue our case and theirs, too. They are just cumulative. My objection is made on the basis that they are cumulative.

JUDGE CLARK: I think it is unnecessary myself, inasmuch as the Government has admitted. That is your position, isn't it?

616 Mr. KLEINFELD: The reply sets forth the reasons for this denial, and I think that bears on the question of the alleged arbitrary conduct or lack of good faith of the defendants, so I offer Defendant's Exhibit 9 in evidence *in evidence*.

JUDGE CLARK: It may be admitted.

(The document referred to was received in evidence as Defendants' Exhibit No. 9.)

Mr. KLEINFELD: This letter reads as follows:

"Mytinger and Casselberry, Inc.
"Long Beach, California.
"AF-28-002, Nutrilite Products, Inc.
"Los Angeles, California.
"AF 22-872.
"February 11, 1949.

"Dear Mr. Rhyne:

"Your letter of January 28, 1949 addressed to Administrator Ewing requests that there be no finding of fact or probable cause

to the effect that Nutrilite is misbranded until a hearing has been accorded to Mytinger and Casselberry, Inc., of Long Beach, California.

"I presume that you refer to a finding of fact under the Federal Food, Drug and Cosmetic Act for which provision is
617 made in section 304(a)(2) of that Act. This section provides for a finding that the labeling of a misbranded article is fraudulent or would be in a material respect misleading, to the injury or damage of the purchaser or consumer when the Administrator has probable cause to believe such from facts found without hearing.

"In the absence of Administrator Ewing, because of illness, I on January 28, 1949, made such finding of fact with respect to the misbranding occurring in the labeling of the drug Nutrilite, or Nutrilite Food Supplement, as distributed by the firm of Mytinger and Casselberry, Inc., and their representatives. The labeling involved, is the booklet 'How to Get Well and Stay Well.'

"The partnership Mytinger and Casselberry, as well as William S. Casselberry, Lee S. Mytinger, and Carl F. Rehnborg as individuals, were accorded hearings on July 15, 1947, and on September 16, 1947, at which time they were attended by counsel Lee J. Myers in their appearances before the chief of our Los Angeles District.

"In addition to personal appearances, written responses were filed by Attorney Myers on behalf of Lee S. Mytinger and William S. Casselberry, in which it was set forth that Nutrilite products are foods for use as a supplement to the regu-
618 lar diet, that they do not cure and are not offered for cure for anything. Mr. Mytinger stated that he would personally revise all of the labeling, so as to bring such printing into harmony with the Food, Drug and Cosmetic Act

"Subsequently, on November 3, 1947, Mr. Myers, by letter, represented to the Food and Drug Administration that the various pamphlets heretofore distributed by the firm had been destroyed and discontinued, and that the booklet 'How to Get Well and Stay Well' had been entirely revised and the old copy destroyed. Actually, the current edition of 'How to Get Well and Stay Well' is replete with numerous representations which classify the Nutrilite products as drugs for the treatment of serious disease.

"The first 36 pages of 'How to Get Well and Stay Well' contain essentially the same phraseology as is involved in the early editions of the booklet. The recent addition to the booklet of several pages, substituted for original pages from 37 to 54, do not mitigate the unjustifiable impressions established by the first 36 pages.

"Sincerely yours, J. Donald Kingsley, Acting Administrator."

To save the time of the Court and not to abuse the Court's patience I would like to offer two subsequent letters, one
619 from Mr. Rhyne and a reply from the Federal Security Administrator, without reading them.

Mr. RHYNE: I will agree to your not reading them if you will stipulate that the hearing in July 1947 related to the booklet that is involved in the criminal case and not to the booklets that are before the Court.

Mr. KLEINFELD: I will be glad to read them, if the Court wants me to.

Mr. RHYNE: Will you agree to that, that the hearing in July 1947 related entirely to the booklet that is involved in the criminal case out in California?

JUDGE CLARK: That appears in Mr. Myers' deposition which you put in evidence yesterday.

Mr. RHYNE: That is right.

Mr. KLEINFELD: I think the letter which I wanted to read or offer in evidence does indicate that that did apply to the entire transaction, the type of labeling put out.

JUDGE CLARK: The hearing out in California, according to Myers' uncontradicted deposition, referred to the booklet involved in the criminal action.

Mr. RHYNE: These books hadn't even been written then.

Mr. KLEINFELD: There was a whole sequence of booklets.

JUDGE CLARK: That hearing at Los Angeles had reference exclusively to the booklet involved in the criminal action. Nothing has been produced here to impeach Myers' deposition
620 in any way.

Mr. KLEINFELD: I believe the hearing really referred to all the activities going on by the plaintiff at that time. It wasn't limited solely to any one particular allegation of the plaintiff.

Mr. RHYNE: I think you better read the next letters, then, Mr. Kleinfeld, because you are trying to eliminate that.

Mr. KLEINFELD: I will offer in evidence letter dated 18 February 1949, addressed by Mr. Rhyne to Mr. J. Donald Kingsley, Acting Administrator.

JUDGE GOLDSBOROUGH: What was the date?

Mr. KLEINFELD: 18 February 1949, addressed by Mr. Rhyne, counsel for plaintiff, to Mr. Kingsley, Acting Administrator of the Federal Security Agency.

(The document referred to was marked for identification as Defendants' Exhibit No. 10.)

Mr. KLEINFELD: "Mr. J. Donald Kingsley, Acting Administrator, Federal Security Agency, Washington 25, D. C.

"Dear Mr. Kingsley:

"I have your letter of February 11, 1949, in which you reply as Acting Administrator of the Federal Security Agency to my letter of January 28, 1949, addressed to the Honorable Oscar Ewing, Administrator of the Federal Security Agency.
621 I respectfully again call your attention to my letter of January 28, and ask that you note that no reference is made therein to 'findings of fact' under section 304(a)(2) of the Food, Drug and Cosmetic Act of 1938. My letter had reference only, and exclusively, to the decision of 'probable cause' which must be made by the Administrator as a condition precedent to multiple seizures under section 304 of that Act.

"Only the Administrator can make a decision of 'probable cause,' although 'findings of fact' may be made by minor employees, and my request was that my clients, Mytinger and Casselberry, Inc., be granted a hearing by the Administrator himself"—the last four words are underlined—"before he made such a decision as to the character of the labeling used by my clients.

"Your attention is specifically called to the fact that under section 304(a)(2), facts may be found 'without hearing,' but the words 'without hearing' do not apply to the Administrator's 'probable cause' decision. I am certain that if you will but read the language, this interpretation will be found to be the correct one.

"It is shocking that you now claim that the hearing on July 15, 1947, which was held before one of your chemists in Los Angeles under section 305 of the Act and for an entirely different purpose, could possibly be a hearing by the
622 Administrator"—the last three words being underlined—"before a decision of probable cause in the instant case.

"The hearing on July 15, 1947, was chiefly concerned with an alleged deficiency of vitamin B-1 in one of my client's products, and only slightly with my clients' labeling. This charge as to vitamin B-1 was clearly disproved by an analysis made by an independent laboratory, and nothing further whatever has been heard from it.

"The booklet 'How to Get Well and Stay Well,' in its present form, was not in existence at that time. It is quite obvious from your letter that you have confused the early edition of 'How to Get Well and Stay Well' with the current edition, and

it seems doubtful from the very nature of your comments that you have been presented with an analysis of either edition of the book.

"I also can tell you that just as the charge of a shortage of vitamin B-1 was completely refuted as a result of the July 15, 1947, hearing, the charge now made in the decision you made herein would be completely refuted if the Administrator would but give my clients the opportunity to refute it at a public hearing.

"I am certain that your file will reveal that the hearing
623 of September 16, 1947, was also scheduled under section 305 of the Act and that Mr. Born of your Los Angeles office advised that a written response to the citation there issued was to be the procedure rather than a hearing, and this response was made by Lee J. Myers, attorney for my clients. No hearing was, therefore, held at all on September 16, 1947.

"A copy of the response by Mr. Myers will undoubtedly be found in your files. It is set forth in full in the affidavit of William S. Casselberry filed in the civil action now pending in the United States District Court for the District of Columbia, of which your General Counsel's office has a copy, as we have been furnishing extra copies of our papers to the Department of Justice for that purpose.

"'I cannot believe that Mr. Ewing, who is known as a very able lawyer, would ever agree that the hearing under section 305, before one of your chemists'—those last five words being underlined—'in Los Angeles for an entirely different purpose, could possibly be construed as a hearing under section 304(a)(2) by the Administrator'—those last three words being underlined—'on the question of probable cause here presented.

"I do not want to be argumentative, but are you not incon-
624 sistent when you say that no hearing is necessary, yet arguing that a hearing has taken place before your minor employees. I note in your letter that you state in part, 'I, on January 28, 1949, made such finding of fact.' The papers filed by the Department of Justice and served upon me contain three undated papers entitled 'finding of fact,' signed by Robert G. Butz, Medical Officer, Food and Drug Administration, and on a separate page of each, also undated, is a statement entitled 'conclusions,' signed by J. Donald Kingsley, Acting Administrator, in which you say, 'I concluded, on the basis of the facts reported above by Dr. Robert G. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause.'

"There is a very serious and fundamental distinction between a decision or a conclusion of 'probable cause,' and the

'finding of fact' under section 304(a)(2), and it is quite evident that your attorneys agree with me in this, or they would not have segregated the 'finding of fact' and the 'conclusion' with the 'finding of fact' made by Dr. Butz, and the 'conclusion' by you as Acting Administrator."

Mr. RHYNE: Mr. Kleinfeld, I think this is going to be rather long. I will agree that you can discontinue using it. There are 2½ more pages of it and several pages of the other.

625 JUDGE CLARK: Do you offer that?

Mr. KLEINFELD: This has been admitted in evidence as Defendants' Exhibit 10, I believe.

JUDGE CLARK: Not that letter you have just been reading.

Mr. KLEINFELD: It has been marked.

JUDGE CLARK: Yes, for identification. It will be admitted, since Mr. Rhyne has withdrawn his objection.

Mr. RHYNE: My only objection is that it is cumulative and argumentative. I don't like to object for my own client because I thought it was a pretty good one at the time, and still do, but they did admit all this, so I see no purpose of cluttering up the record with it.

Mr. KLEINFELD: The reply from the Acting Administrator dated March 2, 1949, we also offer in evidence.

JUDGE CLARK: That may be admitted, too.

(The document referred to was received in evidence as Defendants' Exhibit No. 10.)

(The document referred to was marked and received in evidence as Defendants' Exhibit No. 11.)

Mr. KLEINFELD: Will Dr. Dunbar take the stand, please?

626 Whereupon, DR. PAUL B. DUNBAR was called as a witness on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Kleinfeld:

Q. Dr. Dunbar, will you want to explain to the Court about your hearing difficulties?

A. May I say to the Court that I am somewhat hard of hearing, but I don't like to use this gadget (indicating) unless I have to, and I would like to proceed without it.

JUDGE CLARK: Very well.

THE WITNESS: If I find I need it I will ask your indulgence to allow me to adjust it.

JUDGE CLARK: You may proceed at your convenience.

By Mr. Kleinfeld:

Q. What is your full name and address?

A. My name is Paul B. Dunbar. My residential address is 311 Cumberland Avenue, Somerset, Chevy Chase, Maryland.

Q. What position do you hold with the Food and Drug Administration?

A. I am Commissioner of the Food and Drug Administration.

Q. Is that the top administrative job in that administration?

627 A. That is the top administrative job.

Q. Will you kindly describe to the Court what degrees you have and where you got them?

A. I graduated first from the Baltimore City College in 1902, Baltimore, Maryland. In 1904 I received a bachelor of science degree from Gettysburg College, Gettysburg, Pennsylvania.

In 1907 I received the degree of doctor of philosophy from Johns Hopkins University in Baltimore. I specialized in chemistry, physical chemistry, and physics at the time that Dr. Remsen was head of that department.

JUDGE GOLDSBOROUGH: What did you major in?

THE WITNESS: Chemistry.

A. (continuing) I also hold a master of science degree of course from Gettysburg College and an honorary doctor of science degree from the same institution, which I think I received in 1933.

By Mr. Kleinfeld:

Q. Are you a medical doctor?

A. I am not. I am a chemist—or I was a chemist before I became an administrative officer.

Q. When did you first become associated with the Food and Drug Administration?

A. I became associated with the Bureau of Chemistry,

628 then under the chiefship of Dr. Harvey W. Wiley, which was the predecessor of the Food and Drug Administration, in July 1907. That was the year that enforcement of the first federal food and drug act began.

I was appointed, under civil service rules, as a chemist under Dr. Wiley, and served in the Federal Government since 1907.

Q. Has your service since 1907 been with the Food and Drug Administration?

A. The Food and Drug Administration was established in 1927, on the 1st of July 1927. Prior to that time, the enforcement work

under the Food and Drug Act had been done by the Bureau of Chemistry.

When the Food and Drug Administration was authorized in 1927 the entire enforcement group was transferred from the Bureau of Chemistry to the Food and Drug Administration, and as a member of that enforcement group I went with it to the Food and Drug Administration.

JUDGE CLARK: That was in the Department of Agriculture at that time, was it not?

THE WITNESS: The Department of Agriculture, yes, your Honor, and at that time I was assistant chief of the Food and Drug Administration. I had been promoted through various grades to the position of assistant chief.

629 By Mr. Kleinfeld:

Q. Is it true that since 1907 you have been, up until the present time, either with the Food and Drug Administration or its predecessor?

A. That is true.

Q. Describe the various positions you have held and the functions which you performed in each position.

A. My first assignment after I entered the Department of Agriculture, Bureau of Chemistry, back in 1907, was as chemist.

The larger part of my duties was to develop new methods of analysis for the purpose of detecting adulterations in food products.

We were in those days just beginning enforcement, and there was a dearth of analytical methods. At the same time there was a great deal of interest on the part of the Food and Drug industry in this new law—that is, the original law.

The general run of manufacturers of food and drug products were extremely anxious to comply in every respect with the requirements of the law. They needed guidance. They made many inquiries of the Bureau of Chemistry as to how to comply with the law.

630 From the very beginning, it was recognized that an advisory-before-the-act attitude in the way of assisting manufacturers, whose intentions were correct, to prepare products and labels that met the law, was in the public interest and was a very effective method of acquiring legal compliance with the law.

Because of the fact that apparently I was able to write a fairly correct English letter, I was assigned, even in those early days, to the preparation of replies to these inquiries from inquiring manufacturers, so that during the early days of my assignment I did both laboratory work and some administrative work, with I suppose the natural effect that gradually I was selected as assistant chief and later commissioner of the Food and Drug Administration.

Q. What functions do you perform as head of the Food and Drug Administration?

A. I have over-all direction of the entire operation of the Food and Drug Administration. One of our most important obligations is appearing before budgetary committees in the Bureau of the Budget, and before appropriation committees in the House and the Senate, in an endeavor to get sufficient funds for enforcement purposes.

I also have to deal with over-all personnel and appointment matters. The general matter of determining enforcement policy with respect not only to the Food, Drug and Cosmetic Act, but
631 to four other statutes which we enforce—the tea act, the import milk act, the filled milk act, and of course the poison act.

In the course of my many responsibilities I find it impossible to give personal and immediate attention to every regulatory action, and therefore have surrounded myself with a group of trained administrative assistants on whom I must rely for a great deal of advice and assistance.

Q. Is one of your functions at times making determinations of probable cause under Section 304 of the Act?

A. That duty was delegated to me by the Federal Security Administrator, Mr. Ewing.

Q. What experience have you had in connection with the labels and labeling of food and drug products?

A. For a great many years, in the course of my experience in enforcement matters, I have been obliged to review labels and labeling—that is to say, the circular material that accompanies the product in interstate commerce—for the purpose of determining in an initial fashion whether in my judgment the labels are misleading or false to an extent constituting misbranding, in which case it is my duty to recommend appropriate legal action. In making that survey of labels, it is always my effort to place myself in the position of the individual who is going to read that label and
632 attempt to determine what impression—

Mr. RHYNE: If the Court please, I object to this. It seems like it is kind of an argument rather than a qualification of the witness.

He has told about his background, but now he is really arguing about how well he does his job.

JUDGE CLARK: He is testifying as to his duties in the Food and Drug Administration.

JUDGE GOLDSBOROUGH: The theory of admissibility, as I see it, is that he is qualifying himself as an expert to analyze the effect that certain language would have upon the average human mind.

Isn't that what you were testifying?

THE WITNESS: That is what I was trying to do.

Mr. RHYNE: I wasn't objecting to that so much as his telling how well he did it.

JUDGE CLARK: Objection is overruled.

JUDGE GOLDSBOROUGH: I have a little trouble hearing all of it with the windows open, and I am up against it.

JUDGE CLARK: The objection is overruled. You may continue.

Mr. KLEINFELD: Continue, please.

THE WITNESS: May I have the last sentence read back to me?

Mr. KLEINFELD: Try to speak as loud as you can.

633 THE REPORTER (reading): "In making that survey of labels, it is always my effort to place myself in the position of the individual who is going to read that label and attempt to determine what impression—

A. (continuing)—what impression the labeling will make on the person—the customer or purchaser—who reads that label.

By Mr. Kleinfeld:

Q. When was your first contact, Doctor, with Mytinger & Casselberry or Nutrilite, if you recall?

A. To the best of my recollection it was some time during November—I think around the 13th of November, 1948—at which time Mr. Mytinger, Mr. Casselberry, and Mr. Lev their counsel, called at my office.

Q. What was discussed at that conference?

A. The subject discussed was the attitude of the Food and Drug Administration with respect to the consolidation of the then pending seizures of Nutrilite for trial at Los Angeles.

They informed me that they had talked the previous day to Mr. George P Larrick Associate Commissioner of the Food and Drug Administration, who had advised them that it was contrary to the administrative policy of the Food and Drug Administration to stipulate to the trial of seizures in the home jurisdiction.

634 They had then asked whether they might appeal to some higher authority, and Mr. Larrick had suggested that they talk to me.

We had a conference, an entirely amiable one, for about an hour, I should say, and I confirmed the views expressed by Mr. Larrick: that from the standpoint of administrative policy we felt it unwise to stipulate for removal of the case to Los Angeles, but that we would have no objection to a consolidation of the pending seizures and trial at any adjoining jurisdiction.

Q. When did you first give consideration to the pamphlet entitled, "How to Get Well and Stay Well"?

A. That was in the early part of December 1948. The circumstances were about these: One of my administrative assistants, Mr.

Alexander G. Murray, an associate of nearly 40 years, who had very extensive experience in evaluation of labels—almost as extensive as I have—told me that he was then considering a seizure recommendation, or a number of seizure recommendations, against the product Nutrilite, and told me about the labeling contained in the circular known as "How to Get Well and Stay Well." That is the 42-page booklet.

Q. Do you have an administrative number for it?

A. The number on this booklet that I have in my hand is 25560-K, which I believe is the number of that particular
635 seizure action.

Q. May I stop you for a moment and ask that plaintiff's Exhibit No. 3, I believe, being the 42 page booklet, be handed to the witness?

JUDGE CLARK: Mr. Kleinfeld, this seems to be a convenient place to recess. I don't like to interrupt the middle of a question, but I have been summoned to a conference of the Court of Appeals, and it will be necessary to take a recess until 2 o'clock.

(Whereupon at 12 Noon the trial was recessed to reconvene at 2 p.m.)

636 AFTERNOON SESSION—2:00 p.m.

JUDGE CLARK: All right, Mr. Kleinfeld.

Mr. KLEINFELD: Dr. Dunbar, will you resume the stand, please.

Whereupon, PAUL B. DUNBAR resumed the stand, having been previously sworn, was further examined and testified as follows:

Direct examination (resumed):

By Mr. Kleinfeld:

Q. I think I asked that the 42-page booklet, I believe it is Plaintiff's Exhibit 3, be handed to Dr. Dunbar.

JUDGE TAMM: The last question asked was for the identification of the book. He gave you the number 25560-K.

By Mr. Kleinfeld:

Q. You gave us the identification?

A. Yes, sir.

Q. Will you compare the book you brought with Plaintiff's Exhibit 3 and see if they both appear to be the same book? Would Mr. Rhyne like to look at those books?

Mr. RHYNE: I will take the Doctor's word for it.

By Mr. Kleinfeld:

Q. See if they are the same number of pages.

A. Same number of pages, same title.

637 JUDGE GOLDSBOROUGH: You can tell in a minute if it is the same book.

Mr. RHYNE: I will take the Doctor's word for it.

Mr. KLEINFELD: I just wanted to make sure that plaintiff's counsel agrees with it.

THE WITNESS: So far as I can tell, it is the same booklet.

By Mr. Kleinfeld:

Q. Will you please describe to the Court the circumstances surrounding the bringing to your attention of Dr. Butz's medical findings of fact upon which you reached your determination of probable cause.

JUDGE CLARK: Who is Dr. Butz again?

Mr. KLEINFELD: He is the one of the medical officers of Food and Drug who made findings of fact with respect to medical points involved in these administrative determinations.

JUDGE CLARK: Isn't he the proper one to testify as to that?

Mr. RHYNE: I object on that ground. He hasn't been identified. There is no evidence in this record at all about Dr. Butz. Do you intend to call him as a witness, Mr. Kleinfeld?

Mr. KLEINFELD: We will come to that later. I ask the
638 Clerk to mark for identification this certified copy of a document (handing to the Clerk).

(Defendants' Exhibit No. 12 was marked for identification.)

By Mr. Kleinfeld:

Q. Dr. Dunbar, I show you Defendants' Exhibit 12 for identification and ask you to describe what it is (handing to witness).

A. The first page of this document is a certificate indicating that the two attached documents are true and official documents on file in the Food and Drug Administration—are true copies of the official documents on file in the Food and Drug Administration of the Federal Security Agency, and a part of the official records of the Administration and Agency.

The first enclosure is a document on the letterhead of the Federal Security Agency, Food and Drug Administration, Washington 25, D. C., "Nutrilite Food Supplement". It is entitled "A Finding of Fact", dated 9 December, 1948, and signed by Robert C. Butz, Medical Officer, Food and Drug Administration.

The second enclosure is a document entitled "Finding of Fact, Conclusion" and signed by myself as Commissioner of Food and Drug, and dated 9 December, 1948. Shall I read these documents?

Mr. KLEINFELD: No, sir.

639 JUDGE GOLDSBOROUGH: Would that have to be approved by you personally before it is filed?

THE WITNESS: Yes, sir.

JUDGE GOLDSBOROUGH: As I understand it, the first action was started in October, was it not?

THE WITNESS: The first time I became aware of these actions was in November, November 13.

JUDGE GOLDSBOROUGH: I know, but the action was started before you knew anything about it, wasn't it?

THE WITNESS: That is right. I was away on official business, or perhaps on a vacation, and one of my assistant or associate Commissioners handled the earlier seizure action.

JUDGE CLARK: Do you know who handled it?

THE WITNESS: Mr. Charles W. Crawford, Deputy Commissioner, approved the first series of actions, I have since learned, and Mr. George B. Larrick, Associate Commissioner, the second series of seizures.

Mr. KLEINFELD: I offer the document in evidence.

Mr. RHYNE: I object to the part of it that he has identified as a statement on the part of Dr. Butz, on the ground that it is clearly hearsay, a statement signed by Dr. Butz, who is not a witness here on the stand, and stating a lot of things that could only be hearsay and I object on that ground.

640 JUDGE CLARK: Mr. Rhyne, it seems to me—I haven't had a chance to consult with my colleagues—but it seems to me that the fact that Dr. Dunbar acted on a report from somebody in his department is a matter that is admissible.

I am not talking about its probative effect, but it is admissible as going to the question of whether the action of Dr. Dunbar and the Administrator were arbitrary and capricious.

I do think that the man who signed that ought to be produced and subjected to cross examination as to what, if any, qualifications he has to arrive at the conclusion that he did in that report.

Mr. KLEINFELD: I offer that document in evidence.

JUDGE CLARK: It may be admitted.

(Defendants' Exhibit No. 12 was received in evidence.)

By Mr. Kleinfeld:

Q. Dr. Dunbar, when you got the medical finding of fact signed by Dr. Butz, did you then read all or part of the 42-page booklet, Plaintiff's Exhibit 3?

Mr. RHYNE: I object. He has two questions about "all" or "part". They should be separate.

JUDGE CLARK: It makes a great difference.

Mr. KLEINFELD: I will reframe the question.

JUDGE CLARK: He can indicate all or indicate what part.

641 By Mr. Kleinfeld:

Q. Did you read all of the 42-page booklet?

A. At that time I did not. I read many parts of the booklet and discussed the entire booklet with Mr. Murray, my assistant who had made a thorough review of the whole document, and who gave me a number of pertinent facts about the method of distribution, the sales technique, and also briefly on the previous seizure actions and what had occurred in the way of revision of booklets following those further seizure actions.

Q. With respect to the medical facts did you rely on the finding of fact made by Dr. Butz?

A. I did.

Q. After considering Dr. Butz's medical findings and considering the booklet as you did—or those passages to which you have referred—what conclusion did you come to?

A. I came to the conclusion that the character of the representations made in this booklet would constitute a misbranding in that they were false, they would have the tendency to mislead the purchaser as to the properties of this product which was being sold under the name Nutrilite.

JUDGE GOLDSBOROUGH: This book, it seems to me, can be read in an hour, and it is your testimony, as I understand
642 it, that you reached the conclusion without reading the whole book and being able, therefore, to place the part that you did read in that direct connotation. Is that correct or is it not correct?

THE WITNESS: Your Honor, I want to repeat my assistant, Mr. Murray, had given me a great deal of background in his oral discussion with me before the formal papers requiring my signature were presented. If I may, I would like to detail, somewhat chronologically, the method that I used in considering this matter.

Mr. Murray came to my office with a copy of the booklet, apprised me that following two previous seizure actions there had been some revisions of this booklet but that it still retained 42 pages carrying representations which in his judgment constituted misleading representations as to the value of this preparation.

He apprised me also of the method of sale, namely by door-to-door salesmen who left the booklet for perusal by the prospective customer. Upon return of the salesman, efforts were made to sell a year's supply of this medicine on the installment plan at about $200 for a year's supply.

I then took the booklet, and without reading the entire 42 pages in detail, considered it—considered various pages to which
643 Mr. Murray called my attention, as well as some that I was interested in myself in reading.

I was first struck with the title of the book "How to Get Well and Stay Well" which seemed to me an extremely broad claim in itself and one designed to impress a prospective purchaser with the life and health-giving qualities of this preparation.

I then read the title page, which repeates the sentence "How to Get Well and Stay Well", and then carries a brief statement "If your health problem is the result of dietary deficiencies and if you want to get well and stay well, be sure to read this book. Even if you are sure that your diet has nothing to do with your ailment read this book now because science is correcting more and more physical troubles with diet and nutrition. If your health is good, read this book and learn how to stay well."

I then read the foreword in its entirety, and was impressed by the fact that in that foreword there is a paragraph which serves in a sense as a disclaimer in that it says:

> "From this title do not conclude that we do not offer every person the means of getting well whether he is breathing his last few breaths at the age of 110, on his deathbed with cancer, in a diabetic coma or about to die of typhoid
> 644 fever."

It occurred to me to wonder what the purpose of the booklet is and I then confirmed by reading the next six pages. The impression I had was that it was a remarkably adroit method of creating in the minds of the readers the suspicion that they were afflicted with many serious chronic ailments.

A scare technique was being followed in the early part of this booklet to impress the prospective purchasers with the idea that almost everyone they met—members of their family, their friends, and they themselves—were afflicted with something or other that needed treatment or something terrible would happen.

It is quite a favored technique with those who in times past—and even to this day—are selling various types of worthless patent medicines. It is very adroitly worded. There is a vast amount of factual statement in here, so I felt, that would create a fear complex in the mind of the purchaser.

I read the first six pages most carefully to determine whether that impression was carried out through the initial paragraphs of the book, then turned back and found further on that this product eventually is offered as the salvation of the individual who fears

that he is afflicted with some of these diseases, or may be afflicted with those diseases.

645 I was particularly struck with a section, on pages 20 and 21, in which the reader is assured:

"1. He can reason that since his body needs all necessary building and regulating materials anyway, whether ill or well, he must make sure his body is getting all of these essential items for proper rebuilding and regulating and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild and see if that is all he needs.

"2. If his physical ailment seems to be acute, he can immediately, upon beginning his body building through food and the micro food factors, consult a physician to determine whether or not his condition might be due to poisons in his system or to germ invasion. If so, while he continues to build his body through food and the Nutrilites, he can have medical treatment."

Incidentally, the word "Nutrilites" is capitalized at that point and obviously applies to this particular product. In the earlier references to nutrilites, which appear, I think for the first time on page 13, in the second paragraph, your Honor, the word "nutrilites" is not capitalized.

646 That statement there says that "nutrilites is a technical word you won't find in your dictionary but it means all of the food factors" et cetera. While I don't pretend to be a nutritional expert, I have done considerable reading in the course of my official duties on nutritional matters and I have never seen the word "nutrilites" used in technical literature on nutrition until I saw it in this document.

It is used on page 13 as the name of a class of substances found in foods or necessary in foods, but it is capitalized later on as identifying the product under seizure.

The third paragraph marked 3, on page 21, is so phrased as to appeal to individuals who have religious scruples against taking medicines. It reads:

"If his belief or his ailment indicates to him the need for spiritual, psychological, psychiatric, or religious assistance, he can, while he continues to supply his body with all necessary building and regulating material, have whatever psychological, mental, or religious assistance he needs."

Then follows a statement which I have read and reread and
647 which has given me concern every time I have read it:

"This procedure should be acceptable to all concerned. First: if the ailment is chronic rather than acute, no harm can

come from the use of the processes of physical rebuilding through food and the nutrilities, since the ailment has likely been plaguing the person for a considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse."

We have had continually impressed on us, particularly within the past few years, the danger of failure for early diagnosis of such ailments as cancer, the danger which may result from a delay in approved medical treatment, the fact that the average layman cannot tell in cancer cases whether he is suffering from cancer or some minor ailment.

The importance of diagnosing a case of that kind promptly, so that the most expert medical treatment can be administered—I have been tremendously concerned about the implication here that a few months delay, while the patient experiments with nutrilites, will not make things any worse.

648 JUDGE CLARK: It is true, isn't it, that a typical medical examination in these times—if you go to a doctor for a sore finger—is to immediately insist on taking your temperature and your blood pressure and analyzing your urine, each one with a different specialist, $5 or more per, and they insist on a lot of experimentation and examination that hasn't anything on earth to do with what is the matter with them?

Many people don't like to go to doctors for that reason. I am one of them.

THE WITNESS: Your Honor, I have been fortunate, I guess. I haven't had to go through that experience for a long time with a doctor, and I certainly have had no doctor put me through that course of treatment.

JUDGE CLARK: I wouldn't mind if a doctor would put you through all those things, but he sends you to another doctor to take your temperature, another doctor to take your blood pressure, another doctor to examine your urine.

Go ahead, doctor. I didn't mean to interrupt you. When you were talking about medical examinations I thought of my own experience.

A. (continuing) As a result of that study of the booklet at that time, plus the oral statements made to me by my assistant, Mr Murray, I concluded, first, that the booklet constituted what
649 I would personally regard as a serious misbranding, and I felt justified after reading the medical affidavit by a qualified medical officer of the Food and Drug Administration, Dr. Butz, in signing the conclusion that this booklet was misleading in a material degree, to the injury or damage of the consumer.

I, therefore, instructed Mr. Murray to prepare a memorandum recommending seizure of the consignments which were then before us, two consignments of Nutrilite. And a few days later, about the 13th of December, those memoranda were prepared and I signed them and sent them forward to the General Counsel's office who issued a request to the United States Attorney to pray the Court for seizures of these two consignments.

I would like to say, sir, that in my rereading of this booklet—and I have read it repeatedly and in detail since that time—I have never changed the conclusion that I reached at that time, that this constitutes, in my judgment, a misbranding of a kind that is most serious and very capable of damaging and injury to the consumer.

By Mr. Kleinfeld:

Q. Doctor, did I understand you to say that since you made your original determination of probable cause you have read the entire 42-page booklet?

A. I have.

Q. After reading the entire 42-page booklet, plaintiff's
650 Exhibit 3, is it still your conclusion that the exhibit is, in material respect, misleading, to the injury or damage of the purchaser or consumer?

A. It is

Mr. Rhyne: You didn't give me a chance to object, but I will move to strike his answer on the ground that what he did after didn't matter. It is what he did before that we are complaining of.

Judge Clark: The doctor will be subject to cross examination, Mr. Rhyne. You can bring that out at that time, that the fact that he read the book was entirely subsequent to his issuing the order of seizure.

By Mr. Kleinfeld:

Q. Dr. Dunbar, will you take the booklet which you state you have read in full and explain to the Court—beginning at the beginning of the booklet, of course, but without repeating, if you can, what you have said—what in your opinion is misleading in that booklet?

A. I have already referred to the promise implied in the title, "How to Get Well and Stay Well," on page 1 there is a series of questions asking the reader whether they know of anybody in their circle of acquaintances who are absolutely and completely well.

The second paragraph states:

"Just look around you at the members of your family
651 at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are you enjoying perfect health?

"On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who should be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely."

And my emphasis is due to the fact that the word "died" is underscored here. As a person who has had some experience with that sort of thing I know that if you harp emphatically on the ailment that those around us are suffering from, you soon begin to feel that you must have some of those symptoms yourself, and the technique here—

JUDGE CLARK: Doctor, in nearly all medical advertising of that nature—every morning when I am coming up to the office I
652 have to listen to ballyhoo for Doane's Kidney Pills, Carter's Little Liver Pills and by the time you listen to that for five minutes you feel like digging a hole and crawling in the hole and pulling the hole in after you.

THE WITNESS: Your Honor, that is exactly the impression that I have. I agree with you thoroughly. That is a vicious type of advertising. I have been told even that medical students immediately imagine that they have all the ailments that they are studying in medical schools, and that it is a natural reaction particularly for the type of people who either have not the funds or who are not accessible to doctors and who are likely to be impressed with the seriousness of the ailments that are affecting them, and impressed also with the life-giving qualities of this product that is now offered to them on the installment plan, a year's supply for $200.

Then there comes a series on the bottom of that page of descriptions of the qualities that accompany good health.

"First—appearance. The healthy person is good looking. His features may be irregular and far from the usual classic model, nevertheless the inner condition of health shows in a good complexion and clear skin (even for the teen agers), in sparkling eyes, a ready smile and a general air of alertness and life.

"Second—odors. The healthy person smells good. Most
653 of the really unpleasant human odors come from a sick body."

I cannot agree with that.

JUDGE GOLDSBOROUGH: You cannot?

THE WITNESS: I have been in too many gymnasiums where too many boys were exercising.

JUDGE GOLDSBOROUGH: A smell of that kind doesn't smell bad to me, but you get around an unwholesome person—my sense of smell is very acute. If I get as close as I am to the reporter to an unhealthy person I can smell a very disagreeable odor. There isn't any question about that, but good healthy sweat on a good healthy person I think is fine.

THE WITNESS: Even the smell of onions may be emitted by a healthy person. I don't want to take the Court's time by reading these descriptions, but I want to call attention to the final paragraph under that heading, which again impresses the prospective customer with the fact that practically nobody is free from ailments:

> "Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?"

It is an artful and adroit method of creating the idea that the prospective customer needs some kind of medication.

Then there is a new heading at the bottom of page 2:

654 "What Good Health Means to Your Body"

Nobody can question the accuracy of those statements, but there is woven into it the beginning of references to organs of the body which may become seriously affected.

At the very bottom of the page, page 2:

> "If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways."

Then the booklet proceeds, on the next page, to refer to such organs as the brain:

> "Your brain is one of your most important organs and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry

is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body (stroke or
655 paralysis), and at least a partial breakdown of the thought processes (confused thinking)."

In the next paragraph they deal with the heart, and the ailments that may be developed by the heart. In the next paragraph, they deal with the glands, then the teeth, building up a concept in the minds of the reader that any ailments that may affect these organs can be corrected by this building material which later on will be referred to as nutrilites.

Mr. RHYNE: May it please the Court, I object to this whole line of testimony on the ground that it is really an argument, like the lawyers, rather than testimony.

JUDGE GOLDSBOROUGH: The witness, under the examination of his counsel, is endeavoring to demonstrate to the Court that whatever action was taken by the Food and Drug Administration was not taken arbitrarily. For that purpose, the Court thinks it is admissible. Don't you?

JUDGE CLARK: I do, too. The doctor is giving an argument, but as I understand it, it is testimony for the purpose of explaining the action that the — took, and for that purpose it is admissible.

You may proceed.

THE WITNESS: I have made notations in the course of this book. I don't want to try the patience of the Court by reading too much of this.

JUDGE CLARK: We have been over all that business four
656 or five times. Go ahead. You can go as far as you like as to anything you find objectionable.

A. (continuing) On page 3, at the bottom, there is another paragraph I have checked:

"Nobody wants to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already."

Then there follows on page 5 a series of pictures of children who were overweight or underweight, with the impression that 22 million children are ailing, and again there is the scare technique to impress

a would-be purchaser that here is possibly a cure-all for those diseases.

Finally, on page 6, there are references in the first paragraph again to glandular disturbances, to tuberculosis, spinal curvature, and a statement at the end of the fourth paragraph on page 6:

> "This means that if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children."

At the bottom of the same page, page 6:

> "Obviously it is better to keep your body in splendid
> 657 condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to its basic and natural condition of health.
>
> "But before we tell you exactly how to do this, let us tell you a story."

There follows the Rehnborg story, which I have no knowledge about and we will pass over. However, I would like to say—I will come to that later.

I have noted on page 10:

> "So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors."

Then at the bottom of page 11:

Mr. KLEINFELD: Dr. Dunbar, for the sake of the Court, when you read a passage I think the Court will probably want to know what your idea on the passage is. Instead of merely reading it, tell the Court what your opinion of the passage is. Otherwise, it doesn't mean anything to the Court.

A. (continuing) My idea on that passage, your Honors,
658 is that having been conditioned by reading the previous five or six pages with the repeated references to ailments to the brain, the heart, the glands, the teeth, the nervous system, that the average reader is not going to disassociate those conditions of those organs as due exclusively to dietary deficiency, but is going to draw the conclusion that nutrilites are treatment for such conditions.

I recommended this action and I cannot now draw any other conclusion from this dissertation. In fact, I can find no basis whatever in my own mind for having a booklet of this kind written and distributed gratis unless the purpose was to sell a large supply of Nutrilite for the treatment of the ailing to whom this booklet is addressed.

JUDGE CLARK: The president of the company testified very frankly. The purpose of this booklet was to sell Nutrilite. Go ahead.

THE WITNESS: Under the misapprehension, however, that they have far more curative and therapeutic value than is actually the case.

A. (continuing) I have already referred to the word "nutrilites" being new to me. I pass over this description of work by Dr. Rehnborg, or Mr. Rehnborg. I will say that I am very familiar with the work of R. R. Williams which is discussed on page 14. If this is a matter of interest, R. R. Williams completed his work on
659 the subject of beriberi in the Bureau of Chemistry at the time I was a member of that Bureau, and I have seen many of the pigeons in which he had produced an artificial condition of beriberi and then restored them to life by the injection of the vitamin obtained from rice polishing. So I am familiar with that, and there is no question about the overall correctness of that statement—I am not questioning it at all.

I am not a nutritional or vitamin expert and I have no comment to make on the descriptions of the various functions of the vitamins—pages 16, 17 and 18.

I have already commented, your Honors, on the appeal to all classes of people—those who believe in doctors and those who do not, and those who believe in Christian Science, found on page 20 and 21. I will not repeat that, but I come now to page 28.

There had been a reference on the preceding pages, pages 26 and 27 to the fact that if one spoke of the wheel lacking we have a flat wheel.

I should point out this, if I may: On page 25 at the very bottom of the page:

> "Great-grandpa used to take the grain to the mill and bring back the whole flour for bread and cereals. Today the grain is shipped to the mill where all of the bran and germ is taken from it, then a chemical is used to bleach it. Most bakers use
> 660 other chemicals to make it rise when making bread and cakes. Result: You and I do not get what our great-grandparents used to get in the old days."

The implication is that our health is damaged and our lives probably shortened by the fact that we are not getting probably whole-

wheat flour. The fact of the matter is that medical records show that our life expectancy, when we are getting this type of flour, is much greater than it was in our great-grandfather's day.

JUDGE GOLDSBOROUGH: That doesn't necessarily follow because if we got the kind of stuff we got in our great-grandfather's day our life expectancy might be much longer. There are other factors than flour in the life expectancy.

THE WITNESS: Our grandfathers didn't live as long as we are.

JUDGE GOLDSBOROUGH: Isn't it true that you can't buy a loaf of bread or a sack of flour today that doesn't tell you it has been enriched? Isn't that true?

THE WITNESS: That is right.

JUDGE GOLDSBOROUGH: It is these vitamins that are put in the bread or the flour that enriches the bread or flour, isn't it?

THE WITNESS: That is right. That is not compulsory.

JUDGE GOLDSBOROUGH: That agrees with the great-grandfather statement, doesn't it?

661 THE WITNESS: Yes, in a sense.

JUDGE CLARK: Isn't this true: that a great many other factors besides bread have contributed to the prolongation of life expectancy since the time of my great-grandfather?

THE WITNESS: That is right. There are better methods of treating disease and quicker methods of diagnosis, but if they are not applied, if the patient simply tries to doctor himself, we haven't got those cases.

A. (continuing) There is on page 27 a paragraph that has given me quite a great deal of concern. Page 28:

> "The flat wheel you develop as the result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40s and 50s."

My understanding is that the causes of death in the 40s and 50s: at the head of the list are the heart and the ailments involving what we know as high blood pressure or hypertension; second, respiratory diseases such as pneumonia and tuberculosis.

I think accidents come in there, but we can pass them over. Then there are other diseases which afflict the human race between 40 and 50, and my understanding—not as a medical man but as an administrative officer who has been exposed to this sort of thing for a good many years—is that most of those diseases are
662 not caused by dietary deficiencies primarily and cannot be corrected by that kind of treatment.

On page 33 is an elaboration somewhat of that same idea:

> "Think of our population, and think of all the common ailments. Pick up any newspaper and you read of prominent citizens dying in early middle age of the various diseases that claim the lives of so many. Think of the people you know who are ill right now, and suffering, without relief."

I cannot get away from the conclusion that the purpose of that kind of a statement is to imply that Nutrilite will take care of all of these ailments. The actual representation of Nutrilite as a treatment is largely confined to the last section of the book beginning with "Conclusions" on page 39, where the word "Nutrilite" is capitalized and the virtues are now brought before the reader as an answer to his desire to get something that will protect his health, will help him to get well and to stay well.

By Mr. Kleinfeld:

Q. Are you through, Dr. Dunbar?

A. Yes, sir.

Q. Dr. Dunbar, do you gather from the booklet, Plaintiff's Exhibit 3, that Nutrilite is represented in the booklet as merely helping the body to resist disease?

663 A. Ceretainly, to the ordinary reader I would not interpret it that way.

Q. Dr. Dunbar, what do you understand by the term "common diseases"?

A. Common diseases are, in my mind, the type of ailments that I discussed a moment ago as those which are ordinarily suffered by adults between, say, 40 and 50, those involving heart and arteries, high blood pressure, coronary diseases, the respiratory ailments such as the common cold, but particularly pneumonia, tuberculosis. And in the case of childhood diseases I would say infectious diseases such as mumps, measles, and the like.

JUDGE CLARK: They are not necessarily childhood diseases, are they. I have seen all of them go through an army camp.

THE WITNESS: My children had them all in childhood.

JUDGE CLARK: So have mine, but I have seen just swarms of them in an army camp.

By Mr. Kleinfeld:

Q. Is it your understanding that malignant growths are a common disease?

A. I didn't get that, pardon me?

Q. Is it your understanding, Doctor, that malignant growths are a common disease?

A. Cancer, yes.

664 Q. Dr. Dunbar, have you ever issued any order to anyone in your organization directing that steps be taken to destroy plaintiff's business?

A. No.

JUDGE GOLDSBOROUGH: I don't think that is a proper question.

JUDGE CLARK: I think that question and answer should be stricken. That is not a proper question. The only thing that the Court has before it is the necessary results from the actions that the Food and Drug Administration admittedly took, which is not disputed here, as I understand it.

Mr. KLEINFELD: No further questions.

Cross examination:

By Mr. Rhyne:

Q. Dr. Dunbar, at the time Mr. Mytinger and Mr. Lev and Mr. Casselberry came to see you last November, you informed them that the Food and Drug Administration would not object to a trial consolidation and removal of the seizures that had been made to San Francisco or to Phoenix, Arizona; is that right?

A. That is correct.

Q. Did they inform you that their place of business was within 25 miles of Los Angeles and that all of their witnesses and distributors were there?

665 A. I don't recall the 25-mile statement, but they did say that their witnesses were close to Los Angeles.

Q. And is it not true that your records and witnesses in this whole case for the Government was worked up in Los Angeles?

A. No, I don't think that is true.

Q. Hasn't your whole investigation been under the direction of Mr. Born in Los Angeles?

A. That part of the investigation involving the reporting out of shipments, the initial investigation, has been made in Los Angeles, but samples have been collected in many parts of the country by inspectors under the direction of the various district officers throughout the country.

Q. So your answer is, then, that your case against Nutrilite has not been worked up in Los Angeles?

A. That is right.

Q. Did you inform them that if the cases that had then been filed were consolidated and removed to either San Francisco or Phoenix, that no more seizures would be made?

A. I don't recall that.

Q. Did you talk to Dr. Butz personally before you signed this decision?

A. No.

Q. You did not?

A. No, I did not.

666 Q. Have you talked to Dr. Butz recently?

A. No. Dr. Butz transferred from the Food and Drug Administration several months ago and I have not talked to him recently.

Q. Do you know where he is now?

A. I do not, no. I suppose our records can locate him.

Q. Did you know anything about Dr. Butz' background at the time you relied on his finding?

A. I knew his background to this extent: that he was a graduate of a standard medical school—I think it was Wisconsin—that he had qualified as a medical officer under civil service requirements, and had a satisfactory background of medical experience—training, rather—plus experience as a medical officer in the Navy during the war.

Q. Doctor, did you know that he graduated from medical school in 1943?

A. I didn't.

Q. Did you know that he was actually in the Army and that his work was chiefly in the field of psychiatry?

A. I knew that he specialized in psychiatry, yes.

Q. Doctor, I was wondering, when you were reading in this pamphlet here on page 21—may I call your attention to that,

667 at the top of the page? You read from page 20 and then over on 21, and you called attention to the fact that "Nutrilites" was capitalized there in that first sentence on page 21 for the first time. Isn't it true that these words are all capitalized: "while he continues to build his body with foods and nutrilites"—they are all capitalized, aren't they?

A. That is true.

Q. Why is it you omitted the next sentence? You did not read that.

A. The next sentence?

Q. The next sentence. Would you mind reading that now?

A. Do you mean No. 3?

Q. No. The one that follows right after the word "treatment" there. I will read it to you, "as a matter of fact."

JUDGE CLARK: What page is it—21?

Mr. RHYNE: 21—at the top of page 21.

JUDGE TAMM: The witness has a different page 21.

THE WITNESS: I did read the following part.

Mr. KLEINFELD: We have pointed out that there have been several differences between this booklet and the one—

Mr. RHYNE: And the one that was seized?

Mr. KLEINFELD: Yes. I think it is in the record and you gave us the list.

668 JUDGE TAMM: You have the document from which the plaintiff read as Plaintiff's Exhibit No. 3. It is not identical with the document which the Court has as Exhibit No. 3. There are two additional sentences on page 21 which are not in the pamphlet which the witness testified from.

Mr. KLEINFELD: That is why when we compared them we did point out that there were several minor differences between Plaintiff's Exhibit 3 and the copies of that 42-page booklet which we have. That is, I believe, one of the differences.

Mr. RHYNE: Since you are the only one who has the copies that were seized and you made several seizures of the 42-page pamphlet, did you compare all of them or just one that you happened to have in your files, because it is our information that you did make a seizure on this 42-page pamphlet that had in it these next two sentences?

Mr. KLEINFELD: The booklet that the witness has was one of the booklets that is involved in this case.

Mr. RHYNE: That is one of them.

Mr. KLEINFELD: Unless you feel that that is not so.

Mr. RHYNE: I will withdraw that question, because they made several seizures, and, of course, the book was being changed at that time, so we can't tell just what they have seized. But I will withdraw that question.

669 By Mr. Rhyne:

Q. You referred to Dr. R. R. Williams. Are you familiar with the fact that he coined the word "nutrilite"?

A. No, I am not.

Q. That appears in his book on vitamins?

A. No, I am not.

JUDGE CLARK: There has been medical testimony to the effect that he invented this term "nutrilite."

By Mr. Rhyne:

Q. Doctor, have you ever seen any complaints from Nutrilite users?

A. No.

Q. Has the Food and Drug Administration ever conducted any control experiments with Nutrilite?

A. Not that I am aware of.

Q. Do you disagree with the statement that science is connecting more and more physical troubles with nutrition?

A. No.

Q. When you read that, then, you didn't mean to criticize it?

Mr. KLEINFELD: Did you understand the question?

THE WITNESS: I am not sure that I did.

By Mr. Rhyne:

Q. When you read that sentence, you did not mean to disagree with it, then?

670 A. I didn't mean to disagree with the absolute statement, but the implication that most of our ailments are due to dietary deficiency, I think, permeates the entire booklet.

Q. Doctor, have you found in the booklet at any place any statement that it will cure any disease?

A. Not the flat statement. It is here by inference, as I read it, in many places.

Q. Doctor, before you made this decision, did you have any facts called to your attention indicating that Nutrilite or this pamphlet had injured anyone?

A. No.

Q. In your opinion, is there any objection to the product itself under the label as—

A. I don't think so. As a matter of fact—

Q. Did you say you do not think so?

A. I don't think so. As a matter of fact, I can conceive that the product would have value, and if it had been sold under a type of labeling that represented its identity and carried the directions for use on the bottle—in fact, the bottle label—the product as shipped under the bottle label was not seriously objectionable. There are many products of that kind that are sold and shipped under labels, to carry a small amount of additional information from that

671 carried on this label, that are thoroughly legitimate, but they cannot be sold in the quantity that these products are unless they are represented as having miraculous properties.

There is a legitimate use of this kind of product under a legitimate label.

Mr. RHYNE: I have no further questions.

Mr. KLEINFELD: That is all.

(Witness excused.)

Mr. KLEINFELD: Will Mr. Crawford take the stand?

CHARLES W. CRAWFORD was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Kleinfeld:

Q. What is your full name and address?

A. Charles W. Crawford, 4844 Old Dominion Drive, Arlington, Virginia.

Q. What position do you hold with the Food and Drug Administration?

A. Deputy Commissioner of Food and Drug.

Q. Is that the second-high position in the Food and Drug Administration?

A. It is.

Q. Kindly describe your education.

672 A. I have a Bachelor of Science degree from the Oklahoma A & M College in 1909, Master of Science degree in 1915, from the same institution.

Q. How long have you been with the Food and Drug Administration or its predecessors?

A. Since 1917.

Q. Will you please describe to the Court the various positions you have held with the Food and Drug Administration and its predecessors and the functions which you have performed in these positions?

A. I was a chemist in the Chicago station of the old Bureau of Chemistry when I was first appointed. I was only there for a brief time; was transferred to New Orleans and served in a similar capacity in the station at New Orleans. In May of 1918 I was transferred to the headquarters of the Bureau of Chemistry in Washington to do administrative work, and have been in the field of administrative work since that time, in the enforcement first of the old Food and Drug Act of 1906 and subsequently the Food and Drug and Cosmetic Act of 1938, with the other minor laws of which Dr. Dunbar spoke in his testimony.

Q. What functions do you now perform as Deputy Commissioner of the Food and Drug Administration?

A. To substitute for the Commissioner in his absence in all the functions he performs.

Q. Please speak a little louder.

673 A. To substitute for the Commissioner in his absence in all the functions that he performs, and to handle general administrative matters as an assistant to him in his presence.

Q. Is one of your functions the making of determinations of probable cause under section 304(a) of the Federal Food, Drug and Cosmetic Act?

A. It is.

Q. Please detail your experience to the Court in connection with the labels and labeling of food and drug products.

A. Since my first assignment to Washington in 1918 one of my functions has been to review labels of foods and drugs, to evaluate them in terms of the composition as revealed by either label statement or by analysis, and to evaluate the representations made on the labeling to the public generally to whom the labeling is addressed.

Q. About how many years would you say you have been studying, at least in part, in looking over labels and labeling to determine whether they violated the Federal Food, Drug and Cosmetic Act?

A. Something more than 30 years.

Q. When was your first contact, Mr. Crawford, with Mytinger and Casselberry or Nutrilite, if you recall?

A. My first recollection of contact was with the product
674 Nutrilite, when records and documents constituting a seizure recommendation came to my desk—I think it was on September 28, 1948.

Q. When did you first give consideration to "How to Get Well and Stay Well," Plaintiff's Exhibit 1, the 58-page booklet?

A. On that date.

Q. Do you remember the circumstances surrounding that?

A. Yes, I recall the case.

Q. Would you mind describing them to the Court?

A. In the ordinary course of the flow of mail these documents and records came to my desk showing an interstate shipment of Nutrilite from California to some place in New Jersey, as I recall it. There was a report of investigation by one of the inspectors working out of the New York station showing the general plan for the distribution of material. There was a copy of this booklet—this 58-page booklet, "How to Get Well and Stay Well"—and there were two or three minor pamphlets associated with that also, that made representations concerning Nutrilite.

Mr. KLEINFELD: Will the Clerk please mark this for identification.

(A document was handed to the clerk).

(The document referred to was marked for identification as Defendants' Exhibit No. 13.)

675 By Mr. Kleinfeld:

Q. Mr. Crawford, I show you these papers marked Defendants Exhibit 13 for identification and ask you what they are?

A. The first page is a certification that the attached are true copies of official documents on file in the Food and Drug Adminis-

tration, the Federal Security Agency, and are part of the official records of the Administration and Agency.

The first attachment is identified as 9113-K, Nutrilite Food Supplement, finding of fact, signed by Robert C. Butz, Medical Officer of the Food and Drug Administration, dated 30 September 1948.

JUDGE CLARK: That is the same one that was read a short time ago, isn't it?

Mr. KLEINFELD: It is a separate finding made on one of the different booklets, sir.

A. (continuing) Page 2 is a Conclusion signed by myself as Associate Commissioner of Foods and Drugs.

By Mr. Kleinfeld:

Q. What conclusion, please?

A. "Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I concluded on the facts reported above by Dr. Robert C. Butz, an em-
676 ployee of the Food and Drug Administration of the Federal Security Agency that there is probable cause for me to believe, and I do believe, that the labeling of this article would be, and is, in a material respect, misleading, to the injury or damage of the purchaser or consumer." Signed—

Mr. KLEINFELD: I offer that document in evidence.

Mr. RHYNE: I object on the ground that Dr. Butz' statements are all hearsay.

JUDGE CLARK: It may be admitted for the purpose of showing the official action of the Administrator. I still think that Dr. Butz ought to be produced and interrogated as to what investigation he actually made and as to his qualifications.

Mr. KLEINFELD: If your Honor please, Dr. Butz' deposition was taken by counsel for plaintiff and if he wants to offer it we have no objection.

May I offer this document in evidence, sir?

JUDGE CLARK: It may be admitted for that purpose.

(The document referred to was received in evidence as Defendants' Exhibit No. 13.)

By Mr. Kleinfeld:

Q. In reaching that determination of probable cause which you have just referred to, did you rely, with respect to the medical aspects upon the finding of fact of Dr. Butz?

677 A. I did.

Q. What else did you have before you besides that medical finding when you made that determination of probable cause?

A. I had the booklet and two or three leaflets.

678 JUDGE CLARK: You had what?

THE WITNESS: A booklet how to get well and stay well and two or three leaflets advertising the same product.

By Mr. Kleinfeld:

Q. I would like to have the Clerk show you Plaintiff's Exhibit 1 and ask you if that is, as far as you can tell, the booklet you had before you?

THE CLERK: (handing to witness)

A. I know the one I had ran 58 pages.

Q. Does the one in your hand run 58 pages?

A. And the one in my hand runs 58 pages and has the same general appearance certainly as the one I had.

Q. When you were considering Plaintiff's Exhibit 1, the 58-page booklet, did you read the whole booklet at that time?

A. I scanned through the first part of the booklet up to something like page 36, I think it was, which was the prelude, we might say, to the final pages in the booklet beginning with "What is the solution". I read from there on out, not in a scanning way at all, but thoroughly.

Q. I believe you have stated that in reaching your determination of probable cause you relied on Dr. Butz's findings with
679 respect to the medical aspects and your opinion with respect to the claims made by the booklet, is that correct?

A. That is right.

Q. Have you read the entire booklet at any time since your original determination?

A. Since the original determination I read the entire booklet once

Q. Is it still your conclusion, Mr. Crawford, that the 58-page booklet, Plaintiff's Exhibit 3, is in a material respect misleading to the injury or damage of the purchaser or consumer, that it contains false and misleading statements?

A. It is, sir.

Q. Will you explain to the Court the basis for your conclusion?

A. To one who has been experienced in the reading and evaluating of published material relating to nostrums and patent medicines this booklet fell into a very familiar pattern. It wins the reader's confidence right at the beginning by making statements of fact that everybody knows, and by professions of honesty and good will toward mankind, and then starts playing upon the scare technique.

on persuading the reader that something is wrong with him.
680 It goes into very cleverly worded descriptions of disease conditions, abnormalities, it sets up theories about why all these should exist, and then gives the answer:

"Is there a solution? There is."

And they then proceed with the answer as to just what this will do to erase any basis for the reader's fear that may have been inspired by the first part of the booklet.

Q. Will you start with the beginning of the book and go through it and point out to the Court what portions of the book are and were in your opinion false or misleading. Begin at the beginning.

A. My conclusion, after reading it the first time—and as I say, the first 36 pages were scanned through the first time. I got the substance of what it said but did not read it word for word.

JUDGE CLARK: You issued the order before you even read the booklet completely, didn't you?

THE WITNESS: No.

JUDGE CLARK: I understood you to say you just scanned it and then after you had issued the order you read the book. That is one of the reasons I am asking that.

681 It has been the contention of the plaintiff that if you read the book as a whole there is no objection to be taken to anything in it.

THE WITNESS: I did read the book as a whole, your Honor.

JUDGE CLARK: I understood you to say that was after you issued the order.

THE WITNESS: No, the first contact I had with the thing on September 28, I read the book as a whole.

JUDGE CLARK: I beg your pardon then.

THE WITNESS: But I scanned through and got the substance of the first 36 pages but read with meticulous care the final pages from 36 on, because it was from there on that the charges that were preferred in this case were based, and I wanted to check exactly the language there and the language in the charges.

JUDGE CLARK: Very well.

By Mr. Kleinfeld:

Q. Are you through answering that question, Mr. Crawford?

A. I am not quite sure whether I am or not.

Q. I just wanted you to point out what particular paragraphs you found false and misleading.

A. I want to say this: that it is hard to separate fact from
682 fiction in reading through a book of this kind, because fact is used to emphasize fiction. It creates an aura of honesty, an aura of good faith, for implications, innuendos, inferences, that I

believed when I read the book first—and believe now—are highly misleading, and are likely to be of great damage to consumers who are persuaded by this book or this material, and rely upon it for the purposes for which it is held forth in this book.

Q. Mr. Crawford, did you gather from the booklet that Nutrilite is represented as merely helping the body to resist disease?

A. I think that is not the impression that the lay reader would get from it. I was struck, I know, the first time I read this booklet, by the double talk that I found in a paragraph on page 40.

JUDGE GOLDSBOROUGH: Page what, sir?

THE WITNESS: Page 40. It is the third full paragraph just past the middle of the page:

"So when we tell you about these cases, where a set of symptoms disappears after Nutrilite is used for a period of time, please remember that never should you consider the symptoms eliminated or a disease cured by Nutrilite. Remember that Nutrilite never cures anything. Nutrilite
683 provides the body with needed nutrilites or other vital food factors"—

JUDGE GOLDSBOROUGH: "And", it says in this copy.

THE WITNESS: "And other vital micro-food factors". I didn't say "and". I misread it.

"(continuing) "and other vital micro-food factors. The body takes these and rebuilds. In the process of rebuilding, the inner cause of the deficiency ailment disappears, and consequently the symptoms cease to bother. Then the person is well, and he got well through the use of Nutrilite, but nothing was cured. This may seem like a fine distinction, but it is important because on this basic understanding depends your method of seeking health and maintaining health."

I believe the usual person to whom this sort of thing is addressed, who is not an expert in medicine or in nutrition, who is a layman in those fields, and who has been caused to feel concerned about himself—maybe before he read this booklet—would regard that as a promise of cure, despite the double talk that is involved in the presentation of it.

By Mr. Kleinfeld:

Q. Mr. Crawford, do you regard testimonials as a repre-
684 sentation that a person with similar symptoms would be helped by the product referred to in the testimonials?

A. Yes. I think that a testimonial is a representation very definitely.

Q. Mr. Crawford, I believe you testified that in reading the booklet you paid particular attention, in reading the Plaintiff's Exhibit 1, to the last pages, I believe beginning at page 40 and going through 58.

A. Yes, sir.

Q. Are those testimonials of alleged satisfied users? Will you look at the booklet, please?

A. Beginning on page 41, we have the testimonial of a Nutrilite distributor about a case to whom he has sold Nutrilite evidently.

Q. I would like you, if you will, to go through those pages—the testimonial pages—and point out to the Court—

JUDGE CLARK: I dislike to interrupt the business of the Court on my personal affairs but I have an appointment with the doctor this afternoon—I am taking Dr. Dunbar's advise and going to a doctor with my ailment, so it will be necessary to take a recess at this time until 10 o'clock Monday morning.

Mr. RHYNE: Could I bring this one thing to your attention before you leave?

685 JUDGE CLARK: Yes, sir.

Mr. RHYNE: The defendant has served a subpoena upon Mr. Rehnborg here to produce the records pertaining to the manufacture and formulation of the base of this product.

In view of the concession, I think by everybody, that the product has nothing to do with the case, I ask that that subpoena be quashed because I see no reason of trying to drag all those records and everything back here.

JUDGE CLARK: The Court will permit argument on that Monday morning. In the meantime, the Court will grant a stay on the execution of the subpoena.

(Whereupon, at 3:30 p.m., the Court was recessed, to reconvene at 10:00 a.m., Monday, October 24, 1949.)

685a Reporter's Certificate to foregoing transcript omitted in printing.

686 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Washington, D. C., Monday, October 24, 1949

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and

the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a.m.

APPEARANCES:

On behalf of the plaintiff: Mr. CHARLES S. RHYNE and Mr. LESTER L. LEV.

687-688 On behalf of the defendants: Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice and Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

689 PROCEEDINGS

Mr. GOODRICH: May it please the Court, we request permission to take up a medical doctor, out of turn, before completion of Mr. Crawford's testimony.

DR. HAROLD JEGHERS was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Goodrich:

Q. Will you state your name and address, please?

A. Harold Jeghers, medical doctor, Georgetown University Hospital.

Q. When were you licensed to practice medicine, Dr. Jeghers?

A. In 1932.

Q. What is your educational background that qualifies you to testify in this case?

A. I am a graduate of Western Reserve University in 1932, with a degree of M.D. I had my graduate training in medicine at Boston City Hospital at the Evans Memorial Research Institute in Boston, between the years 1932 and 1937.

I was formerly a member of the faculty at Boston University with the rank of associate professor. I was physician-in-chief of the Boston University staff at Boston City Hospital until 1946

690 and since '946 I have been professor in medicine at Georgetown University and physician-in-chief at Georgetown University Hospital.

Mr. GOODRICH: Speak up just a little louder and address your remarks to the Court, if you will.

By Mr. Goodrich:

Q. What are your professional or honorary societies?

A. I am a member of the societies that District doctors usually belong to: the AMA, Medical Society of the D. C., American Society for Tropical Medicine, the American Heart Association. In addition to that, I have a membership in two leading research societies: the American Society for Clinical Research and the Southern Society for Clinical Research.

Q. Have you made contributions to the medical literature?

A. I have been interested in research and active in research ever since I graduated from school.

Q. What are the subjects on which you have made contributions?

A. Vitamin deficiencies, nutrition, renal disease, and skin color and pigmentation.

Q. Now, do you specialize in any branch of medicine at the Georgetown University Hospital?

A. My primary specialty in medicine is internal medicine. Actually, I do it from the standpoint of administration.

691 Q. You stated that you were interested in administration at the hospital. Would you tell the Court what your duties are as chief of medicine at Georgetown University Hospital?

A. I have a dual role. I have the role of being head of the Department of Medicine in the Medical School and also the role of physician-in-chief of the University, so I don't have an active practice. I am interested in the care of the patients in the hospital that are assigned to me as service cases, those that don't have their own private doctor. I consult with the private doctors in the hospital, and I supervise the work of the medical students and the young doctors who are training inasmuch as we teach by showing them how to take care of patients.

Q. Do you have responsibility for the admission of medical doctors to the staff of the hospital?

A. I pass on their qualifications.

Q. What has been your experience with dietary deficiencies?

A. During the years 1934 to about 1940, that was my primary interest in research and also in the care of patients. During those years I was at Boston City Hospital, and as at most municipal hospitals, Boston City Hospital had a good many indigent
692 people who had deficiency disease; so I had that as both research interest and also from the viewpoint of the study of patients clinical interest.

JUDGE GOLDSBOROUGH: If you will, just take it easy and speak a little slower.

A. (continuing) My research is directed along the lines of studying vitamin deficiencies in humans by producing dietary deficiencies

on an experimental basis and also the study of such patients in the wards of the hospital.

By Mr. Goodrich:

Q. In that experience, have you given special attention to the diagnosis of deficiency diseases as that term is known to medicine?

A. Within the broad field of medicine, that has been to a certain degree my hobby, and I have gone out of my way to see every patient who was admitted to the hospital where there came up this question of deficiency disease as a diagnostic possibility, so, in a sense, that has been a minor specialty within my broad field of medicine.

Q. What in your experience is the rate of incidence of dietary deficiency disease among the American people at the present time?

A. That can be best answered by saying that the incidence is changing. During the depression years and before, common knowledge about vitamins was not known. Deficiency disease in
693 its grossly recognizable form—as obvious outright disease—was fairly common in the big municipal hospitals. It was not common, however, in private practice or in those hospitals that dealt primarily with private patients.

During the years from about 1930 to 1940, the many advances made in nutrition in this country, the improvement of the standard of living, supplementation to diets, and so forth—all this has gradually decreased the incidence of recognizable clinical deficiencies.

At the present time a case of vitamin deficiency of the nature that it could be recognized and demonstrated to the students has become such a rarity that for the most part I am forced to teach about these subjects by showing students pictures that I took in the earlier days.

Q. In your experience, Doctor, and based upon your knowledge of the medical factors there reported in the literature, do you believe that there are widespread subclinical dietary deficiency diseases among the American population as a whole?

A. That answer could not be given without a certain amount of qualification. The diagnosis of subclinical deficiencies has been a problem to the scientific portion of the medical profession in trying to devise tests that would be objective in the sense that you know if a person demonstrated on an objective test that he had a
694 subclinical deficiency and not based on symptoms alone. Such data is very difficult to obtain and at the present time reliable statistics on how common this is is difficult to put into words.

It is my feeling that in order to evaluate whether or not a person has a potentiality for subclinical deficiency they may demonstrate no signs or clinical symptoms that are reasonably objective—the only way you could evaluate that is to sit down with the person and

go over their dietary habits and analyze their representative eating habits. I think that could be done by having them keep a food diary. That is done and that is part of our training for future practitioners.

The majority of people that I have contact with now appear to be eating a fairly adequate diet. There are many instances where a person may not eat an adequate diet, and obviously a person living on coffee and doughnuts for two of his meals is not getting as good a diet as a person who takes three well-rounded, substantial meals that you would get in a restaurant or at home.

So I would say that the bulk of the population certainly must have improved their dietary standards in recent years. The fact that the gross, clinically recognizable deficiencies have become a rarity would mean also that a lesser degree must be becoming rare, even though you can not put your finger on them.

695 Q. What are subclinical vitamin and deficiency diseases, if you know?

A. That is a term that has been used to indicate that the person has been living on a diet that is not of optimum quantities for each of the various factors. In most instances, there is no known objective test whereby that can be ascertained with certainty, so that a good bit of reasoning has gone along the line that if an individual has not been living on an entirely adequate diet, and thereafter has some symptoms, that the two are combined; and that is not necessarily so.

Q. Do you see subclinical vitamin and mineral deficiency diseases commonly?

A. That is a difficult question to answer because of the inability to recognize just what these deficiency symptoms are, and it would depend upon an analysis of the person's diet before you can say that they even have the potentiality of getting such deficiencies.

Q. In your experience, say within the last year or two, have you seen such conditions either at Georgetown University Hospital or among your private patients?

A. Patients who have any of the manifestations that I could label as such are relatively rare, and they are likely to occur under situations in which the cause is reasonably obvious, such as a per-

696 son who is an alcoholic and imbibes alcoholic beverages. And alcohol supplies caloric energy, so it is possible for an individual drinking alcohol to get his caloric requirements for the day with none of the nutritive factors of food. Or it is possible that some person has a disease that prevents him from eating.

Practically all the vitamin deficiency symptoms that I have seen in recent years have fit in that category of person.

Q. Do you mean that alcohol contributes to this disease or that the people are just not eating because they are drinking alcohol?

A. The reason alcoholics are more likely to become deficient than the average individual or the person who is on a poor diet, is that they get the one substance in nature that supplies caloric energy with absolutely no nutrient requirements other than caloric energy, so the diet is most likely to become deficient.

Q. Is it proper to attribute widespread irritability, gastric distress, and headache, as those symptoms are suffered by the American public, to subclinical dietary deficiency diseases?

A. I don't believe that is so.

Q. Why not?

A. Those represent a response of the body to some untoward situation. For instance, an individual may have a headache for
697 any one of a hundred reasons, and there is no way of telling the exact mechanism or the cause of the headache or how it should be adequately treated unless various possibilities are evaluated by going over the case as a whole.

In other words, in the practice of medicine the doctor can approach the problem of the patient from two ways; If a person has a headache he can give certain remedies that will temporarily relieve the pain of the headache. If it is due to any one of a number of inconsequential reasons, the chances are that the headache would be gone anyway in a few days.

If, on the other hand, the headache should be due to some important disease, such as a brain tumor or hypertension or refractive error and so forth, the headache would not disappear until the specific factor responsible were corrected.

In other words, that individual having a headache due to refractive error would probably not get consistent relief in a headache until he had properly prepared glasses obtained.

Q. What proportion of your patients, or the patients that you see at Georgetown University Hospital, who complain of irritability, gastric distress, and headache, have those conditions because of deficiency disease?

Mr. RHYNE: I object to the question on the ground he has
698 asked two questions. He asked him what proportion of his patients and the doctor has testified he doesn't have patients himself, and then he asked as to the patients he sees at Georgetown. I think the question should be broken in two.

JUDGE CLARK: I think there are two questions.

Mr. GOODRICH: I will be glad to do that. I was only attempting to include the entire group of his patients.

By Mr. Goodrich:

Q. Doctor, let me state it another way: What proportion of the patients you see who manifest irritability, gastric distress and headache are suffering from vitamin deficiency disease?

A. At the present time I would say that is a minor group of patients.

Q. Would it be a safe practice for a layman suffering from persistent gastric distress or indigestion to treat himself for a period of several months alone with a vitamin or mineral preparation in the dosage of Nutrilite?

JUDGE CLARK: The doctor hasn't qualified as being familiar with Nutrilite yet.

Mr. GOODRICH: I will withdraw that question.

Will you hand the doctor Exhibit 8 of the plaintiff?

(The clerk handed a document to the witness.)

By Mr. Goodrich:

Q. Would you look over the label, Doctor, please?

699 THE WITNESS: Would you restate the question, please?

Mr. GOODRICH: Yes.

By Mr. Goodrich:

Q. You have looked over the label of Nutrilite to see its contents?

A. Yes, sir.

Q. You also regarded the dosage there?

A. Yes.

Q. Would it be a safe practice for a layman suffering from persistent gastric distress or indigestion to treat himself for a period of several months with a vitamin and mineral preparation of the kind of Nutrilite?

A. It is not considered good teaching to advise patients to treat themselves for prolonged periods of time for important complaints.

JUDGE GOLDSBOROUGH: Doctors don't like you to do that anyway, do they?

THE WITNESS: That is right.

JUDGE CLARK: They prefer to have direct visits from the patients, don't they, Doctor?

By Mr. Goodrich:

Q. Would you explain why that is not considered good practice?

A. The reason is that an important disease can have the same symptom as a minor complaint. If the symptom occurs

700 only once or twice or only very rarely the symptom on the whole is generally ignored by most people, but if it persists, continues to persist or get worse, I think there should be some investigation as to just what may be behind that.

Q. Persistent indigestion is one of the danger signals for cancer, is it not?

A. That is generally accepted as one of the important symptoms of cancer of the stomach.

Mr. RHYNE: I move to strike out that answer on the ground that cancer has nothing to do with this case. I should have objected to it.

JUDGE CLARK: That will be overruled. The Court has repeatedly ruled out evidence of cancer because this book that is under discussion makes no claim of being able to cure cancer, but for the present the objection will be overruled.

Mr. GOODRICH: May I address the Court for a moment?

JUDGE CLARK: Yes.

Mr. GOODRICH: My purpose of asking it, sir, was that this symptom of persistent gastric distress which we have been discussing here and which Dr. Myers discussed in his direct examination, and we also discussed on cross with him, has been given as one of the symptoms that would be treated.

701 JUDGE CLARK: Very well. Objection will be overruled.

By Mr. Goodrich

Q. Doctor, is gastroenteritis a common disease condition?

A. That is one of the most common of the ordinary diseases.

Q. What proportion of the cases of gastroenteritis that you see are due to vitamin or mineral deficiency?

A. Practically all the cases we see fit into one of several categories of either indiscretion in food or the common infections that produce gastroenteritis, either free form, toxic material that gets in the food by infection or that the food is infected and after ingesting the infected food a condition of gastroentertis is set up.

A person who is sensitive to certain types of food may have gastroentertis after eating such a food. Those are some of the more common reasons.

Also, there is a certain type of gastroenteritis which is contagious.

Q. What part does vitamin deficiency play in such diseases?

A. Personally, I do not think that is a common etiological factor.

Q. By etiological factor what do you mean?

702 A. An etiological factor is a specific agent or substance that causes a disease; such as in an infectious disease like pneumonia, the germ pneumococcus would be the etiological factor of that disease.

Q. Upon what rationale are vitamins prescribed for persons suffering from severe illness or debilitation?

A. Vitamins are prescribed for many reasons. Persons who are ill or who have a fever have an increase temporarily during the period of the fever of 50 percent more in their body metabolism particularly in the need for vitamin B factors.

An individual is frequently not able to eat and in the hospital regimen it is possible to give such persons injections of a food

substance such as glucose that has no vitamins at all. A person who has a debilitating disease has a change in the liver and, therefore, that is counteracted to some degree by increasing dosage of those vitamins.

Q. What is the rationale for prescribing vitamin supplementation during pregnancy and in old age?

A. Would you repeat that question?

Q. What is the rationale for prescribing vitamin supplementation—vitamin and mineral supplementation, I should say—during pregnancy and in old age?

A. As far as pregnancy is concerned, it is a standard practice to supplement the diet, for the reason that the pregnant woman
703 during the period of gestation needs more of these factors than she would if she were not pregnant. Also, if there is a longer period of lactation the drain on her supply is much greater than normal. In other words, she must eat not only what she requires herself but for the baby, so it has become standard practice to supplement the diet during pregnancy and also during lactation.

Q. During old age, what is the rationale for prescribing vitamin substances?

A. The main rationale during old age is that one of the main reasons why elderly people get into nutritional difficulties is their inability to chew, and if the elderly person has lost his teeth or can not afford a good set of dentures, or if the dentures hurt his mouth, this individual will not eat the diet that he ate while he was younger. In other words, he may not be able to chew meat and so forth, and he may have to take a modified form of diet.

In addition to that, I think there is evidence that in old age the absorption of nutritional substances from the intestinal tract may not be as good as in younger life due to the change in secretions.

Q. Would the rationale in these unusual conditions which you have mentioned also suggest a supplementation of the American diet in general?

Mr. RHYNE: I object to his arguing his case as he goes along. He says these are unusual conditions.

704 JUDGE CLARK: I think the objection is well taken.

Mr. GOODRICH: I beg your pardon?

JUDGE CLARK: If you will, phrase your question in a little less argumentative way.

By Mr. Goodrich:

Q. Would the same rationale on which vitamins are prescribed during severe illness, debilitation in pregnancy and in old age, suggest the desirability of supplementation of the American diet in general with vitamins and minerals?

A. I am not aware that that is an improvement. I think that in an individual if an individual eats an adequate diet that he will automatically get all the required substances.

Q. Do you believe that the ordinary American diet is adequate in these factors of vitamins and minerals as present in Nutrilite Food Supplement, the labeling of which you have seen?

A. It all depends on the adequacy of the diet from the standpoint of a well balanced diet. There are undoubtedly many individuals who, for some reason or other, don't eat an adequate diet.

JUDGE GOLDSBOROUGH: Do you think that a physician or layman could walk through the poor sections of any metropolitan area and possibly reach the conclusion that any considerable percentage of the people living in those areas are receiving an adequate, balanced diet?

705

THE WITNESS: It would depend upon the group of the people.

JUDGE GOLDSBOROUGH: Sir?

THE WITNESS: It would depend entirely on the group of people.

By Mr. Goodrich:

Q. Has it been your experience, Doctor, that the indigent patients that you see nowadays are suffering from vitamin deficiency or mineral deficiency?

A. The incidence of recongnizable deficiency disease in the indigent group is considerably less than what it used to be.

Q. What is the fate of vitamins and minerals that are given to supplement the diet in instances where the diet already provides at least the body's daily requirements for the vitamins and minerals?

MR. RHYNE: I object to the argument in that it includes another argument: "already."

JUDGE CLARK: Objection sustained.

MR. GOODRICH: I beg your pardon. I have no intention of arguing this. If I did, it was unintentional.

JUDGE CLARK: You have assumed facts that haven't been proved here.

MR. GOODRICH: Let me see if I can restate the question.

706

By Mr. Goodrich:

Q. Doctor, assuming that a person is taking a diet which provides the body's daily requirements of vitamins and assuming further, that he were given Nutrilite in the dosage as given on the package, plaintiff's Exhibit No. 8 which you have examined, what would be the fate of the vitamins and minerals added through supplementation when they were taken into the body?

A. A person who eats a diet adequate in all factors, the intake of additional factors in no way influences the utilization of those

factors. In other words, the body uses only a certain amount and if you take more than that and there is no need for storage in the body, if the body's stores are adequate, then they are simply excreted or destroyed in the body.

Q. Will a super-abundance of vitamins and minerals added to the diet provide protection against disease?

A. No better than an adequate diet having all the factors.

Q. Have you had personal experience with vitamin A deficiencies?

A. That was the subject of some of my early experiments.

Q. Would you tell the Court about your experience with that deficiency?

707 A. This was one of the deficiency syndromes that was investigated early in the 1930s. The reason that this became of interest is the fact that certain tests that appeared to be objective became available: an attempt was made to screen large groups of the population. Now, it appeared to me at the time we were doing experiments that rather than approach the subject from the viewpoint of testing people and trying to find out whether they are deficient, a better method would be for a group of healthy people to live on such a deficient diet.

In other words, it is possible to give a healthy individual a diet that is adequate in all respects except a single factor. Such diets were prepared lacking only vitamin A, and I tried such a diet on myself and stayed on that diet for a period of time until definite phenomena were produced.

I also did this on a number of other healthy subjects, using as subjects healthy medical students. It became apparent from this regimen that the variability with which an individual would show manifestations of a deficiency syndrome under such an approach is extremely a wide one. In my own case it took well over a month before any evidence at all could be detected, and some of the individuals would go four or five months, and the experiment was terminated for lack of an adequate amount of time.

708 Q. Based on that experience, would you say that vitamin A deficiency disease is common or rare in the American people?

A. My original ideas about vitamin A deficiency were that I thought they were common. Many of our earlier tests seemed to indicate that, but as these tests were more critically evaluated it was apparent that many of the low readings were due to factors that we could not adequately control.

I think at the present time it is generally felt that good evidence that a large number of people having manifest a vitamin A deficiency is certainly not sustained. It is actually very difficult to produce good phenomena of clinical deficiency on such an experimental basis. The maintenance requirement of vitamin A is prob-

ably, as a minimum, about 3,000 units a day; in order to produce a vitamin A deficiency in the human it is necessary to give vitamin A in the range of 100 or so units a day for long periods of time.

Q. Is there any scientific basis for the statement that subclinical vitamin A deficiency is responsible for starting gall stones or kidney stones?

Mr. RHYNE: I object. There is no such evidence in this record, and it is going so far afield.

Mr. GOODRICH: I refer your Honors to transcript page 153. If I may have your permission, I will read it?

709 JUDGE CLARK: Whose testimony is that?

Mr. GOODRICH: Dr. Myers'.

Mr. RHYNE: If he said it, all right; but I don't recall it. I don't see that it has anything to do with it.

JUDGE GOLDSBOROUGH: I don't remember anything about it. I don't see why it isn't admissible. It is a product investigation, but I don't remember anything about it.

Mr. GOODRICH: May I have permission to read it to the Court?

JUDGE CLARK: Yes.

Mr. GOODRICH: On page 153, Dr. Myers is explaining vitamin A deficiencies and he says:

> "There are other conditions associated with vitamin A deficiency; that is a roughened skin, an irritation and a hardening of all of the linings of the mucous membranes of the nose and throat, and the linings of the glands, gall bladder, bladder itself, the kidney, and because of this we believe that it is the beginning of some of the concretions that form in those glands."

Those "concretions," of course, are gall stones and kidney stones.

Mr. RHYNE: That is argument rather than a statement of Dr. Myers.

JUDGE CLARK: That is your conclusion, isn't it? There might
710 be an irritation of the gall bladder that didn't result in gall stones or of the kidneys that didn't result in kidney stones.

JUDGE GOLDSBOROUGH: He says a "concretion" means kidney stones.

Mr. GOODRICH: May I ask the doctor to explain?

By Mr. Goodrich:

Q. What do you understand by "concretions" in those glands?

A. Concretions would be the deposits of mineral matter on the surface of a hollow organ—gall stone, kidney stone, bladder stone.

JUDGE CLARK: Very well.

Mr. GOODRICH: Would you read the question back to the doctor, please.

THE REPORTER: (Reading) "Question: Is there any scientific basis for the statement that subclinical vitamin A deficiency is responsible for starting gall stones or kidney stones?"

A. This idea arose from the observation on experimental animals that such animals on a markedly deficient diet produced marked tissue changes and would develop kidney stones, let's say; but the truth that the same holds true for humans is much more difficult to ascertain. And I don't think it has been well established at all.

711 By Mr. Goodrich:

Q. Is insomnia commonly due to vitamin B-1 deficiency?

A. Would you state that again?

Q. Is insomnia commonly due to vitamin B-1 deficiency?

A. I don't believe so.

A. Are the symptoms numbness and tingling in the hands and fingers normally due to a vitamin B-1 deficiency?

A. In the average practice of medicine I doubt that.

Q. Could you explain where those symptoms regularly occur?

A. In the average person who has a multiple number of complaints, the chances are that they have what we understand from the medical viewpoint as a variety of functional disturbances within the body and various nervous influences can temporarily upset the body in many ways.

I think in the practice of medicine the common reason for a variety of symptoms is a person who does not have a progressive or organic disease due to one of the known factors that produce disease but only a temporary disturbance in body function that could be straightened out as time goes on. I mean by that that such known etiological factors as being born with some part of your body not correct, a congenital factor, or being infected with an organism or having traumatic injury or the growth of a cancer—

those would be considered as organic disease.

712 Most organic diseases have a definite pattern that they follow, and if you do not correct what the basic factor is, sooner or later organic disease runs its course in such a way that it can be recognized. Many people from time to time complain of something, and a great study of the case will indicate no definite reason for it. And in a matter of a few weeks it may go away again.

Certainly, the symptom of insomnia is a very common one in this country and is probably due to many factors.

Q. Would your answer be the same for the symptoms, peculiar pains and swellings in the legs?

A. The chances are that pains and swellings of the legs would in most instances represent some sort of rheumatic, some form of rheumatism, possibly a varicose vein.

Q. Is that normally due to a vitamin B-1 deficiency?

A. The etiology of rheumatism is not entirely known, but it would appear from the new work with cortisone, the hormone from the pituitary gland, that there may be some hormonal mechanism involved.

Q. Are you aware of any scientific literature on any scientific evidence that pregnant women suffering from vitamin B-2 or riboflavin deficiency will be apt to give birth to children with cleft palates, hair lips, fused ribs, and other such abnormalities?

713 A. I am not familiar with such work.

Q. What is the cause of such malformations?

A. They are congenital defects that develop during the period of gestation.

Q. Doctor, assuming that a person had ariboflavinosis, with marked scaliness about the eyes and ears, a soreness around his nose and mouth, that the condition was diagnosed in March 1944 and was corrected at that time by the injection of B complex vitamins—would you consider it good medical practice to continue to give that patient monthly injections of riboflavin for a period of more than five years to keep his eyes clear?

A. I am afraid I don't understand the facts in that question.

Q. I will restate it: Assuming that a person had ariboflavinosis, with marked scaliness around the eyes and the mouth, he had soreness around the nose, and around his ears, the condition was diagnosed in March 1944 and corrected at that time by the injection of B complex vitamins—would you consider it sound medical practice to continue to give that patient injections of vitamin B complex for a period of more than five years thereafter, for the purpose of keeping down the disease?

JUDGE CLARK: Mr. Goodrich, you left out the part of the testimony now which you are purporting to include in your

714 question.

Mr. GOODRICH: I beg your pardon?

JUDGE CLARK: It was to the effect that Dr. Myers testified—I assume it was the case of that judge?

Mr. GOODRICH: No, sir. This is the case of his surgeon friend. page 163 and 164 of the record.

JUDGE CLARK: I was going to say that Dr. Myers' testimony was that when the treatment was discontinued the ailment returned.

Mr. GOODRICH: The case I referred to was page 163 and 164. You will remember the surgeon friend that was diagnosed in 1944 and was given the injections after that.

Mr. RHYNE: Injections for approximately once a month and a lot of other statements, not just the way you have them there.

Mr. GOODRICH: If necessary I will read the thing. I believe I will state it accurately. I can pass it up so you may check it.

JUDGE CLARK: I have got it right here in front of me.

Mr. GOODRICH: 163 and 164, sir.

THE WITNESS: That question could be best answered—

Mr. GOODRICH: One moment. Let the Judge check up on the record.

JUDGE CLARK: That is correct. I had in mind the other case.

715 A. That question can best be answered by giving the statement that if a person has a specific vitamin deficiency and you give him that vitamin, you usually get a dramatic cure. Obviously, if he is living on an inadequate diet, or there is some disease process that interferes with the use of the vitamin, it may return. If you treat a person and then put him on a good diet the difficulty will not return. If it does return, that may be an indication that for some reason he is unable to utilize vitamins taken by mouth such as the inability to absorb them or he may have some liver disease that prevents their adequate use.

Under ordinary circumstances, the generally accepted principle is that a vitamin deficiency will respond to a single course of treatment followed by placing such a person on a good diet.

By Mr. Goodrich:

Q. Would it be proper medical advice to advise the injections or to advise a change in dietary habits?

A. It is best wherever possible to give medicines by mouth, and certainly it would be best in the case of vitamin deficiencies to advise a normal diet.

Q. Doctor, is riboflavin deficiency at all commonly associated with heart ailments?

A. I am unaware of such an association.

Q. Is riboflavin deficiency the commonest cause of sudden

716 death from heart disease?

A. I am not aware of that concept.

Q. Doctor, have you had personal experience with experimental scurvy in human patients?

A. Only indirectly personal experience in this sense: that at the time that I was working on the vitamin deficiencies, a doctor at the Boston City Hospital, which is reported in the medical literature of Dr. Crandon, went on a scurvy-producing diet very similar to the one that I took for producing vitamin A deficiency.

Essentially, Dr. Crandon's diet was adequate in all respects except that it lacked only the one factor, vitamin C. During the course of the period that Dr. Crandon stayed on the scurvy-producing diet, a large number of scientists in Boston studied Crandon and I was fortunate enough, since I worked in the same building, to have an opportunity to see him almost daily.

The interesting fact that came out of Dr. Crandon's experiment

which has since been confirmed in a number of other universities, is the lack of anything happening for a good many months. In fact, it was two or three months before any detectable phenomena referable to the disease scurvy, as we know it, became observable, and it was not until well into the fifth month that Dr. Crandon developed scurvy as it is understood in the medical literature,
717 having bleeding and failing-to-heal wounds and changes in the skin and so forth.

Q. Doctor, would you say that it would be possible to develop scurvy in a period of two weeks on a high carbohydrate diet consisting practically of bananas and cane sugar?

A. The experiments with which I am familiar have indicated that individuals have gone on several months before manifesting features of a scurvy syndrome.

Q. Were those people on a diet entirely devoid of vitamin C?

A. Entirely, practically entirely—as near so as could be obtained.

Q. Do you know whether bananas contain vitamin C?

A. I do not.

Q. If you administer or prescribe medication for a patient and subsequently the patient tells you that he feels better, does that mean that the medication was responsible for the improvement?

A. That is the major problem in clinical research, in the sense that in order to evaluate a drug which is based on the relief of subjective symptoms, it is necessary to run control treatment by giving the patient a placebo which is essentially an inert substance such as sugar, which looks the same, and is given with the same psychology as you give a test substance. And unless a drug
718 is tried in that fashion with controls selected so that all the factors that influence disease are the same in one series as the other, it is not possible to evaluate drugs on that basis.

Q. What type of work is necessary for true and correct evaluation?

A. Your group must be large enough so that the statistics are significant, and it is necessary in all clinical research to have some form of control over the experiment.

Q. Are such common complaints as fatigue and lack of pep ordinarily due to a vitamin deficiency?

A. I do not believe so.

Q. Would you explain your answer a bit on that, please?

A. Well, fatigue is a very common symptom in this country. It is one of the common complaints that bring a patient to the doctor, and there are usually numerous reasons for it. When that particular complaint has been analyzed in big clinics where they have a large number of cases, it is commonly determined that it is usually on a functional basis, meaning some upset, and their reaction to life

their nervous system and their inability to react to the common stimuli of everyday life.

JUDGE GOLDSBOROUGH: Doctor, over 40 years ago when I was State's attorney in my county, a jail superintendent came and asked me if I could do anything for the prisoners. He said
719 the diet of the prisoners was largely bread and black molasses, and when they came out of there after being there for three or four months, they would ache all over and would be so tired that they weren't worth anything and couldn't work, and he ascribed it to over-acidity.

I don't know anything about it, only that I am sure he was right in what he said. What do you think about that?

THE WITNESS: I think that particular diet that you mentioned would certainly produce deficiencies.

JUDGE GOLDSBOROUGH: Produce what?

THE WITNESS: That that would produce deficiency. That particular diet you mentioned may well produce a deficiency state.

JUDGE GOLDSBOROUGH: Of what vitamin?

THE WITNESS: I think it would be difficult to ascertain what particular vitamin. But the point about the complaint of fatigue is that that is a major complaint among people who have had an adequate amount of money for a diet, have frequently had all sorts of supplementations to the diet and still have their fatigue. There isn't any doubt that a person—let's say a prisoner in a war camp—who had a gross deficiency would be fatigued. And, in fact, by work tests on deficient individuals, you can eventually demonstrate that such a person would be fatigued.

The doctor I mentioned who went on a scurvy-producing
720 diet for the first month or two felt reasonably adequate to do his work. But as the months went by he became progressively more fatigued so that fatigue is a symptom that could be due to deficiency, but it could also be due to dozens of other things.

JUDGE CLARK: Fatigue is not necessarily a disease.

THE WITNESS: No, it is not a disease.

JUDGE CLARK: If a man gets out and plays 60 minutes of a football game he would be very fatigued, and properly so; and if a man walks 20 or 25 miles with a full pack on, he is very likely to be fatigued.

JUDGE GOLDSBOROUGH: As I understand the doctor, he is discussing fatigue without any apparent exertion, aren't you?

THE WITNESS: That is the important thing. A person who becomes fatigued from exertion, who has a good night's rest or day's rest will frequently the following day be able to repeat that endeavor. The person who complains of fatigue, as it is understood in clinical practice, complains of fatigue in spite of the fact that

they appeared to get adequate rest and they are not working hard physically.

By Mr. Goodrich:

Q. Is colitis generally caused by a deficiency of thiamin, riboflavin and niacin?

A. Most types of colitis that are seen in this country are due to fairly specifically defined clinical causes. Now, the term
721 "colitis" has a wide variety of definitions, and the chances are that the so-called mucous colitis is on a functional basis.

The types of colitis where the intestinal lining breaks down and sheds blood and so forth is on such basis as being infected with tuberculosis.

We also have what is known as the idiopathic ulcerative colotis, where there is an infection with certain parasites, the effect of cancer growing, in the bowel and so forth. Those are the common causes of colitis.

Q. What part does thiamin, riboflavin and niacin play in that?

A. Diarrhea in some cases of colitis may occur in the instance of a subclinical deficiency such as pellagra.

Q. Is that in the early state of the disease or the advanced state?

A. That is in the advanced state.

Q. What are the most common eye disorders necessitating the wearing of glasses?

A. The refractive errors.

Q. Is vitamin deficiency responsible for that, in whole or in part?

A. I do not believe so.

Q. Is glaucoma due to a vitamin deficiency?

A. That is not the accepted explanation of developing glaucoma.

722 Q. What is the accepted explanation?

A. I am unfamiliar with the details of the literature of glaucoma since I don't work in that field.

Q. Is there any scientific basis for the conclusion that coronary disease is caused by a deficiency of vitamins C and K?

A. The medical literature at the present time is in a very controversial state as to the cause of coronary thrombosis. No definite factor has been agreed upon by all investigators. The one that has an interest at present, but unproved, is the question of whether or not a disturbance in cholesterol metabolism is the etiologic factor. That appears to be true in certain experimental animals, and has not been proven entirely, but suspected for humans.

Q. Is there any scientific basis for the conclusion that vitamins other than vitamin C or vitamin K are responsible for coronary disease?

A. I am unaware of that evidence.

Q. Is it at all probable that a deficiency of vitamin K is responsible for coronary thrombosis?

A. I am also unaware of that evidence.

Q. Would you explain the action of vitamin K in the body, if you please?

A. Vitamin K is necessary when ingested and absorbed for
723 a formation in the liver of the substance prothrombin which is necessary for the normal clotting of blood.

Q. In a deficiency of vitamin K do you have a condition in which clotting is usual or unusual?

A. A deficiency of vitamin K would be manifest by the inability of the blood to clot normally and probably the effect on certain body tissues.

Q. Is coronary thrombosis caused by clotting of the blood?

A. Coronary thrombosis is a change in the inner lining of the vessels that supply the blood to the hear wall, so that they occlude, not by blood clots as such, but by a change in the intima of the vessel.

Q. Do you believe that vitamins and minerals, if taken in abundant amounts, would prevent rheumatic heart disease?

A. I am unaware of such evidence in medical literature.

Q. In rheumatic heart disease, is the heart tissue that has been damaged rehabilitated by feeding vitamins and minerals in abundant amounts?

A. In the person with acute rheumatic fever you have the same situation as an individual who has many other febrile illnesses, but during the period of the febrile illness he is not in a normal state of health and, therefore, may temporarily require a wide variety of supplements to the basic treatment.

724 JUDGE CLARK: The Court will take a recess for five minutes.

(Whereupon a short recess was taken.)

Mr. GOODRICH: May it please the Court, may I proceed?

JUDGE CLARK: Yes.

By Mr. Goodrich:

Q. Doctor, is the tissue damage done to the heart in rheumatic heart disease rehabilitated by the feeding of vitamins and minerals?

A. I am unfamiliar with any careful studies on that.

Q. Does the taking of multiple vitamin and mineral supplement insure against infections or other diseases?

A. No more so than a good diet.

Q. Are heart murmurs commonly regarded as being due to vitamin deficiencies?

A. The commonest cause of a heart murmur is known as a functional heart murmur, and there are many reasons why such murmurs occur, depending upon minor configurations in the heart. Since one heart does not have the same shape as another heart, there are changes in the flow of blood through the heart. When an individual is excited during a fever the flow of blood is faster which will create a murmur. Many normal people have functional murmurs.

Q. Is arteriorsclerosis or hardening of the arteries caused by a deficiency of any vitamin or mineral?

725 A. The exact reason for arteriosclerosis is not generally accepted in the medical literature.

Q. Not generally accepted?

A. The exact etiological reasons are not generally accepted.

Q. What do you mean by that—not known?

A. It is an aging process. The exact reasons for it are still under experimentation.

Q. Would an ample supply of vitamins retard arteriosclerosis?

A. I would be unable to express an opinion on that.

Q. Is it true that if an individual's mother took an adequate supply of vitamins and minerals during pregnancy and the individual received an adequate supply throughout life, that the individual would not be likely to suffer from the common diseases?

A. That is too broad a question.

JUDGE GOLDSBOROUGH: I assume that is admissible, but it isn't anything that is relative to anything that was testified to by the plaintiff.

MR. RHYNE: And he hasn't defined "common diseases" and there seem to be about as many definitions as witnesses.

MR. GOODRICH: May I, with the Court's indulgence, read one portion of the transcript?

JUDGE CLARK: Yes.

726 MR. GOODRICH: Dr. Myers was on cross examination at the time—page 214:

"There are many common diseases. Once they have been precipitated we do not offer to alleviate them. Vitamin deficiency disease is preventive medicine, not curative medicine. As we have mentioned all the way through the book, it does not effect a cure.

"Question: Do I understand your testimony now to be that this product won't cure any of these common diseases?

"Answer: That is right.

"Question: It hasn't any effect in curing them?

"Answer: By 'cure' we mean to get a patient well and when we take him off the medication he stays well. In vitamin deficiency there is no cure. When you take the material you

feel well, and when you stop it, you regress, and that is exactly what we are trying to maintain and teach."

That being his testimony, I wish to inquire as to this doctor's understanding of the relationship of the vitamins and minerals to the common diseases.

JUDGE CLARK: You haven't defined common diseases, Mr. Goodrich. You wasted most of one day here trying to get a definition of common diseases without success.

This doctor is your own witness. If you are going to
727 ask him a question about common diseases you must define common diseases.

Mr. GOODRICH: May I just take one moment?

JUDGE CLARK: Yes.

Mr. GOODRICH: My difficulty in doing that, as you are well aware, is that my understanding of common diseases, and the witness' understanding, Dr. Myers', and Mr. Casselberry's, is not the same.

JUDGE GOLDSBOROUGH: Why don't you ask this witness what his view of common diseases is before you ask a question about it?

Mr. GOODRICH: All right.

By Mr. Goodrich:

Q. Doctor, what do you understand by "common diseases"?

A. That would depend on whether you mean minor illnesses or are you talking about major disease. Considerable importance lies in the fact that persons can have minor illness. They don't die from it. Frequently if they receive no treatment they will eventually get better.

On the other hand, if you use the definition that a "common disease" is a disease which would eventually kill the individual, such as hypertension or heart disease, then, certainly heart disease and hypertension are common diseases. As we see them in the hospital, they are among our most common diseases. You see
728 patients treated in office practice for a common cold, which may be a common disease.

So from a medical point of view you have to subdivide that as to whether you are dealing with minor disorders that have a temporary duration or whether you are dealing with functional complaints which are extremely common or whether you are dealing with major diseases which have a serious consequence, perhaps a fatal termination. They also are common. I don't believe it is possible to define common diseases unless you more specifically divide parts of it.

Q. What are the common diseases most responsible for death in the fourth and fifth decades of life?

A. The cardiovascular diseases of the heart, of the brain, the cancerous diseases, traumatic infection, diseases of the kidney—these would be among the leading group.

Q. Are tuberculosis and pneumonia in that group?

A. Pneumonia is rapidly going down the list of important fa d diseases due to improvements in treatment with antibiotics.

JUDGE CLARK: With what?

THE WITNESS: Antibiotics.

(continuing) At one time the mortality rate for pneumonia in a general hospital was about 30 percent. At the present time, if 100 people with pneumonia entered a general hospital having a
729 bacterial pneumonia chances are that not more than a few percent will die, and that improvement has come about chiefly through the use of sulfa drugs, penicillin, and so forth, oxygen therapy, and many other supportive forms of therapy.

By Mr. Goodrich:

Q. Assuming that an individual's mother took an adequate supply of vitamins and minerals during pregnancy, and that the person—the individual—received an adequate supply of vitamins and minerals throughout life, would that individual be likely note to suffer from cardiovascular disease?

Mr. RHYNE: I object. The question is so vague.

JUDGE CLARK: Will you state that question again? I couldn't understand it.

Mr. GOODRICH: I will be glad to, sir.

By Mr. Goodrich:

Q. Assuming that an individual's mother took an ample supply of vitamins and minerals—all she could use—during pregnancy, and assuming that that individual, after birth and throughout his life took an adequate supply of vitamins and minerals—would that person be less likely to suffer from cardiovascular disease?

A. I don't believe there is any evidence in the medical literature where such studies have been followed for a long enough period of time to draw conclusive results.

730 Q. Would that person be less likely to suffer from a malignant growth?

A. I know of no such evidence.

Q. Would that person be less likely to suffer from it?

Mr. RHYNE: It seems to me, your Honor, all these questions are leading and I o ject on that ground.

JUDGE CLARK: They are leading, and the doctor in each one has answered that he knew of no such evidence. It doesn't show that no such evidence existed: he didn't happen to know about it.

By Mr. Goodrich:

Q. Doctor, would you explain to the Court what you mean by that, that you know of no such evidence. I believe you are using it in a sense that is unusual here.

Mr. RHYNE: That is a leading question also, it seems to me. I object on that ground.

JUDGE CLARK: I think the question is leading.

Mr. RHYNE: He is trying to suggest an answer to the witness.

JUDGE CLARK: I haven't ruled these questions out, although a great many of them have been leading questions. This witness is supposed to be an expert and certainly shouldn't need leading.

Mr. GOODRICH: I certainly agree that he needs no leading.

JUDGE CLARK: You have been doing it, anyhow.

731 JUDGE GOLDSBOROUGH: They haven't been doing anything else on either side, so far as that is concerned.

Mr. GOODRICH: Is the Court ruling that that question is leading?

JUDGE CLARK: Yes; I think the question is leading. Don't you think that question is leading?

JUDGE GOLDSBOROUGH: I not only think it; I know it.

By Mr. Goodrich:

Q. Doctor, would you explain what you mean by your statement that you know of no such evidence?

A. The literature is a wide collection of writings, experimentation, and it is impossible for every individual to know every bit of it. But in the course of many years of teaching and reading the more important facts come to the fore.

So a physician who is actively in practice—and certainly if he is doing experimental work—will become acquainted with the well accepted facts. Now, there may be ideas in the medical literature that have appeared from time to time, which have not been substantiated by further documentation or experimentation. There are many unproved statements in the medical literature.

Q. Do you routinely read and keep up with the literature?

A. I do an extensive amount of reading.

732 Q. Is beriberi heart disease common in the United States?

A. Beriberi heart disease, as it is defined in the medical literature, so that it could be recognized in the patient, is a very rare disease.

Q. Are most cases of cardiac dilation relieved by thiamin?

A. No, they are not.

Q. Is it possible to relieve hypertension and hypertensive heart disease by injection or oral administration of B complex vitamins?

A. I do not believe so.

Q. Is arthritis caused by a deficiency of vitamins?

A. The reason for arthritis is still one of the unsettled problems in medical literature.

Q. May rheumatoid arthritis be treated successfully with vitamin C taken orally?

A. Not as a single isolated substance.

Q. Is vitamin C the same as cortisone in its action on the human body?

A. Do you mean "cortisone"?

Q. Cortisone—I am sorry.

A. I have had no experience with cortisone, but cortisone is an adrenal hormone which is certainly different from chrystalline vitamin C.

733 Q. Do vitamin preparations taken orally have any effect in relieving pains associated with osteoarthritis?

A. I do not believe so.

Q. Why not?

A. I do not believe vitamins act that way in the case of osteo-arthritis.

Q. Will the administration of vitamin B complex to a diabetic so improve the physiology of the liver that the insulin requirement may be reduced?

A. Under rare circumstances, vitamin B, by changing the amount of fat in the liver, may influence the general nutrition of the individual. That is not the common experience, however, in the treatment of diabetics.

Q. Is diabetes known as a disease that is due to derangement of the liver?

A. The exact reason for diabetes centers probably in a disturbance of the islet cells of the pancreas. The question of diabetics being influenced by other hormonial glands has to be considered.

Q. Is it generally accepted among medical men that the liver is an important factor in diabetes?

A. Only secondarily.

Q. If a patient suffering from diabetes refused to follow his doctor's instructions as to his diet, ate anything that was
734 placed before him; could his insulin intake be controlled by giving vitamins and minerals?

Mr. RHYNE: I object to the question on the ground that the doctor couldn't possibly know all the facts relating to the particular patient. It is much too broad.

Mr. GOODRICH: I am referring, if your Honor please, to page 262 of the transcript, in which Dr. Myers testified that he had two patients who did these things.

Mr. RHYNE: Yes; but he didn't give all the facts relating to their diet and all the other conditions.

Mr. GOODRICH: If the doctor can't answer, he can answer in that way. It is toward the bottom of the page there.

JUDGE CLARK: What page is that?

Mr. GOODRICH: 262.

JUDGE CLARK: He may answer.

THE WITNESS: Would you restate the question, please?

Mr. GOODRICH: Would you read it back, please?

(The last question was read by the reporter.)

JUDGE GOLDSBOROUGH: Dr. Myers didn't say it could be controlled. As I remember, he said that very often you would reduce the quantity of insulin and have the same effect as if you gave a large dosage of insulin, by the use of vitamins. That is my recollection of what he testified.

Mr. RHYNE: That is correct. That is what he testified.

Mr. GOODRICH: Frankly, your Honor, I am not able to tell
735 just exactly what Dr. Myers did testify at this point, because there seems to be some slight inconsistency here on page 257 and 262. I attempted to state it with all the facts that he gave on 262.

For example, on page 261 and the following page, he said these patients were very well controlled and following their doctor's advice; then on page 262 he says that these two happened to be very rambunctious and wouldn't follow their doctor's advice.

Mr. RHYNE: He is not talking about the same ones at all.

JUDGE CLARK: There are two different classes.

Mr. GOODRICH: That was the reason I put the hypothetical case: to include the factors that Dr. Myers included on those so-called rambunctious statements, those last two.

Mr. RHYNE: He doesn't tie up his statement with these two patients at all. He is just talking, as you can see from his testimony.

JUDGE CLARK: I don't see any inconsistency in his testimony. He is talking about two different classes of patients.

Mr. GOODRICH: May the question be answered as a hypothetical question with these facts in it?

736 JUDGE CLARK: Very well.

Mr. GOODRICH: Read it back. Do you understand it?

THE WITNESS: Yes.

A. Diabetics, to a certain degree, particularly mild, could be restricted to a certain form of food intake, and since that would be less than a normal diet that would be one of the indications for supplementing that diet.

Q. Would the supplementation have anything to do with the requirement of insulin?

A. Only indirectly, in that you have to give them a diet which will supply all the body requirements. You can do this better, if

their general diet is restricted, by supplementing the diet. It is possible, by starting with a minimal amount of diet, in a diabetic, to gradually reduce the use of insulin by building up the amount of carbohydrate in the diet, little by little, so that the body can make those adjustments; so it is common practice to change requirements for insulin, depending on how the diet is built up. With insulin, of course, it can be built up much faster.

Q. What is there in the diet that is directly related to the insulin requirement?

A. It is the general increase in intake of the food probably, more than any one specific factor.

737 JUDGE CLARK: I went up to the leading diabetes specialist in the United States, and I suppose in the world—Dr. Joslin of Boston.

He told me that I had a very mild case of diabetes, and *and* if I wanted to go on a very strict diet that I wouldn't have to take insulin at all.

I don't mind the insulin, so I didn't go on a very strict diet. A very strict diet wouldn't have given me anything to eat to speak of.

THE WITNESS: That is true, your Honor.

By Mr. Goodrich:

Q. If a person has an active diabetes, with an insulin requirement, and if he eats everything that is placed before him, will vitamins and minerals added as a supplement to his diet have any effect, one way or the other on his insulin requirement?

A. There have been many studies attempting to prove the relationship there, but I think it boils down that, in the common denominator, it is still the basic caloric intake of the diet that remains the important factor. If you want a larger diet you probably would have to supplement that with insulin.

Q. Would the vitamins and minerals in any way burn up the carbohydrates in this high diet?

A. It would be difficult to answer that specifically.

738 Q. Doctor, is it true that most deaths reported in the vital statistics as due to pneumonia have an underlying dietary deficiency disease—in your experience, of course?

A. I do not believe that.

JUDGE GOLDSBOROUGH: Doctor, don't you believe that the better the general condition of the body is, the more able it is to resist a disease like pneumonia?

THE WITNESS: That is true, your Honor.

JUDGE GOLDSBOROUGH: A good diet helps to build up a good body, doesn't it?

THE WITNESS: Certainly.

JUDGE GOLDSBOROUGH: All right. You may proceed.

By Mr. Goodrich:

Q. Is the giving of vitamin pills in the dosage of Nutrilite, as you have seen, synonymous with saying that a person is on a good diet?

Mr. RHYNE: I think that is an argument rather than a question.

JUDGE CLARK: I don't think there is any question about that being highly argumentative, Mr. Goodrich. You can't make an argument in the guise of asking leading questions.

Mr. GOODRICH: Would your Honor, for my education, please indicate to me what portion of that question was leading? I have some difficulty—

JUDGE CLARK: I think the whole business was leading and
739 also highly argumentative. You have just put words in the witness' mouth. You said: Was it synonymous with something else which you introduced yourself? Let the witness testify. He is qualified as an expert.

By Mr. Goodrich:

Q. Doctor, are all of the factors necessary for a good diet present in Nutrilite, as the content of that product has indicated to you, by an examination of plaintiff's exhibit No. 8?

JUDGE GOLDSBOROUGH: I couldn't hear you, sir.

Mr. GOODRICH: I will restate it.

By Mr. Goodrich:

Q. Doctor, are all of the elements necessary for a good diet present in the product Nutrilite Food Supplement?

Mr. RHYNE: I object; there is no such testimony in the record; there is no such contention made.

JUDGE CLARK: There is nothing in the booklet claiming that all the factors of a good diet are present in Nutrilite.

It seems to me that that question is clearly beyond the field, Mr. Goodrich.

By Mr. Goodrich:

Q. Doctor, is it true that most deaths due to heart disease have an underlying dietary deficiency disease?

740 Mr. RHYNE: I object that it is again leading. He says Is it true? Why doesn't he ask him what the causes are or something like that. It's a leading question that suggests the answer.

JUDGE CLARK: This is direct examination, Mr. Goodrich. You are not permitted the latitude that you are on cross examination.

Mr. GOODRICH: Of course, I understand that, your Honor. What I was asking him was simply—maybe the part of my statement "is it true" is what is objectionable?

JUDGE CLARK: Yes.

Mr. GOODRICH: That is what I was trying to find out.

741 By Mr. Goodrich:

Q. Doctor, do most deaths due to heart disease have an underlying dietary deficiency disease?

A. That is not the accepted idea about the underlying cause of heart disease.

Q. Do most deaths due to cancer have an underlying dietary deficiency?

Mr. RHYNE: I object to the question about cancer.

JUDGE CLARK: The question about cancer has been ruled out time and again, because the booklet doesn't contain anything about cancer except a specific disavowal that Nutrilite wouldn't improve that.

By Mr. Goodrich:

Q. Do most deaths due to nephritis have an underlying deficiency disease?

A. The common cause of nephritis, which is a general term, include the streptococcal infections, various other types of infections, chemical damage to the kidneys, and they influence the kidney as related to hypertension. Those are certainly the more common causes of kidney failure.

Q. Do most deaths due to cerebral hemorrhage have an underlying deficiency disease?

A. I do not believe that.

Q. Do most deaths due to tuberculosis have an underlying dietary deficiency disease?

742 A. All these questions that deal with chronic disease would have the secondary consideration that a person who has a serious, progressive, fatal disease, will terminally have malnutrition. That doesn't necessarily mean that that was the reason they got the disease. A person who is critically ill obviously can't eat adequately, and even if vitamins are injected they may not be utilized, due to the underlying disease of the body.

Q. I show you Defendants' Exhibit No. 13, which is in evidence, and ask if you will examine the sheet headed "Finding of Fact."

A. What was your question, please?

Q. I asked you to study that over. Would you state whether, in your opinion, Dr. Robert C. Butz, who made that finding of fact correctly reported the consensus of medical opinion to the Federal

Security Administrator and to the Commissioner of Food and Drugs?

A. The various disorders listed here are primarily symptoms. There are a few known specific diseases, such as leukemia, and certainly in the majority of instances these symptoms and certain of the diseases mentioned here would not be treated effectively with vitamins alone.

Q. Can you state any exceptions there that might be treated with vitamins?

743 A. Certain symptoms, such as poor appetite, may be a symptom of vitamin deficiency; it may be a symptom of many other things. If it is specifically due to thiamin deficiency, anorexia, poor appetite, and the individual has a specific deficiency, giving Vitamin B-1 would relieve that particular symptom.

If on the other hand the poor appetite was due to some reason entirely aside from that, the thiamin, then, obviously would not relieve the poor appetite, so that, although there are certain points in this, in the way of specific symptoms, as they relate to deficiencies that would be relieved, in most instances I do not believe they would be.

Q. I show you Government Exhibit No. 12, which is in evidence, and ask that you examine the finding of fact therein, dated 9 December 1948, signed by Dr. Robert C. Butz, and tell the Court whether in your opinion Dr. Butz correctly advised the Administrator, and the Commissioner of Food and Drugs as to the consensus of medical opinion.

Mr. RHYNE: I object until we have an understanding that this doctor has the same definition of "common diseases" used by Dr. Butz in making this opinion.

Mr. GOODRICH: The doctor, of course, has testified as to his understanding of the common diseases.

Mr. RHYNE: Yes, but it is Dr. Butz whom you are talking about here.

744 JUDGE CLARK: You haven't examined Dr. Butz as to his qualifications or as to his view on any of these questions.

Mr. GOODRICH: As we stated the other day, your Honor, Dr. Butz' deposition has been taken.

JUDGE CLARK: I understand, but you haven't put it in.

Mr. GOODRICH: We can't put it in. The other side took it. We have no objection to their putting it in, if you like.

JUDGE CLARK: When you take depositions either side can put them in, but you can't compel the plaintiff to put it in as a part of his case, because it is not part of his case.

Dr. Butz' report is the basis of all of this case that the Government has been putting in. Neither Dr. Dunbar nor Mr. Crawford testified to making any independent investigation of it.

The whole thing rests on Dr. Butz' testimony. Now you can't compel the plaintiff to prove qualifications of your witness for you.

Mr. GOODRICH: Of course not, your Honor.

JUDGE CLARK: If you want to put it in you are entitled to put it in, even though the plaintiff took it.

Mr. GOODRICH: As I understood the rule, we could not put it in unless they read a part of it. If I am incorrect in that, I will check it to be sure.

745 JUDGE CLARK: I think you have a right to put it in if you have a copy of it. I haven't read it. You can't compel the plaintiff to prove your case.

JUDGE GOLDSBOROUGH: It is not necessary to look it up. You can put it in if you want to put it in.

Mr. GOODRICH: All right. I would certainly like to have permission to check the rule if I may.

JUDGE GOLDSBOROUGH: Certainly, but rule or no rule, if we say you can put it in you can put it in, because we make the rules.

Mr. GOODRICH: Yes, sir. If that is the ruling of the Court that is good enough for me, of course.

Will you mark this for identification?

(Defendant's Exhibit No. 14 was marked for identification.)

Mr. GOODRICH: We offer in evidence at this time, as Defendants' Exhibit No. 14, Dr. Butz' deposition.

Mr. RHYNE: I object to that on the ground that he is their own witness, and they even told us that he is unavailable in this jurisdiction. Usually you can't use a deposition unless you can prove that the witness is not available for appearance in court.

Mr. GOODRICH: I thought the Court had ruled on that.

Mr. RHYNE: They said you could offer it, but they did not say I couldn't object.

746 JUDGE GOLDSBOROUGH: I assumed that Dr. Butz was not available. Of course if the defendants are attempting to use a deposition when the witness is available, it is a very suspicious circumstance, to say the least.

Mr. GOODRICH: Your Honor, as I started to say, we told Mr. Rhyne that Dr. Butz had transferred from our organization into the Department of the Army, and is now not in Washington.

The last time we heard from him, he was in Brook General Hospital in San Antonio, Texas.

Mr. RHYNE: You didn't tell me that.

Mr. GOODRICH: I think I did. If I have not, I beg your pardon. I certainly intended to. I believe I did. It is my recollection that I did.

JUDGE GOLDSBOROUGH: If he is in San Antonio, Texas, this member of the Court thinks that the deposition is admissible.

MR. RHYNE: I am unable to agree that they can put it in without proof of where he is.

JUDGE GOLDSBOROUGH: I say, if he is. I supposed you agreed on it.

JUDGE CLARK: Here is the rule:

"Depositions of a witness, whether or not a party, may be used by any party for any purpose, if the Court finds:

747 (1) that the witness is dead, or (2) that the witness is a greater distance than 100 miles from place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition, or (3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment, or (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena or upon application and notice, and that such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of the witnesses, orally in open court, to allow the deposition to be used."

MR. RHYNE: Of course, it is not shown that they have made any attempt whatever to procure the witness.

MR. GOODRICH: As I stated, when I was seemingly reluctant about putting it in, I said I wanted to check the rule, because I believed the 100 mile limitation had been changed by the new Judicial Code, but I was not certain of that.

JUDGE CLARK: The only reason I suggested your putting the deposition in, Mr. Goodrich, was that it seemed to me that your case up to date completely falls without the testimony of that witness.

MR. GOODRICH: We haven't finished our case, your Honor.

748 JUDGE CLARK: I understand, but the whole thing that you have put in up to date, taking two days—or a day and a half—is based on the finding of Dr. Butz.

MR. GOODRICH: We are attempting to show that the findings were reasonable findings, that they did have a basis in medicine, that both of the findings by Dr. Dunbar—we attempted to show that a reasonable man would arrive at the conclusion that the pamphlet represented the article for serious diseases.

Then, having done that, we offered a specialist in internal medicine to prove that the medical facts were sound medical facts as reported.

That is the purpose of this interrogation. Of course we have some more to come to.

JUDGE CLARK: You offered the deposition?

Mr. GOODRICH: Yes, sir, and the question was:

By Mr. Goodrich:

Q. Do you believe that Dr. Butz correctly advised the Federal Security Administrator and the Commissioner of Food and Drugs, in the finding of fact dated December 9, which is now before the witness?

Mr. RHYNE: I objected that the term "common diseases," as understood by Dr. Butz, has not been defined to this witness, and that is the important question.

JUDGE CLARK: We have been over that time and time again.

749 I think that objection is good.

Mr. GOODRICH: No further questions.

Cross examination:

By Mr. Rhyne:

Q. Is the Mayo Clinic considered on a par with Georgetown Medical School and Boston College?

A. The Mayo Clinic is one of the leading clinics in the country.

Q. Would Dr. Russell M. Wilder of the Mayo Clinic know about deficiency diseases, from his experience?

A. Yes, he would.

Mr. RHYNE: Do you have an extra copy of our Exhibit No. 6? If you don't I will just hand this one to the doctor.

By Mr. Rhyne:

Q. Doctor, I hand you what the defendants have admitted to be a correct extract from a book by Dr. Fishbein, Modern Home Medical Advisor, a chapter of which, on deficiency diseases, was written by Dr. Russell M. Wilder, and published in 1949, and I ask you:

In this chart, which they admit is an exact reproduction, he says this about Vitamin A:

"Excellent purposes: Maintains integrity or epithelial (covering) tissues, thereby helping in part to prevent infec-

750 tions. Promotes growth and vigor. Essential for reproduction."

Do you agree with that statement?

Mr. GOODRICH: We object to this interrogation with mimeographed extracts, although we have no objection to cross examination from

the book itself. This excerpt is one page taken out of a book Modern Home Medical Advisor edited by Dr. Fishbein, a number of chapters, as was stated, having been contributed by other people.

Mr. RHYNE: Dr. Wilder wrote this particular chapter, and Judge Tamm ruled that you had to admit whether this was a true extract. I am merely asking him whether he agrees with that statement.

Mr. GOODRICH: We have admitted that this was a true extract, of course, but I believe a doctor on cross examination has a right to look at the book to see if there might be other things that might explain part of this.

JUDGE CLARK: If you have admitted that the extract was correct, counsel has a right to cross examine him on the basis of the extract.

Mr. GOODRICH: May the record show our objection?

JUDGE CLARK: Both sides, throughout this case, have been permitted to read extracts from authorities, and if you insist on bringing in a great big book and compelling the witness to read it, it seems to me to be a substantial restriction on the right of cross-
751 examination that I have never heard of before in my experience. If it is a true and correct extract from the book, of course you have the right to bring in the book and put the whole book in evidence if you want to.

Mr. RHYNE: We would be glad to have the book in evidence. Mr. Goodrich has examined Dr. Myers and read things and asked if he agreed with them.

By Mr. Rhyne:

Q. Do you agree with that statement?

A. That is a correct statement for the advanced form of Vitamin A deficiency.

Q. You also see here that Vitamin A deficiency leads to:

"Lowered resistance to infection of i. any organs, especially of the eyes (xerophthalmia). Failure of growth of children. Loss of vigor. Night blindness."

Do you agree with that statement?

A. That is true.

Q. On Vitamin B-1, Dr. Wilder says:

"Promotes appetite and digestion. Stimulates body activity. Overcomes some forms of neuritis."

Do you agree with that?

A. All these statements apply to severe forms of the deficiency

Q. Do you want to read them all—well, let me ask
752 you about this: Do you agree that:

"Vitamin B-1 deficiency leads to loss of tone of digestive tract, fatigue depression, loss of appetite, forms of neuritis."

A. Only in its advanced forms.

Q. And on B-2 deficiency, do you agree that its excellent purpose is:

"Extrinsic factor in pernicious anemia."

A. I don't think that is any longer true. B-2 factor has been shown to be concerned intimately with pernicious anemia, not riboflavin.

Q. He says it is also necessary for normal growth, development of cells; do you agree with that?

A. All the vitamins are necessary for normal growth.

Q. You agree with the statement then?

A. Yes, sir.

Q. Also on B-2, he says that the deficiency leads to disorders of growth, digestive disturbances, nervous weakness, infection; do you agree with that?

A. The statements about riboflavin in the medical literature are——

Q. I just asked you: Do you agree with it, Doctor?

A. I don't agree with all the points.

Q. You don't agree with all of them?

A. No.

753 Q. What do you agree with?

A. I agree with the "extrinsic factor in pernicious anemia": that has been proven. It has been difficult to evaluate just what riboflavin does.

JUDGE GOLDSBOROUGH: It is not particularly necessary for Mr. Rhyne to hear you, but it is necessary for us to hear you.

THE WITNESS: I am sorry, your Honor.

A. (continuing) These factors, as I read them on the page here, with the exception of pernicious anemia factor, which was probably not available at the time this was written.

By Mr. Rhyne:

Q. In 1949?

A. That is now the accepted factor. It takes some time for a book to come out after the manuscript is written. All the vitamin factors are necessary for growth, so that every single item that is

here probably would bear out—there isn't any doubt that a gross deficiency of any vitamin will lead to the things listed here.

Q. What about the digestive disturbances he mentions there?

A. You will have to define what your mean by "digestive disturbances."

754 Q. He says that Vitamin B-2 deficiency leads to digestive disturbances.

A. Was this written for the laity or for physicians?

Mr. GOODRICH: For the laity, if I might add that.

A. There are many terms in here that would have to be further defined, from a medical point of view.

By Mr. Rhyne:

Q. Well, the way a layman would understand "digestive disturbances," and he says it is related to B-2 or riboflavin deficiency; do you disagree with that?

A. There are certain digestive disturbances that do result from severe——

JUDGE CLARK: You gentlemen seem to be conducting a confidential conversation. The Court can't hear a word you are saying.

A. There are certain digestive disturbances that do result from these vitamin deficiencies.

By Mr. Rhyne:

Q. Calling your attention to nicotinic acid in the next section, where he says:

"Excellent purposes: Prevention of features of pellagra."

Do you agree with that?

A. That is the known specific factor.

Q. He says that nicotinic acid deficiency leads to nerve,
755 skin, and intestinal dusturbances; do you agree with that?

A. That is correct.

Q. Turning the page, on Vitamin C, under "Excellent Purposes," he says:

"Protects body from scurvy. Required for proper formation of bones and teeth."

Do you agree with that?

A. That is correct.

Q. He says that Vitamin C deficiency leads to scurvy, softening of bones, decay of teeth, loss of muscle strength, and hemorrhage; do you agree with that?

A. The softening of bones would apply only to infants. Loss of muscle strength would apply to any one of the deficiency diseases.

Q. Doctor, under Vitamin D, "Excellent Purposes," he says:

"Proper calcification (hardening) of bones. Prevents rickets."

Do you agree with that?

A. That is the generally accepted idea.

Q. Under Vitamin D, he says:

"This deficiency leads to rickets, bone deformities, defects and caries of teeth, general muscular weakness."

Do you agree with that?

756 A. That is correct.

Q. Under Vitamin E, under "Excellent Purposes," he states:

"Necessary for reproduction in animals and man?"

with a question mark.

A. That has not been entirely accepted by the medical profession. It is true for animals.

Q. He says that this deficiency leads to sterility noted in animals only, failure of reproduction noted in animals only.

Do you agree with that?

A. That is correct.

Q. And under Vitamin K he says,

"Excellent purposes: Prevention of hemorrhage by maintaining concentration of prothrombin in blood."

A. That is correct.

Q. And he says that deficiency of this vitamin K leads to:

"Tendency to bleed, in newborn infants and in patients who have jaundice."

Do you agree with that?

A. That is correct.

757 Q. I take it that most of your work has been in the teaching field rather than private practice?

A. I think it would be necessary for me to explain what my work actually is. In every teaching hospital, a number of the beds are allocated to the teaching functions. The patients that are admitted to these beds do not have a private doctor, and come in on what is known as a service of the hospital, and the chief of the service has the professional responsibility.

I actually have more contact with patients, than any private doctor does. I have 30 or 40 patients under my care at all times.

Q. Doctor, you spoke of the persons possibly taking vitamins

and minerals, and staying away from doctors. Wouldn't it be true that a person might take aspirin or anacin, and they would mask their condition even more than the taking of vitamins?

A. Aspirin will mask a number of symptoms. I think that most statements would be that—I would simply make the statement that aspirin would mask symptoms, yes.

Q. If, for example, he had a tumor in his brain, or something like that, wouldn't aspirin mask the pain from that even more than vitamins?

A. I think it would mask it temporarily, yes, provided the pain were not severe. Aspirin will only mask a mild pain.

758 Q. When Dr. Butz refers to "all deficiency diseases," do you understand that term to include vitamin and mineral deficiencies?

A. The term "deficiency"?

Q. He refers to the term "all deficiency diseases." Do you understand that to relate to vitamin and mineral deficiencies only?

A. Deficiency diseases would include the vitamins, the minerals, and other factors in nutrition.

Q. Do you understand what "all deficiency diseases" means?

A. I assume, as it is given here, it refers to vitamin and mineral deficiencies.

Q. Is it your testimony that the vitamins and minerals contained in Nutrilite would not be effective for vitamin and mineral deficiencies?

A. I didn't state that.

Q. Do you think that the vitamins and minerals contained in Nutrilite would be effective for vitamin and mineral deficiencies?

A. If the person had a specific deficiency syndrome, the amount of vitamins listed here would be entirely adequate for a supplemental dose or as a treatment.

Q. If Nutrilite were only sold as a food supplement then, it would be perfectly proper for that purpose—as a food
759 supplement—Nutrilite?

Mr. GOODRICH: I object to that as asking for a conclusion of law.

JUDGE CLARK: It is cross examination.

THE WITNESS: Would you rephrase that?

By Mr. Rhyne:

Q. I am asking you whether or not the vitamins and minerals contained in Nutrilite could properly be sold as a food supplement.

A. They would be just as effective as any vitamin supplement of that dosage.

Q. Do you agree, Doctor, with the statement:

"Because of its vitamin and mineral content Nutrilite could assist in the cure and prevention of vitamin deficiency diseases"?

A. Yes, that would be true.

Q. Do you know, Doctor, what is contained in the base of Nutrilite, where it refers to extracts of alfalfa, parsley, and watercress?

A. I am not familiar with that.

Q. So in answering the question about Nutrilite and what it contained, you did not have furnished to you an assay of that base?

A. Not of that base, no.

760 Q. When is the first time you saw a package of Nutrilite?

A. Right here, or when it was handed to me.

Q. So you have had no opportunity to make any control studies with it?

A. No. That is true.

JUDGE CLARK: The Court will take a recess.

MR. RHYNE: I am just about through. I think, if I could have one second I will be finished with the doctor, and I know they want to get him back to the hospital.

JUDGE CLARK: Very well.

MR. RHYNE: That is all right. I have no further questions.

JUDGE CLARK: The Court will take a recess until two o'clock.

(Whereupon, at 12 Noon, the trial was recessed, to reconvene at 2:00 p.m. the same day.)

761 AFTERNOON SESSION—(2:00 p.m)

JUDGE CLARK: All right, Mr. Kleinfeld.

MR. KLEINFELD: Mr. Crawford, will you resume the stand?

Whereupon, CHARLES W. CRAWFORD was recalled as a witness on behalf of the defendants, having been previously sworn, was further examined, and testified as follows:

Direct examination: (resumed)

By Mr. Kleinfeld:

Q. Mr. Crawford please turn to pages 40 to 58 of the 58-page booklet, plaintiff's Exhibit No. 1. Kindly tell the Court what impression, in your opinion, each of these testimonials or case histories, mentioned in these pages—what impression each of them makes upon the purchaser or consumer.

A. I believe the first case history begins on page 41, about the middle of the page—or about the first third of the page. This quotes a story by a Nutrilite distributor.

"The first time I called upon this man he was propped up in a chair and his feet on an ottoman. He was very weak and spent all his time either on the chair or in bed. He had been ill for a year, had gone from doctor to doctor for relief, and had spent thousands of dollars.

762 "His case had been pronounced hopeless and his wife had expected to make arrangements with the hospital to have one foot amputated as that, they said, would be the only way to relieve the burning. Following is a record of his blood count after beginning the use of Nutrilite. The significant part there is the white count ranging on the date of May 20 from 30,000 down to December 11, 7,800, with a notation that a 5,000 to 10,000 white corpuscle count is normal.

"The fact that he went back to work the first of July might account for the increase to 21,000 white corpuscle count. He has been worrying ever since."

I think the ordinary person reading that statement is justified in concluding that by the use of Nutrilite this man got well of a very serious disease which had been in evidence for a year——

JUDGE CLARK: Mr. Crawford, I think you testified that you are not a doctor. Is that correct?

THE WITNESS: That is correct.

JUDGE CLARK: Do you think you can read the English language and tell the impression it might make on an average man any better than members of this Court? We have seen as many average men as you have or anybody else.

763 THE WITNESS: I don't think I can do it better than this Court but my experience in passing upon material of this kind was responsible for the action I took in signing the conclusions based upon the finding of fact.

JUDGE GOLDSBOROUGH: What page is that on?

THE WITNESS: Page 41.

JUDGE GOLDSBOROUGH: Do the defendants intend to offer evidence that that statement is untrue?

Mr. KLEINFELD: Our position, your Honor, is this: We think that in interpreting labeling, there are two aspects: the first aspect is what claims are made by the labeling and that we claim is not a medical function. That is a function primarily in this law of the administrative officials. They decided what in their opinion, what claims are made. Then after that is decided the medical doctors

come in to decide whether, if this claim is made, will it fulfill the claim or will it not fulfill the claim.

What Mr. Crawford is testifying to, as both one of the officials of the Food and Drug Administration charged with this function and also as an expert on labeling, he is testifying what claims, in his opinion, are made by this labeling. That is not a medical function.

JUDGE GOLDSBOROUGH: What claims are made?

Mr. KLEINFELD: Yes sir.

764 JUDGE GOLDSBOROUGH: That still speaks for itself. It says what claims are made as far as that case is concerned. Have you any evidence that it is untrue?

Mr. KLEINFELD: The evidence as to its being untrue is primarily the finding of fact of Doctor Butz and the testimony of our doctors here, but the first function as to what claims are made, we urge, is clearly a function of these defendants, first because they are charged by law with the function, second because they are experts, as to what claims are made by this labeling, not whether this product will or will not cure a certain disease but whether the product is held out as a cure for that disease. That is not a medical function. That is the witness' function.

JUDGE GOLDSBOROUGH: But here is a specific story. That story doesn't constitute a claim that the medicine, as a general thing, would do anything, but it undertakes to detail what some distributor said.

Now I am interested in knowing whether you intend to prove that what the distributor said was not true.

Mr. KLEINFELD: We claim that these case histories and these testimonials are a representation that people suffering from like illnesses will be cured by the use of this product. That is our contention and we believe the cases invariably so hold.

JUDGE CLARK: What cases invariably so hold?

765 Mr. KLEINFELD: The case cited in our trial brief, particularly the John J. Fulton case which we have cited before.

Mr. RHYNE: None of those cases, if the Court please, involve a full explanation that precedes the use of the testimonials at all. They are entirely distinguishable and have no relation whatever to this matter.

JUDGE CLARK: You may answer, Mr. Crawford.

By Mr. Kleinfeld:

Q. Go right ahead.

A. My experience in the interpretation of statements of this kind convinces me that many readers would believe that a disease condition exhibiting the symptoms here found would, through the use of Nutrilite, be relieved or cured. The condition obviously is an extremely serious one that is described by these symptoms.

The white blood count, running as high as 30,000, the fact that the disease has been in progress for a year, that one of the symptoms was burning, indicate that the disease was probably leukemia, a malignant condition of the blood, and usually fatal.

JUDGE GOLDSBOROUGH: In order to refresh my recollection: Was this particular 58-page pamphlet used when this action was begun in October of 1948?

Mr. KLEINFELD: I believe it is the subject of three libel actions, your Honor.

766 JUDGE GOLDSBOROUGH: Sir?

Mr. KLEINFELD: I believe the 58-page booklet is the subject of three or four of the libel actions.

JUDGE GOLDSBOROUGH: All right.

Mr. RHYNE: It was not in use at the time of the action your Honor, if that is what you—it had been discontinued you see, your Honor, and was not in use at the time this action was filed. Only the 42-page booklet that Doctor Dunbar testified about was in use.

JUDGE GOLDSBOROUGH: That is the question I was asking: whether or not this 58-page book or 42-page book was in use at the time of the first libel action.

Mr. RHYNE: This one was used at the time of the first libel action.

By Mr. Kleinfeld:

Q. Are you through with that case?

A. Yes sir.

Q. Will you continue with the next one?

A. Another Nutrilite distributor reports:

"One of my customers learned about Nutrilite about a year ago. At that time he was afflicted with a variety of complications and had been under the care of three doctors. Receiving no encouragement from the doctors, he tried various drug store remedies and bought several vitamin and mineral

767 supplementary foods at the Health Food Stores.

"He improved for a time and then began to slip back again. It was at this time that he learned of Nutrilite food supplement and ordered a supply. The day before it arrived he had a violent attack accompanied by severe abdominal pains and a splitting headache. This attack lasted from about 9:00 in the morning until midnight and several times the heart catches were so intense he expected his heart beat to discontinue at any second.

"The following day he began to use Nutrilite and since that day he has had, he says, but one attack which was light. Within

three months he was back at his job and able to work as he had five years previously. He reports that out of the 19 disorders he experienced the day he began to use Nutrilite, but three remain and these only slightly. No one of those three is heart difficulty."

Again we have a representation concerning a severe condition, a condition of long duration, of pains, abdominal pains, splitting headache, heart catches, and in my opinion, in the fashion in which this story is presented, it offers to the average reader the idea that through the use of Nutrilite these conditions can be alleviated or cured.

768 JUDGE CLARK: Do you have any reason to believe that the statements contained in that report are not true?

THE WITNESS: Yes, your Honor.

JUDGE CLARK: Have you any evidence to that effect, Mr. Kleinfeld?

Mr. KLEINFELD: We have one, the finding of fact made by Doctor Butz.

JUDGE CLARK: Doctor Butz has disappeared.

Mr. KLEINFELD: He has not disappeared, your Honor. He is no longer in the employ of the Food and Drug Administration. At the time he made the finding of fact, he made the finding of fact as permitted by the Federal Food, Drug and Cosmetic Act and these defendants were permitted by law to rely on it.

That is what they did.

JUDGE GOLDSBOROUGH: Do you mean made a finding of fact?

Mr. KLEINFELD: The Federal Food, Drug and Cosmetic Act, 21 U.S. Code 334(a), specifically says that when the administrator determines that he has probable cause to believe—

JUDGE GOLDSBOROUGH: I am thoroughly familiar with that. There is not any sense in instructing the Court about that. You said Doctor Butz made a finding of fact. Do you mean that he ascertained specifically that these endorsements were not true? Is that what you mean?

Mr. KLEINFELD: He determined that the medical claims made by the booklet were false and misleading.

769 JUDGE CLARK: Your own witness testified this morning that it was impossible to pass on a matter of that sort without extensive experimentation, and both Doctor Dunbar and Mr. Crawford testified they didn't make any, that the Food and Drug Department didn't make any—

JUDGE GOLDSBOROUGH: And that they never got a complaint from any of these patients. They testified to that, didn't they?

JUDGE CLARK: Yes.

Mr. KLEINFELD: I say, your Honor, that what Mr. Crawford and what Doctor Dunbar did, what Mr. Larrick did, what the acting administrator of the Federal Security Agency did was this: They read these pamphlets—the 58, the 42, the 36. They determined as experts and as persons charged by Congress with making the determination, that certain claims were made by this booklet.

They then again, pursuant to law, called in their medical officer and said, "Are these medical claims true or false?" Now based on the medical finding of fact of Doctor Butz, and upon their reading the pamphlet, they then reached the determination of probable cause involved in this action.

JUDGE GOLDSBOROUGH: That is one thing, but what we are talking about now is an entirely different thing. What the Court wants to know—or what I want to know at least—is whether or
770 not Doctor Butz made any specific investigation of any of these endorsements and found out that those specific endorsements were untrue?

Mr. KLEINFELD: Specific endorsement? No sir.

JUDGE GOLDSBOROUGH: All right.

JUDGE CLARK: Judge Tamm very properly suggested that there hasn't been any determination made. There were some decisions made but there has been no determination of any facts so far as the Court has been informed up to this time.

Mr. KLEINFELD: We have put into evidence the findings of fact of Doctor Butz and the determinations of probable cause made by the defendants.

Mr. RHYNE: Those were not received as proof of the facts contained therein, merely to show that he had something before him. I thought that was specifically understood: that the facts set forth in Doctor Butz' findings—

JUDGE CLARK: Since you attack Doctor Butz' finding as to both decisions—the determinations of Mr. Crawford and Doctor Dunbar—that was obviously the basis of their decisions. Neither one of them made any independent investigations of his own.

Mr. KLEINFELD: Not in the medical aspects. They are not qualified to do so.

JUDGE CLARK: We don't know whether Doctor Butz is qualified either. All Doctor Dunbar testified was that he graduated from Wisconsin and served a hitch in the Army or
771 Navy—I have forgotten which he said—

Mr. RHYNE: Army.

JUDGE CLARK: —as a psychologist. I don't see that that qualifies him to make findings of fact.

Mr. KLEINFELD: That is not what the defendants have said, your Honor. We don't admit that and that is not in the record.

Mr. RHYNE: Doctor Dunbar testified that he was a psychologist.

JUDGE GOLDSBOROUGH: Here is the situation. You are not offering evidence now as to whether or not the general tone of this book is one to mislead the patient into believing that it would cure diseases that it admittedly will not do, and conditions that it will admittedly not alleviate.

What you are now making is a specific statement of fact and that Doctor Butz can't do in my opinion unless in a purely arbitrary way, unless he has some foundation for his opinion, unless he has made a statement that as to a particular finding of fact, he found that to be untrue.

MR. KLEINFELD: This witness is not a doctor. All we are asking of this witness, who is one of the defendants and is qualified as an expert on labeling, is as to the impression that, in the witness' opinion, these statements will make upon the purchaser or con-
772 sumer; that is all we are asking him.

JUDGE GOLDSBOROUGH: I thought you said it was based on Doctor Butz' findings of fact.

MR. KLEINFELD: No, your Honor.

JUDGE GOLDSBOROUGH: That is certainly what I understood you to say a half dozen times or more.

MR. KLEINFELD: I didn't mean to convey that impression.

JUDGE CLARK: There are exhibits here that were obviously based on Doctor Butz' so-called findings of fact.

JUDGE GOLDSBOROUGH: How anybody can make a finding of fact about a specific thing that he knows nothing about is simply beyond my comprehension.

If these endorsements are not true, it would be very easy for the plaintiff to identify the individual who made a particular endorsement and to testify whether it is true or false, not to have Doctor Butz or anybody else make the arbitrary statement that that endorsement was never made. That is what you are saying: that you found, as a matter of fact, that the endorsement was never made.

MR. KLEINFELD: We are not saying the endorsement was never made. We are saying it conveys a false or misleading impression upon the purchaser or consumer.

Let me go into this again to make my point clear. Here is a statement on page 42 at the top of the page:

773 "It was at this time that he learned of Nutrilite Food Supplement, and ordered a supply. The day before it arrived he had a violent attack accompanied by severe abdominal pains and splitting headache. This attack lasted from about 9:00 in the morning until midnight and several times the heart 'catches' were so intense he expected his heart beat to discontinue at any second" and so on.

JUDGE CLARK: Have you any evidence that statement is not true? Doctor Butz' finding of fact doesn't cover that does it?

Mr. KLEINFELD: It covered the entire booklet. I want to explain the function that this witness has to perform.

He first has to look at that language and decide in his mind what representation that language makes to the ordinary purchaser. He may look at that and say, "In my opinion this language, in the form in which it is contained in this pamphlet, this language is claiming that this product will cure severe abdominal pains and splitting headache." That is the only thing he does.

Then he turns to his doctor and says, "Will a product containing the ingredients that Nutrilite contains—will that product cure severe abdominal pains and splitting headache?"

On the basis of what the doctor tells him on that aspect and on the claim which he believes is made by the language, he then
774 determines whether he has probable cause to believe that the language is misleading in material respect.

JUDGE GOLDSBOROUGH: I am not up to your reasoning. I haven't developed that aura of greatness which will enable me to assimilate your thoughts. Proceed.

JUDGE CLARK: I have known this witness for many years and hold him in high esteem, but I don't believe he is any better qualified to read that booklet and tell what is in it than Judge Goldsborough or Judge Tamm or myself.

Mr. KLEINFELD: There have been other witnesses who have testified—Doctor Myers for the plaintiff and this lawyer.

JUDGE CLARK: Doctor Myers testified principally as to incidents that happened in his own actual practice.

Mr. KLEINFELD: He was permitted to testify as to his opinion whether anything in the booklet was false and misleading as I recall.

JUDGE CLARK: He was permitted to testify largely as to deductions that he had made from his own experiences in his practice. The doctor from Georgetown who was on the stand this morning refused to state flatly any proposition, despite a very searching questioning by Mr. Goodrich. That doctor would say, "Well, it hasn't come to my attention" or something of that sort.

775 I still don't see why any expert is needed to tell what the booklet means or the reaction on the average man. We are all average men. I have certainly been acquainted with about as many average men as nearly anybody in the country—certainly anybody my age—and I still don't see that Doctor Butz' finding is any finding at all.

Mr. KLEINFELD: What the Court is really addressing itself to, I urge, is the major issue before the Court and that is whether Mr.

Crawford, for example, who is one of the defendants, acted arbitrarily. He is trying to explain how he didn't.

JUDGE GOLDSBOROUGH: When I was about 10 or 11 years old, sometimes my heart would beat in such a way that you could actually hear it rattle. My grandfather was a country doctor. He gave me some little pills that were marked arsenic and strychnine for about a week and I haven't had it since. If I was giving that endorsement and stated that I took those remedies and they stopped my heart from palpitating in the way it did, could Doctor Butz come in and say it wasn't so, or anybody else? I don't understand your argument at all.

Mr. KLEINFELD: Your Honor, with all due respect to your Honor, I don't think the ordinary non-doctor is qualified to testify as to any diseases he may have or as to what happened to him when he took various medicines.

776 JUDGE GOLDSBOROUGH: They are not testifying what diseases they have. They are testifying to their symptoms—something that they know. They are not testifying to any specific disease they have. These endorsements said, "I had these symptoms and I took Nutrilite and the symptoms ceased."

Mr. KLEINFELD: We think, your Honor, and the defendants think, who are supposed to be experts in this field, that statements such as are contained here are very skillfully put in so as not to specifically mention the diseases but definitely to leave the impression upon the ordinary person, not necessarily lawyers or astute judges, but the ordinary person in the street, that they suffered from severe diseases, they took this product and they were cured.

That is the fundamental point involved in this case. That is what this witness is testifying to. The whole case is based upon the proposition, outside of constitutionality, that in doing what he did this defendant and the other defendants acted arbitrarily and illegally.

We urge that he is trying to explain how he didn't—

JUDGE CLARK: Mr. Crawford, you may answer, but the Court is not going to permit an extended inquiry of that sort.

Mr. KLEINFELD: Was there a question unanswered?

JUDGE TAMM: The last question has been answered.

Mr. KLEINFELD: We do want Mr. Crawford to go through

777 each one of these case histories and testimonials to testify as to his opinion as to the impression it makes, as to the claims it makes of therapeutic value upon the ordinary purchaser or consumer.

If the Court has ruled that he may not do so, then of course I can not proceed.

JUDGE GOLDSBOROUGH: That is the opinion of this member of the Court: that the testimony is not admissible.

JUDGE CLARK: It is the opinion of this member of the Court that it is not admissible, Mr. Crawford not being a doctor, and as I say, not being any better qualified to judge the impression it would make on the average man than anybody else. He is an administrator and a very excellent one, I am perfectly willing to admit, but I don't think that qualifies him to pass on the understanding of the average man.

Mr. KLEINFELD: Then may I have the record show, your Honor, for the sake of getting a clear record, that Counsel for the defendants wish to ask the witness who is one of the defendants as to his opinion with respect to the impression that each of the testimonials and case histories contained in pages 40 to 58 would convey to the ordinary purchaser or consumer, and that the Court has ruled that that may not be done?

JUDGE CLARK: Yes, certainly you may do that in the record.

778 As I understand Mr. Crawford's statement, it was explicitly that he never made any investigation at all as to the truth of these claims. He asked a psychologist down there in the Food and Drug Administration whether he thought that any of these things would be cleared up by Nutrilite, and the psychologist said, "No."

Mr. KLEINFELD: Your witness, Mr. Rhyne.

Cross examination:

By Mr. Rhyne:

Q. You said that this 58-page pamphlet first came to your attention on the 28 of September, is that true?

A. That is my recollection.

Q. At that time did you read it through?

A. Yes.

Q. All the way?

A. As I testified on Friday, I scanned through and got the gist of the testimony up to page 36, I think it was, and then read carefully the remainder of the booklet.

Q. Do you remember my taking your deposition?

A. I do.

Q. You testified as follows:

"Q. Before signing that letter, did you read this 58-page booklet? A. Yes.

"Q. Through? A. Yes. I read through the 58-page booklet not word by word, perhaps, but enough to get the meaning of it.

779

"Q. You just scanned through it? A. That is right, and parts of it I read carefully."

Is that still your answer?

A. Yes.

Q. The matter came before you again on the 30 of September which was two days after that.

A. Yes.

Q. And at that time did you read the 58-page book?

A. Just to check my impressions as I had gotten from the original reading. I did not read it over thoroughly the second time. I did reread certain key paragraphs of it.

Q. So that when you testified in your deposition and I asked you this, "By that you mean that the matter came before you and you, as I say, scanned the booklet and looked through the file and signed the conclusion right then" and your answer was, "Right." Is that still your answer?

A. Still.

Q. So when we asked the defendants to admit that prior to January 28, 1949, you had not read the entire booklet, that sworn answer which states, "Associate Commissioner Charles W. Crawford read a sufficient portion of the 58-page booklet to convince
780 him that it was materially misleading", that is a correct answer?

A. I am not sure I understand your question in its entirety.

Q. Mr. Crawford, I don't mean to—

JUDGE CLARK: Are you reading from the deposition?

Mr. RHYNE: I am reading from our interrogatories which we submitted to all the defendants. We asked them this:

> "Prior to 28 January 1949, had the Associate Commissioner Charles W. Crawford read any of the editions of 'How to Get Well and Stay Well' in its entirety"

and the answer,

> "Associate Commissioner Charles W. Crawford read a sufficient portion of the 58-page booklet to convince him that it was materially misleading."

By Mr. Rhyne:

Q. That answer is correct, is it?

A. That is true, yes.

Q. Your decision of September 30 related only to pages 37 through 58 of the booklet, did it not?

A. The finding of fact related to pages 37, I think it was, to 58. The meaning of what occurred on those pages is amplified and given substance by the first 36 pages.

Q. Your testimony is you merely scanned the first 36 pages?

781 A. Yes, but enough to get the meaning of it and the gist of it.

Q. Isn't it true that the first seizure action in Belleville, New Jersey related only to pages 37 through 58, based on your decision?

A. I believe the charges were based upon those pages.

Q. So you only criticised 37 through 58?

A. That is right.

Q. And you didn't mention that you had any objection to the first 36 pages?

A. No.

Q. When you made this decision of September 30, did you talk to Doctor Butz?

A. No.

Q. Did you know him at all?

A. Yes.

Q. When you made that decision, did you have before you any facts showing damage or injury to any person from Nutrilite or its labeling?

A. No. I had no information concerning the users of Nutrilite at that time.

Q. Then you had before you then no complaints from any users or consumers?

A. I did not.

Mr. RHYNE: That is all.

782 JUDGE CLARK: Any further direct examination?

Mr. KLEINFELD: No re-direct.

(Witness excused.)

783 GEORGE P. LARRICK was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Kleinfeld:

Q. What is your name and address, please?

A. My name is George P. Larrick, 4841 - 30th Street, North, Arlington, Virginia.

Q. What position do you hold with the Food and Drug Administration?

A. I am one of the Associate Commissioners.

Q. Do you have any degrees?

A. I have no degrees?

Q. How long have you been with the Food and Drug Administration?

A. Twenty-six years.

Q. What positions have you held with the Food and Drug Administration and what functions have you performed in each position?

A. I left college—

JUDGE CLARK: I would like to ask one question at this point because there is a point I am not clear on. What is the difference between an Assistant Commissioner and an Associate Commissioner?

THE WITNESS: In the Food and Drug Administration the
784 Commissioner, Dr. Dunbar, he is the boss. Then you have the Deputy Commissioner: he is the second boss. Then you have two Associate Commissioners, and they come under the other two.

JUDGE CLARK: I see.

By Mr. Kleinfeld:

Q. I ask you to describe to the Court the positions you have held with the Food and Drug Administration and the particular functions you have served in each position.

A. In 1923 when I left college I took a civil service examination for Federal Food and Drug Inspector. I was appointed as a Food and Drug inspector in March 1923 at the Cincinnati station. I worked as a field inspector for the next five years. Then I was brought to Washington in a minor administrative capacity where I served as an assistant to Dr. Dunbar and Mr. Crawford. Later I was made Chief Inspector of the Food and Drug Administration which position I held for about 10 years.

Still later I became Assistant Commissioner and still later Associate Commissioner. I held the latter position for about a year.

Q. What functions do you now perform?

A. The functions which I now perform involve the review of recommendations from our field stations as to legal actions. I review recommendations for seizures, prosecutions, and inspections.
785 I also am authorized, in the absence of the Deputy Commissioner and the Commissioner, to make findings of facts in these cases involving more than one seizure.

I handle correspondence with the industry, answer letters of inquiry from the trade, from consumers and from various persons. I have to do with helping Dr. Dunbar in different things, such as budget, personnel; and I generally do the things that I am assigned by my superiors.

Q. Did you say that one of your functions was the making of the determinations of probable cause under section 304(a) of the Act?

A. Yes, sir.

Q. Please tell the Court your experience in connection with the labels and labeling of food and drug products?

A. As a Food and Drug inspector at the beginning I was in the business of inspecting factories, reviewing labels in wholesale houses, and undertaking to determine where there was likely to be a violation of the law.

In the time that I spent in the field I was trained to try to distinguish between suspicious products and those products that didn't require any further investigation. When I came to Washington in 1928, and ever since, a big share of my work has been to pass upon the labels and to use the best judgment that I had in determining whether they were true or false or misleading.

786 JUDGE GOLDSBOROUGH: For my information: Does the Food and Drug Administration have anything to do with magazine and newspaper advertisements?

THE WITNESS: Not directly, sir. That is the direct function of the Federal Trade Commission. As Judge Clark knows, the statute was split so that the Federal Trade Commission controls the advertising and we control the labeling.

By Mr. Kleinfeld:

Q. When was your first contact, if you recall, with Mytinger and Casselberry, Inc., or Nutrilite?

A. I am not sure to what extent I had dealings with Nutrilite beginning in 1939. I know that I saw records pertaining to the product, and correspondence between the original manufacturer and the Food and Drug Administration had begun somewhere at about that time, when they wrote to us and asked for comments on labels, which were given to them.

The most intensive interest in it, however, began in November 1948 when I received a call that three gentlemen representing this firm—Mr. Lev, Dr. Casselberry, and Mr. Mytinger—would like to call at my office and discuss matters of mutual interest.

Q. Did they call at your office?

A. Yes, they did call at my office.

Q. What occurred at that meeting?

787 A. The principal subject of conversation involved the question of the consolidation of several seizures of this product Nutrilite which had been made, in a jurisdiction for trial, and they wanted us to agree to transfer it to the home jurisdiction which was Los Angeles, California. I discussed with them—

JUDGE CLARK: Was that after all these libel suits were filed?

THE WITNESS: It was after some of them were filed. It wasn't after all of them. It was in November and I believe that several of them were filed afterward.

We discussed the question of the Administration's policy or view as to whether or not it would be proper for us to agree to consolidating them in Los Angeles for trial.

By Mr. Kleinfeld:

Q. What happened?

A. Well, I stated the view of the Agency, which was that we did not wish to establish the precedent, in view of the legislative history of the Act, of consolidating in the home jurisdiction. I explained to them that in many of our actions the cases involved matters of tremendous importance to a locality, referred to a statement in Judge Knox's book of a case that he tried involving some canned cherries where the Court in the book that he wrote later told that he had these cherries on trial, and the charge was that they were wormy.

788 JUDGE CLARK: They were what?

THE WITNESS: They had worms in them.

A. (continuing) And the jury was made up of farmers from the locality or merchants whose interests were pretty closely connected with the principal business of the community, and Judge Knox used this illustration in his book.

He said the jury brought in a verdict of Not Guilty against the cherries, but essentially told the firm not to do it again, and Judge Knox used this as an illustration of the difficulty in some types of Food and Drug cases of trying the case in the home jurisdiction.

I explained to them that we didn't want—

JUDGE CLARK: I know a jurisdiction of townships where you couldn't get a conviction under the local law to save your life, and in the next township you couldn't lose the case.

A. (continuing) I explained to them that we wanted to maintain the fundamental principle that we didn't want to transfer jurisdictions to the home district because if we once did it, we would have an awful time deciding when we should and when we shouldn't do it.

In the long run, we felt it would be harmful to the proper enforcement of this law.

Mr. KLEINFELD: Will the clerk please mark this for identification.

(A document was handed to the clerk.)

789 (The document referred to was marked for identification as Defendants' Exhibit No. 15.)

JUDGE CLARK: Is that another exhibit based on Butz?

Mr. KLEINFELD: Yes, your Honor.

By Mr. Kleinfeld:

Q. Mr. Larrick, I hand you Defendants' Exhibit 15 for identification and ask you to tell the Court what it is.

A. Your Honors, this is a document which was received on 10 October 1949 by the Acting Executive Assistant to the Federal Security Agency Administrator, Mr. Ahearn, which states that the documents attached hereto are a part of the files of the Federal Security Agency and the Food and Drug Administration. The document—should I read it?

Q. Tell the Court what it is.

A. The document on the next page involves a finding of fact where Robert C. Butz—

JUDGE CLARK: Is that the same as the other two exhibits?

Mr. KLEINFELD: It is very similar.

Mr. RHYNE: It is different.

JUDGE CLARK: If it is the same, it is not necessary to read it in.

Mr. KLEINFELD: It is somewhat different, your Honor.

Mr. RHYNE: It is different.

790 JUDGE CLARK: All right.

THE WITNESS: I believe it is different from the others which I have heard mentioned in the court room.

JUDGE CLARK: All right. Go ahead and read it.

JUDGE GOLDSBOROUGH: Did you say it was dated October 1949?

THE WITNESS: The certificate, sir.

JUDGE GOLDSBOROUGH: The certificate?

THE WITNESS: The document signed by Dr. Butz is dated 2 December 1948.

A. (continuing) The first page of this finding of fact, signed by Dr. Butz, is identical with those that I have heard previously read, except that after describing the composition of the article in terms of the claims on the label, he said—

Mr. RHYNE: If the Court please, I submit he has gone far enough to describe it. If he is going to offer it in evidence let him offer it so I can make an objection to it.

JUDGE CLARK: Do you wish to offer it in evidence?

By Mr. Kleinfeld:

Q. Will you briefly describe the document?

A. The next document—or attached to the document that I have just referred to is a long list of claims which are referred to as Exhibit A. They are incorporated into Dr. Butz' finding of fact.

791 Attached also to this document is the conclusion for the Administrator, which I signed on 2 December 1948.

Mr. KLEINFELD: I offer that in evidence.

Mr. RHYNE: May I see it?

THE WITNESS: (The witness handed a document to Mr. Rhyne.)

Mr. RHYNE: I again object to the finding of fact by Dr. Butz, on the ground it is hearsay, and I object to the inclusion of Exhibit A here because it contains a lot of excerpts without giving the full text of the pamphlet, "How to Get Well and Stay Well."

JUDGE CLARK: Do I understand that this is the same thing that has been admitted here twice in evidence?

Mr. RHYNE: No, it is not at all.

Mr. KLEINFELD: There were three different determinations of probable cause, each one based upon a different booklet. Dr. Dunbar made one determination based upon a 58-page booklet—42. Mr. Crawford made one based on the 58-page pamphlet, and Mr. Larrick made this based on a different 36-page pamphlet, but this is a certified copy of what he did at that time.

JUDGE CLARK: You mean there were three separate and distinct findings?

Mr. KLEINFELD: Yes, sir.

JUDGE CLARK: It was not a question of going through
792 channels, that is, from the Associate Director to the Deputy Director and thence to the Commissioner—or whatever you call them?

Mr. KLEINFELD: Three separate and distinct determinations of probable cause.

JUDGE CLARK: What was your objection, Mr. Rhyne?

Mr. RHYNE: I say that all the statements by Dr. Butz are entirely hearsay, they are not findings of any fact at all, and the Exhibit A that they have attached there contains a few words and extracts selected from here and there in the pamphlet "How to Get Well and Stay Well" evidently, without giving the full text. So it is an entirely misleading exhibit.

JUDGE CLARK: Mr. Kleinfeld, that would be objectionable.

Mr. KLEINFELD: If the Court please, these two documents are what the defendant signed. This is what the plaintiff claims was done arbitrarily. We just want to put it in evidence so the Court may decide from the evidence whether it was or was not arbitrary. It is a copy of what he did under the statute. That is the only reason we offer it, not for truth or correctness of it, but to prove that it was done.

JUDGE GOLDSBOROUGH: We are going far afield, it seems to me. In the first place, I am not sure that the document was properly authenticated. It is not an authentication of a deposition, as I understand it.

793 Mr. RHYNE: It is evidently an authentication of some thing that appears in their records.

Mr. RHYNE: I will concede that. My primary objection to it, though, is that it is hearsay, pure and simple, that they are getting into the record in this way.

JUDGE CLARK: How is it authenticated, Mr. Kleinfeld?

MR. KLEINFELD: There is a certificate here:

> "Pursuant to the provisions of title 42 of the U. S. Code, an acting executive assistant of the Federal Security Agency certifies that the attached copy of finding of fact and conclusion of Mr. Larrick are true copies of official documents on file in the Food and Drug Administration of the Federal Security Agency and are part of the official records of said Administration and Agency."

MR. RHYNE: That doesn't relate it up to this case in any way, that certification does not, does it?

JUDGE GOLDSBOROUGH: Mr. Rhyne says he is not being technical about the authentication of it, but is it your view that the mere statement of Dr. Butz and the Food and Drug authorities, that certain matters of fact were violative of the Act, that that alone justifies the Commission to take action?

MR. KLEINFELD: No, your Honor, because Dr. Butz does not say and is not authorized to say whether anything is violative of the Act. He merely says that as a doctor a particular product will or
794 will not act as a cure or preventive of a certain disease or condition.

JUDGE GOLDSBOROUGH: Now, then, suppose the matter comes in court, as in this case; Is it your view that his testimony, either in person or by deposition, is not necessary in the defendants' case?

MR. KLEINFELD: That is correct, your Honor.

JUDGE GOLDSBOROUGH: I don't agree with that.

MR. KLEINFELD: But your Honor, I am not offering this other than to show that Dr. Butz made the finding.

JUDGE GOLDSBOROUGH: I know that. I know what you mean.

MR. KLEINFELD: And that Mr. Larrick made the determination, and they are suing on the grounds that it was arbitrary and illegal.

JUDGE GOLDSBOROUGH: But they have a responsibility. Now, ought they not to be required to show they got information from a source that they had to rely upon? To express it in another way: Shouldn't Dr. Butz be here, either in person or by deposition to show what his qualifications are and what reason they had to rely on what he said? It seems that way to me.

MR. KLEINFELD: We have offered Dr. Butz's deposition, but it hasn't been admitted in evidence because of the plaintiff's objection. We are willing to have it go into evidence.

JUDGE CLARK: Are you going to make any effort, Mr.
795 Kleinfeld, to obtain attendance of Dr. Butz?

MR. KLEINFELD: No, because we thought—and obviously incorrectly—we thought that since plaintiff had taken his deposition

in voluminous detail, we assumed that plaintiff would offer it in evidence and we weren't going to object to it.

JUDGE CLARK: I have taken many depositions that I didn't choose to offer in evidence or read at the time of the trial, and I have been sometimes very much embarrassed by having the other fellow get up and read it.

Mr. KLEINFELD: We are willing to have it go in, if the Court will take it in.

JUDGE CLARK: I think it is incumbent on you to make some showing that you attempted to secure the presence of this man who I understand is in the Army; is that correct?

Mr. KLEINFELD: Yes, sir.

JUDGE CLARK: If you would go to the commanding officer and explain to him that the Government is anxious to secure his attendance the chances are 999 to 1 that the commanding officer will say, "If that is the situation, he will have to go."

Mr. KLEINFELD: We hadn't thought so at the time. In addition, is was our view that the burden was on the plaintiff in this action to show that the defendants had acted arbitrarily.

796 JUDGE CLARK: It is not part of the plaintiff's burden to try to prove the qualifications of this fellow Butz. The only testimony that has come into the record as yet, outside of Dr. Dunbar—a somewhat hazy experience in the Navy or the Army. Was it the Army or the Navy?

Mr. RHYNE: He said he was a psychiatrist in the Army.

Mr. KLEINFELD: Dr. Butz is a medical doctor who passed a civil service examination. In making the determinations of probable cause here, the defendants relied on his finding of fact, as we urge they had a legal right to do under the Act.

His deposition was taken at great length by the plaintiff. If the plaintiff wishes to put it in, we have no objection.

JUDGE CLARK: Mr. Rhyne, the authenticity of this document—that is, the certification that it came from the files—of course takes it out of the hearsay rule, but Exhibit A is clearly inadmissible because it just consists of a lot of extracts from this booklet, when we have the whole booklet before us. The whole Court has read the booklet. So that Exhibit A will certainly have to be restricted.

Mr. KLEINFELD: Is the remainder going to be permitted to go into evidence?

797 JUDGE CLARK: The Court would like to take a recess. In the meantime, the Court will take a recess and would like to see what is it.

Mr. KLEINFELD: The deposition of Dr. Butz?

JUDGE CLARK: Yes.

Mr. KLEINFELD: We offered it this morning. We have it here.

JUDGE GOLDSBOROUGH: Somebody has to offer it first.

JUDGE CLARK: He offered it this morning.

Mr. KLEINFELD: We offered it, sir.

JUDGE CLARK: Mr. Rhyne objected and we didn't rule on it.

Mr. KLEINFELD: Do you want to see it?

JUDGE CLARK: Yes, we do want to see it.

(Mr. Kleinfeld handed a document to Judge Clark.)

(Whereupon a short recess was taken.)

798 JUDGE CLARK: The Court is going to admit this deposition, but the Court feels that it should warn the defendants that their failure to produce the witness Butz, or to give any explanation for failing to produce him, will be very seriously against the defendants' case.

He is the key witness in this trial, and it seems as though the defendants are not producing the witness because they don't want to produce him.

Mr. Kleinfeld stated, himself, in open court, that he hadn't made any effort to procure the attendance of the witness Butz, although every line of investigation in this case goes back to Dr. Butz.

(Defendants' Exhibit No. 14 was received in evidence.)

Mr. KLEINFELD: May I address the Court on that?

JUDGE CLARK: Yes.

Mr. KLEINFELD: If it please the Court, our position is this: We believe that under the statute the defendants—the administrative officials here—are permitted to rely on the finding of fact as to medical aspects, made to them by the medical doctors—in this case Dr. Butz. We did not believe, for that reason, that it was necessary, in any way, to call Dr. Butz here.

If we had thought it was necessary we would of course have tried to get him.

799 We believe that his finding of fact here, together with the medical testimony which, in addition, we are producing, was necessary.

Further, we did believe, at all times, that, since the plaintiff had taken the exhaustive deposition of Dr. Butz—very exhaustive deposition—that there was nothing in particular to be gained by it.

We at all times have been willing to have this deposition go in as evidence of what Dr. Butz found and what he did in respect to his qualifications.

JUDGE CLARK: Mr. Kleinfeld, as I have explained several times, you can't throw the burden on the other party to help you prove your case, and the qualifications of Dr. Butz are the very essence of this case.

Mr. KLEINFELD: We urge your Honor that there is no case for the defendants to prove; there is only a case for the plaintiff to prove.

JUDGE CLARK: You have to prove that actions were taken in due course, and really establish probable cause. You can't expect the plaintiff to prove the qualifications of the man whose actions and reports you rely on exclusively.

Mr. KLEINFELD: We think we have shown probable cause by having the defendants here testify as to the manner in which they reached their administrative determination.

JUDGE CLARK: As one member of this Court, I have no
800 hesitancy in saying that I don't think you have. I haven't consulted with my associates yet. Since you make the flat assertion, I will tell you that I don't think you have.

Mr. RHYNE: Could I make one statement? Since you say you are admitting this deposition over my objection. As you all know, when lawyers take such a deposition, they take it more or less for discovery and to find out what it is all about, and you don't ask all the questions that you would like to ask, so I don't think that Mr. Kleinfeld's statement that this is very exhaustive is particularly true, because I merely asked a few of the questions that I probably would have asked had Dr. Butz been here, so I don't think this deposition is a true and full representation of what his testimony would be if he were here, and I did not take it for that purpose.

Mr. KLEINFELD: Your Honor, this deposition takes 84 pages. I think that is voluminous.

Mr. RHYNE: And also you stopped me—you wouldn't let me ask him a lot of questions because of your objections, and you instructed him not to answer.

Mr. KLEINFELD: May I continue, your Honor?

JUDGE CLARK: Yes.

Mr. KLEINFELD: I ask that the Clerk show you plaintiff's Exhibit No. 2, the 36 page booklet.

801 By Mr. Kleinfeld:

Q. Is that the booklet you had before you when reaching your determination of probable cause?

A. It isn't the same booklet. It may be identical with it.

Q. I mean, is it an identical booklet as far as you know?

Mr. RHYNE: I thought, Mr. Kleinfeld, you had stipulated to that.

Mr. KLEINFELD: Yes. I think, Mr. Larrick, that Mr. Rhyne and I have agreed that it is the same, unless you find something that isn't.

A. Yes, it appears to be the same booklet.

JUDGE CLARK: They are all the same booklets that are involved here, aren't they? The 36-page booklet, the 58-page booklet, and the 42-page booklet?

Mr. KLEINFELD: Yes, your Honor.

JUDGE CLARK: They have been referred to that way throughout the trial?

Mr. KLEINFELD: Yes, sir.

By Mr. Kleinfeld:

Q. Did Dr. Butz' medical findings of fact and the booklet plaintiff's exhibit No. 2, which you have before you, come to you in connection with the performance of your regular duties?

802 A. They came to my desk in the regular course of business.

Q. In reaching your determination of probable cause under the statute, did you read the entire 36-page booklet?

A. I did, in its entirety.

Q. After considering the entire booklet and reading it, and after reading and considering Dr. Butz' medical finding of fact, what conclusion did you come to?

A. I came to the conclusion that the booklet, as a whole, was misleading, to the injury or damage of the purchaser or consumer.

Q. Was that conclusion based upon Dr. Butz' medical findings of fact and your opinion with respect to the claims made by the booklet?

A. I accepted Dr. Butz' conclusion as to the misleading character of the statements in it. I then reached an independent conclusion that it was misleading in a material respect and that it would be, in my opinion, to the injury or damage of the consumer.

Q. Did you say it was misleading in a material respect?

A. Yes, sir.

Q. Will you please take the booklet plaintiff's exhibit No. 2

803 and explain to the Court how you came to your conclusion that the labeling of Nutrilite—the booklet—was misleading in a material respect, to the injury or damage of the purchaser or consumer?

A. In appraising the book, I undertook to try to place myself in, the position of the average individual who presumably is ill and wishes very much to find some way to recover his health, or the individual who has health and wishes to retain it.

I placed myself in that position, to the best of my ability, because the title of the book, "How to get Well and Stay Well," to me was a broad, all-inclusive, invitation to people who were ill and people who wanted to be kept well, to read this material.

Q. Would you go through the booklet, beginning at the beginning, and explain to the Court how you came to your conclusion?

A. First, I studied carefully the material which I had received from Dr. Butz. This consisted of his statement that the product would not accomplish certain things stated in the booklet.

I then read the excerpts from the booklet, which were enumerated in the sheet which he attached to his finding of fact.

804 Then I turned to the booklet itself and read it through getting the significance of the things Dr. Butz had picked out in their context as they occurred in the actual booklet.

I read, for example, the introductory statement:

> "If your health problem is the result of dietary deficiencies, and if you want to get well and stay well, be sure to read this book.
>
> "Even if you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition.
>
> "If your health is good read this book and learn how to stay well."

In the light of Dr. Butz' statements to me, I concluded that if it would not do these things, that that was misleading.

Should I continue through the book?

Q. Please continue through the book.

A. On the page headed "Foreword," I found in Paragraph 4 the statement:

805 "Consider, for example, our title—How to Get Well and Stay Well. From this title, do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong.

With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well."

It seemed to me that that paragraph would lead the average person to exaggerate the extent to which illness was likely to be caused by deficiency diseases, and I reached that conclusion in part from my experience in obtaining official information in connection with my duties as to dietary deficiencies.

I attached some significance to the extreme conditions that they included. They didn't say that they were excluding entirely people with cancer, but they say "the fellow that is on his deathbed with cancer."

They didn't say they were going to exclude diabetes,

806 but they excluded the man who was in a diabetic coma.

JUDGE CLARK: Certainly there are no claims anywhere in the book about curing any of those things.

THE WITNESS: That may be, but what I was doing was to start out with the all-inclusive thing, how to get well and stay well, and that certainly, to me at least, was a broad indication.

Now what have they excluded as they go along the line? That was the approach I used in the examination of this circular.

The next paragraph read:

> "When you read the title of this book do you assume that we are going to show you how to stay well, in spite of everything you do to the contrary?
>
> "If so, it is also a wrong conclusion. You can follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet; such as proteins or carbohydrates."

So there they have excluded from this all-encompassing category the people in these extremities and the people who follow up very poor practices of just ordinary living, but the rest they have left in.

807 Beginning on Page 1, in large letters, is language which to me was designed to attract attention, particularly since it is personalised:

> "Are you a victim?
> "Are you suffering from hidden hunger?
> "Are you slowly starving to death?"

JUDGE CLARK: Isn't that exactly the first thing they ask you when you go to a hospital to be examined, Mr. Larrick—those very questions?

THE WITNESS: Yes, your Honor, they ask you those questions.

JUDGE CLARK: I was in a hospital about two weeks ago. There wasn't anything the matter with me: I went out for a check-up, and not only one doctor, but three, one after the other, came over and put me through a catechism of that very kind: Was I doing this? Was I suffering from that?

THE WITNESS: They didn't have to sell you at that stage; you were there. But this to me was a build-up to try to convince everybody, no matter who, that "something is wrong with you," with certain exceptions.

JUDGE CLARK: It is my opinion that most advertising is intended to sell you something.

THE WITNESS: That is right. If it is truthful, well and good, but if it is misleading—

A. (continuing) In the second paragraph on that page, it says:

808 "Our message is important to you for the very reason that you do live in the United States, and because you do eat our modern American diet. Why? Just look around you at the members of your family, at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are you enjoying perfect health?"

To me that was a further expansion of the idea that more and more things will be cured or prevented if you just take this product Nutrilite.

I have been advised by Dr. Butz, in whom I have confidence, that it wouldn't do these things:

"On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies.

"Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment.

"Think of those who should be having physical help of
809 some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely."

Well, I thought of my friends and my relatives and of the sickness in this country, and I read again some of Dr. Butz' statement, and I reached the conclusion that the people that this was addressed to, who were suffering from trouble with their hearts and other important organs, and aches and pains and discomfort, that the most of them wouldn't get any good out of a vitamin supplement, and that therefore this was quite misleading.

The people I knew who had died—most of them had died of heart disease, and I knew, of my personal knowledge that they had had very good diets, and I thought it was very misleading to tie this up with a simple vitamin and mineral supplement.

"Now, having thought about yourself and the members of your family, you probably feel that although some of the members of the family may be in poor health the rest are in good health."

Then continues a series of descriptions of a person in perfect health. This to me built a picture of the type and kind of individual that all of us would like to be, and that none of us completely attain, and then, comparing yourself with this ideal:

810 "Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?"

The clear implication to me was that the "something" to attain this glorious state, is probably Nutrilite, and I thought that was very misleading.

The next paragraph or two down, under the heading, "What Good Health Means to Your Body," says:

"All your senses—sight, taste, touch, hearing, and sense of smell operate in your body, and they depend, consequently, on your physical condition for their correct operation.

"If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties.

"If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways."

That continues into a pargraph which reads:

811 "When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally.

"Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking)."

That to me was an invitation to people who suffered from stroke or paralysis, or from that type of mental disease that manifests itself as confused thinking, to take Nutrilite to prevent it or to cure if it they had it. I thought the next paragraph, which deals with heart disease, to be particularly misleading:

"Your heart is, to put it mildly, one of your most useful organs. While the body is resting it pumps approximately one and one-half gallons of blood through your arteries and veins every minute. When your heart functions normally and beats

regularly and strongly you go along like a $10,000 car running down hill.

"But when you fail to supply your heart with the
812 necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies."

To me the qualification "due to dietary deficiencies" wouldn't mean much to the man in the street. He wouldn't know. He would know that he had heart trouble, and this in my judgment would be an invitation to him to take Nutrilite for his heart trouble:

"Glands are nice to have, too, in good working order. Some endocrinologists say that our glands determine our personalities.

"Certainly it is true that when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

"Teeth also are useful. Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

"Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up.

"Do any of you have difficulty seeing, hearing, or
813 failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?"

This runs the gamut of human disease. It was reminiscent to me of medicines that we found more forthrightly labeled for these conditions 25 years ago when I first started in this field of operation, and to me it was very misleading.

JUDGE CLARK: The evidence in this case has just about convinced me that I should start taking Nutrilite myself, despite the case presented on the part of the Food and Drug Administration.

Go ahead, sir.

A. (continuing) "Nobody wants to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already."

The language that preceded it and followed it is building a
814 conception of what is a deficiency disease, far beyond the normal conception of what deficiency diseases are.

Mr. RHYNE: I object to his testimony along that line. He has not said he is a doctor. He has said he has no degrees whatever. He is making an argument far beyond the argument that any lawyer could make.

JUDGE CLARK: Those remarks of the witness may be stricken.

A. (continuing) The statement follows which relates the percentages of rejections of women applying for admission to the WACs, which reads as follows:

> "Here is an extract from a clipping in the New York Times, printed June 29, 1945. 'The record of 33 per cent rejections for women (applying for admission in the WACs) indicates an even more serious health situation for women than the 40 per cent rejection rate does for men,' said Dorothy La Salle, in charge of the girls. 'It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.,' she said. 'I am sure that if we could have a complete cross-section of the women between the ages of 20 and 50, a much higher rejection rate would be found.'"

The comment in the book is this:

815 "That's interesting, isn't it? It means that you can think you don't need additional amounts of the protective health factors—and yet be wrong."

That was interesting to me, because it implied that all of the rejections of the women from the WACs were based on nutritional grounds, and they would have another reason to believe that more and more illness was caused by that cause.

On Page 6, there are some obvious conclusions. "This little study of the children of America shows that millions of children all over the country are ill.

> "Your study of yourself, the members of your family, your relatives and friends has shown you that almost everyone is more or less ill.
>
> "When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And it hurts.
>
> "Obviously it is better to keep your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through

your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to its basic and natural condition of health.

"But before we tell you exactly how to do this—let us tell you a story."

816 To me these conclusions meant that if you were ill, the chances are very much in favor of your being ill because of a lack of these vitamins. And relying upon Dr. Butz' statement in writing to me, I thought that was very misleading.

On page 9 is a statement which I interpreted to mean that this product would "increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health."

Page 9 says further:

"'All very interesting,' you say, 'But what does this have to do with me? I still think I eat a good diet. I certainly pay enough for it.'

"Here's an easy check on your diet:

"What are some of the mistakes we make in feeding ourselves, and in feeding our families?"

This continues to discuss the question of the alleged lack of nutritive value of pies and cakes and doughnuts, and reaches the conclusion that our children and ourselves eat in a thoughtless and haphazard manner and then wonder why our children, our wives and mothers and we ourselves, become ill.

Skipping down a little further:

"The result is that almost all members of our families
817 have bodies which are malnourished and show evidence of the malnutrition which causes most of our common deficiency ailments."

That, in the light of Dr. Butz' statement, was to me quite misleading.

JUDGE CLARK: Mr. Larrick, do you recall the question Judge Goldsborough asked the doctor this morning? Do you deny that a very large proportion of people do suffer from malnutrition?

THE WITNESS: I am not in a position to deny that.

JUDGE CLARK: You can walk down here one block in any direction from this court house and see evidences of malnutrition.

THE WITNESS: If this product was sold as a supplement to the diet, stating what it is, and that it supplies these nutritive factors

I think it would be an unobjectionable product, but I think if 10 people have a certain symptom, in the belly or wherever it is, and you sell it to all 10 of them because you say, "If you have got this symptom, take it," and you mislead 9 of them and not the tenth, I think the product is misleading. I think they should distinguish in some way.

JUDGE CLARK: Isn't it a fact that any doctor will tell you—I have heard it said time and again—that what will cure one man will not cure another?

THE WITNESS: I suspect that is true.

818 JUDGE CLARK: I have heard a great many of them say that. It may not be true.

THE WITNESS: I think this is an invitation to an awful lot of people, a lot of different diseases, to take this in place of going to the doctor.

JUDGE CLARK: It may be an invitation. That is usually the purpose in putting out a lot of money for advertising.

A. (continuing) On page 11 it says:

> "This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty."

The last paragraph on that page:

> "And remember your reward: a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them."

On page 20 it says:

> Actually, then, when a person has an ache or pain, a weakness, wasting, unsatisfactory feeling, a lesion, a symptom, or loss of physical capacity—in short, when he is ill, there are three courses of action open to him:
>
> "(1) He can reason that since his body needs all
> 819 necessary building and regulating materials anyway, whether ill or well, he must make sure his body is getting all these essential items for proper rebuilding and regulating, and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs."

I wouldn't quarrel with that if they had restricted the subject matter of the book to minor conditions, but including, as I think it does, very serious conditions, where the disease is progressive, every

month is important for the man's future well-being. And I think this statement is particularly misleading.

The same thought is expressed on page 21, where it says:

> "A few months devoted to rebuilding the body can hardly make things worse."

Page 22 says:

> "Now, be sure to remember this: The American diet is deficient in nutrilites, the protective food factors. Why is this true? Why are we sick and ailing in this land of plenty? Why don't we get all the vitamins and minerals we need?"

The pages which follow purport to tell the reasons why the American public isn't getting a balanced diet.

I was amused on page 24 with this statement, which said:

> "Do you know why they give us white flour and why
> 820 it is so hard to get whole wheat flour, and good whole wheat bread? Because millers discovered that white flour would store well without getting rancid, and that weevils would not get into the processed flour. Either the weevils had more sense, or they didn't find enough nourishment in the white flour. Anyway, that's the reason for white flour. And just as the weevils can't live on it, we can't either. It's what we don't eat that makes us sick."

Actually, weevils live and thrive and multiply on white flour, and probably the largest single commodity that the Food and Drug Administration seized in the last year at destination was that which did become infested with weevils. So this statement which implies that there is something so completely lacking in white flour that even bugs can't live on it is, in fact, misleading.

It says on page 26:

> "The wheel of life is only as strong as the weakest spoke of which it is composed."

And one of the other spokes is the "other nutrilites" spoke, and the language which follows is, in my opinion, an attempt to make the sale based on the preceding statements which I believe to be false and misleading.

I think the thing is well summed up in the last paragraph on page 36 which is this:

> "The whole question is this: Do you want to be
> 821 on top of the heap, feeling fine, thinking clearly and accomplishing things, or do you want to be on the bottom of the heap, ill, ineffective, suffering?"

My conclusion was that the taking of Nutrilite could not be depended upon to keep you on top of the heap, feeling fine, and accomplishing things.

By Mr. Kleinfeld:

Q. Mr. Larrick, I want to show you this document marked—I believe it is plaintiff's Exhibit 16, Office Memorandum to Division—

Mr. KLEINFELD: Let me show it to Mr. Rhyne.

JUDGE CLARK: Is that the one you claim was never sent out?

Mr. KLEINFELD: Yes, sir. I want to ask him about it.

By Mr. Kleinfeld:

Q. I show this to you and ask you what it is (a document was handed to the witness)?

A. This is a letter which was prepared by Mr. A. G. Murray to the Division of Field Operations but which is not dated in the way we date letters, and which is scratched with lines through it, showing—

Q. Pardon me. Diagonal lines?

A. Two lines, cross-wise, diagonal.

(continuing)—showing that it did not issue—

JUDGE CLARK: Is there anything to show when those
822 two lines were put on?

THE WITNESS: There is a handwritten note up here saying "3/31/49." Actually, this document is an interoffice communication. It is a communication that would ordinarily go from the Commissioner's office to the office of field operations when they would pass something on to the field—some instructions. This document just was stricken and didn't result in any action at all.

JUDGE CLARK: Why did you keep it in your files then?

THE WITNESS: I suspect that it was the clerk's error. The general plan and rule is to take out these scratched memorandums from the files. I am afraid it was just a human error, sir.

Mr. KLEINFELD: Your witness, Mr. Rhyne.

Cross examination:

By Mr. Rhyne:

Q. Mr. Larrick, you signed the admissions—all the papers, as a matter of fact, the interrogatories and the admissions that we requested the defendants to answer, did you not?

A. I signed all that were presented to me, Mr. Rhyne.

Q. Our Admission No. 40, we requested you to admit this:

"Neither the Administrator of the Federal Security Agency nor the Commissioner of Food and Drugs have ever seen
823 or heard of any complaints from any users of Nutrilite that such users have been injured or damaged in any way from the labeling of Nutrilite."

And your response:

"Defendants admit the statement contained in Request 40 as to the Administrator, but deny as to the Commissioner of Food and Drugs."

Was that your information?

A. May I see the document.

Q. (A document was handed to the witness) It is this one that has been cut up to give your answers.

A. But this is one I signed?

Q. Yes.

Mr. RHYNE: Do you have the official file that contains this response? (addressing the clerk.)

THE WITNESS: My recollection, Mr. Rhyne, is that subsequent to the taking of the Commissioner's deposition, we did receive information concerning complaints that had been made about the product.

By Mr. Rhyne:

Q. You say "we." I asked you about the Commissioner himself, who is Dr. Dunbar, is it not?

A. That is right. I know that he knows in general about that because I have talked to him about it.

Q. Did you hear him testify here?

A. Yes, I heard him testify.

824 Q. Did you hear me ask him: "Doctor, have you ever seen any complaints from Nutrilite users"? The answer is No.

A. I don't know that he saw them, but you know from your own files that there have been some complaints about Nutrilite or so I have been informed. I haven't personally seen them because I don't go through these files.

Q. How did you prepare this answer and, in effect, say that he had seen them when his own testimony says he had never seen them?

A. He didn't say that he didn't know of them. Let's see what you have asked in this again.

Q. (A document was handed to the witness)

A. You say here: "Neither the Administrator of the Federal Security Agency nor the Commissioner of the Food and Drug Ad-

ministration have ever seen or heard of any complaints from any users of Nutrilite that such users have been injured or damaged in any way from the labeling of Nutrilite."

There is a difference between "seen" or "heard." I haven't personally seen these complaints, but I have heard from people in the organization that there are such complaints, and I think Dr. Dunbar is in the same position.

JUDGE CLARK: That is not what he said.

By Mr. Rhyne:

Q. Did you know that I asked him in his deposition: "Have
825. you ever heard of any complaints from any users of Nutrilite that they have been injured or damaged?" And the answer was: "I have not."

You didn't check his deposition, then, before you answered this?

A. I did not.

JUDGE CLARK: The Court is about to take a recess. Mr. Kleinfeld, do you have any idea of how long you intend to consume in presenting your case?

Mr. KLEINFELD: We have, I believe, two more witnesses, and one deposition.

JUDGE CLARK: Very well. The Court will take a recess until 10 o'clock tomorrow morning.

(Whereupon at 4:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, October 25, 1949.)

825a Reporter's Certificate to foregoing transcript omitted in printing.

826 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Washington, D. C., Tuesday, October 25, 1949

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:00 a.m.

APPEARANCES:

On behalf of the plaintiff: Mr. CHARLES S. RHYNE and Mr. LESTER L. LEV.

827-828 On behalf of the defendants: Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

829 PROCEEDINGS

JUDGE CLARK: All right, Mr. Kleinfeld.

Mr. KLEINFELD: Thank you, sir. May it please the Court, in reading over yesterday's transcript of the testimony I see that it wasn't definitely determined—at least it doesn't definitely appear in the record—whether Defendant's Exhibit 15 for identification, the determination of probable cause of Mr. Larrick and the findings of fact were or were not actually admitted in evidence.

JUDGE CLARK: They were admitted. That exhibit was admitted in evidence with the exception of the exhibit which was attached to it.

Mr. KLEINFELD: May I ask that the clerk mark it in evidence, then?

(The document referred to was received in evidence as Defendant's Exhibit No. 15.)

GEORGE P. LARRICK resumed the stand, having been previously sworn, was further examined and testified as follows:

Cross examination: (resumed)

By Mr. Rhyne:

Q. Mr. Larrick, which of the seizures are based upon your decision of December 2?

A. At the same time that I signed the determination
830 of probable cause I signed a recommendation to our General Counsel recommending that seizures be made in Belleville, New Jersey.

Q. Belleville, New Jersey?

A. Yes, sir.

Q. Yours was the second seizure made at Belleville, New Jersey?

A. It was the seizure that was consummated on 15 December 1948. Of my own knowledge, I don't know whether there was a previous one made at that town or not. I believe there was.

Q. Do you know whether there were any other seizures made on the basis of your determination?

A. I think there were others made on that determination, but I would have to consult the records to be sure of that. There were several different shipments in that one seizure.

Q. Mr. Larrick, do you recall signing the answers to the interrogatories submitted by the plaintiff?

A. I do.

Q. Do you recall the question No. 54?

"Did an Assistant United States Attorney in Seattle, Washington, in December, 1948 threaten Mr. Davis, plaintiff's Seattle, Washington, distributor, with inmprisonment
831 over the New Year's holidays if certain goods were not immediately produced by said distributor for seizure by the United States Marshal?"

Mr. KLEINFELD: May I object to that question on the ground that it is irrelevant and immaterial to the question involved in this case?

JUDGE CLARK: Overruled.

By Mr. Rhyne:

Q. And do you recall that your answer was that upon your refusal—

JUDGE CLARK: It was overruled, I may say, Mr. Kleinfeld, because a very material issue in this case is the question of oppressiveness and arbitrariness on the part of the Government.

JUDGE GOLDSBOROUGH: On the part of the defendants, you mean?

832 JUDGE CLARK: On the part of the defendants, the Government.

JUDGE GOLDSBOROUGH: You said it twice. The plaintiffs say it is not the Government.

JUDGE CLARK: All right. These fellows are representing the Government, so they say. After all, they are paid by the Treasurer. Anyhow, this questions seems to me to go very clearly to the question of the arbitrariness of the action.

Mr. KLEINFELD: Our position, of course, is that the only question of arbitrariness involved is whether in reaching these determinations of probable cause these defendants acted arbitrarily or illegally.

JUDGE GOLDSBOROUGH: The answer to that, sir, is this, I think: that anything that happened either before or after the action of the Administrator might tend to show the mental attitude of the Administrator at the time he acted.

Mr. KLEINFELD: Yes, sir, but what he is asking this witness is what some assistant U. S. Attorney may have threatened.

JUDGE GOLDSBOROUGH: They are all in the same crowd.

By Mr. Rhyne:

Q. Your answer to that was:

"Upon Mr. Davis' refusal to deliver to the United
833 States Marshal the articles described in the Court order which the United States Marshal was attempting to execute, the Assistant United States Attorney advised Mr. Davis of the possible legal consequences which might result should Mr. Davis continue to resist the execution of a lawful order of Court."

My question to you, Mr. Larrick, is this: Were you not aware that in your files at the very time you signed your responses to these interrogatories under oath was a statement by Douglas C. Hansen, Inspector of your Seattle District, dated 12/30/48, in which he says, in part, as follows:

"Mrs. Peters returned to the U. S. Attorney's office on December 30th and prepared the Libel of Information. In response to a call from the U. S. Marshal's office I proceeded to the dealer's premises with Deputy Marshal Bradley, arriving there at 3:15 p.m. Mr. Bradley presented his papers and requested the goods. However, Mr. Davis stated the goods were not on the premises and he refused to tell where they were. He read the libel throughout, then stated that he would have to talk to his attorney, who was unavailable, before he would produce the goods to be seized. He suggested that Mr. Bradley return the following day.

834 "Mr. Bradley requested my assistance, and so I informed Mr. Davis that the goods would have to be produced immediately or, if they were not on the premises, their location revealed so the seizure action could be consummated. I informed him that any obstacle placed in Mr. Bradley's path in effecting seizure of these goods would be on Mr. Davis' own responsibility and would make him personally liable to further legal action.

"Mr. Davis would not cooperate. At 4:00 p.m. he still refused to divulge the hiding place of the contraband lot. We therefore gave him a final warning as to his responsibilities and informed him that we were now forced to take further legal steps."

A. Mr. Bradley was the Marshal?

Q. Just a minute. I haven't finished.

"Upon the advice of Mr. Miller, Chief Deputy Marshal, we proceeded to the office of Mr. John E. Belcher, Assistant U. S. Attorney, and informed him of the circumstances. Mr. Belcher therefore telephoned Mr. Davis and informed him that Mr.

Hansen and Mr. Bradley were returning and that this time they were bringing to the Courthouse either the contraband merchandise, or Mr. Davis, and that if it were to be Mr. Davis he could plan on spending New Year week-end in the Federal jail."

835 Mr. Larrick, had you seen this letter before you answered this question?

A. I had not personally seen the letter.

Q. You had not checked your files to see whether or not you had threatened to put this man in jail over the New Year week-end?

Mr. KLEINFELD: I object to the form of the question. There is no indication that Mr. Larrick threatened anybody.

JUDGE GOLDSBOROUGH: He can say he didn't do it, can't he?

Mr. KLEINFELD: Sure, he can.

JUDGE GOLDSBOROUGH: Let him say it, then, if he wants to.

JUDGE CLARK: Personally, I would rather he checked his files.

A. I had the files checked by people in the Food and Drug Administration. The files in this case are voluminous, scattered all over the United States. The sequence of events that lead to my signing this request for admissions—

By Mr. Rhyne:

Q. I didn't ask you that, Mr. Larrick. I merely asked you was this letter in your files at the time you signed those interrogatories?

A. I do not know.

836 Q. Did you know that we secured a copy of it prior to the time you signed that interrogatory under oath and based our question on it?

A. Today is the first time that I had heard of this particular letter.

Q. Mr. Larrick, is it true that prior to the filing of this injunction action the Food and Drug inspectors throughout the nation knew that a multiple seizure program was on against Nutrilite?

A. Yes, I would assume that some inspectors knew it. I doubt that they all did, Mr. Rhyne.

Q. I ask you; Wasn't it the general understanding of your inspectors and chiefs of stations throughout the U. S. that they were to collect the necessary information to make further seizures of Nutrilite?

A. I think it is true that the chiefs of stations had been acquainted with the fact that we wanted to make some more seizures of Nutrilite?

Q. How about the inspectors?

A. Some inspectors work on food; some work on caustic poison; some work on a variety of subjects and they wouldn't all be involved in this.

Q. So when you answered that question Yes when I was taking your deposition, you really didn't mean that?

A. May I hear exactly what I did say?

837 Q. "Isn't it the general understanding of your inspectors and chiefs of stations throughout the U. S. that they were to collect the necessary information to make further seizures of Nutrilite?"

Your answer was Yes.

A. The fact is that the chiefs of stations had been advised and that some inspectors under their supervision I presume had been advised. I don't know specifically what each one was told.

Q. Isn't it true that the correspondence we found in your files indicated that you were preparing to make further seizures of Nutrilite in December 1948 just before this action was filed?

A. Yes.

Q. It was then a general policy to make additional seizures of Nutrilite?

A. It was a general policy of the Food and Drug Administration.

Q. Mr. Larrick, yesterday you testified with respect to Plaintiff's Exhibit—this so-called pressure memorandum?

A. Yes, sir.

Q. Did you personally mark that X through there?

A. No.

Q. When was the first time you saw that pressure memorandum?

838 A. I don't recall whether I had seen it before yesterday or not.

Q. You don't know, then, whether it went out or not, do you?

A. I know from the general course of business in the Food and Drug Administration that this is the way a letter is handled.

Q. I am just asking: Do you personally know whether it was sent out?

A. No, except in the general order of business; but it wouldn't go out in any event. It isn't addressed to anybody out. It is an interoffice communication.

Q. It is addressed to Division of Field Operations?

A. That is four offices down the hall from the man who handled it.

Q. The Division of Field Operations sends out information all over the U. S.?

A. That is right.

Q. So if this went to them it could go to every inspector that you had in the U. S., could it?

A. It could go to the station chiefs, our method of operation. We don't write to the inspectors; we write to the bosses.

Q. It goes to the station chiefs?

A. That is right.

839 Q. And the station chiefs could show it to the inspector?

A. To whichever inspector they wanted to assign to that particular job.

Q. The first paragraph states as follows:

> "As you know, the Administration plans to keep a sustained pressure against this company until an injunction is granted or the criminal case goes to trial."

Is that an incorrect statement?

A. I think that is an accurate statement.

Q. I ask you this: It states, "We have prepared a set of mimeographed copies of the principal labeling, the booklet 'How to Get Well and Stay Well,' for transmitting to the district attorneys with request for seizure."

Is that true?

A. It wasn't done, but it was planned, yes.

Q. Didn't you mimeograph and send excerpts from "How to Get Well and Stay Well" to the District Attorneys who did file the 10 libel actions?

A. As each seizure was specifically and individually approved in Washington.

Q. This says: "We have prepared a set of mimeographed copies of the principal labeling, the booklet 'How to Get Well and Stay Well,' for transmitting to the district attorneys with request for seizure."

840 Is that an untrue statement?

A. No. That means that as the individual seizures came through Washington and were reviewed by Dr. Dunbar or Mr. Crawford or myself that instead of taking some days to write these voluminous things that there was a stencil cut of the material we were going to charge was false and misleading which would then be sent out.

This product had been moving very fast, and the reason for that mimeograph was to save time.

JUDGE CLARK: Do you know how long this memorandum was kicking around the office?

THE WITNESS: No, I don't.

Q. JUDGE CLARK: That in itself was creating office atmosphere in the Bureau as it was kicking around.

THE WITNESS: There is no question, sir, but that the people in the office felt that this product was seriously misbranded. They were talking.

JUDGE CLARK: Did any of them know anything about it?

THE WITNESS: We think so, sir.

JUDGE CLARK: Apparently you and Dr. Dunbar and Mr. Crawford didn't know much about it.

By Mr. Rhyne:

Q. Now, Mr. Larrick, when you made your decision of 2 December 1948 did you know that Mr. Crawford had read the 58-page pamphlet and said nothing about the first 36 pages?

841 A. I reviewed the—

Q. I just want to know whether you knew that.

Mr. GOODRICH: We object and ask that the witness be allowed to answer.

JUDGE CLARK: Let him answer the question.

THE WITNESS: Would you repeat it?

By Mr. Rhyne:

Q. I asked whether on 2 December 1948, when you made your decision holding that the first 36 pages of the 58-page pamphlet were misleading, you knew that Mr. Crawford had read those pages and said nothing about them in his decision of 30 September 1948.

A. I did know that the seizure that he sent out and signed involved only the pages with the testimonials in it. I don't remember the number of pages.

Q. Did you know that the plaintiff had stopped using pages 37 through 58 at the time of your decision?

A. Yes.

Q. And that they had advised you of that fact?

A. Yes.

Q. And that Mr. Myers, their attorney, had asked you, if you found anything further, to let him know and they would try to correct it?

A. Yes.

Q. You are pretty familiar with the correspondence, then,

842 that goes through your office, are you, Mr. Larrick?

A. There is about 3,500 lawsuits in one way or another go through our office a year, and I don't say I am pretty familiar with all of it, no, sir.

Q. I ask you if you have ever seen or heard of a letter signed by Mr. John L. Harvey, the director of your Division of Litigation, dated 1 February 1948, in which he states in part: "We are not vastly concerned that the seizure in Florida be speedily adjudicated"?

A. No, I have no knowledge of that. Harvey is here.

Q. I would like to ask you whether or not you agree with this statement, Mr. Larrick: "Despite our progress in acquiring knowledge about nutrition, people are still dying from the effects of

nutritional deficiency. The widespread effect of inadequate diets is evident in poor resistance to disease"?

A. Do I agree with that?

Q. Yes.

A. I think it is factually true, but I think in some context it may be misleading.

Q. Do you know that that is a statement made by Mr. Ewing, one of the defendants here, in his pamphlet, "The Nation's Health: A 10-Year Program"?

A. I haven't read that pamphlet. I didn't know he had made that statement.

843 Mr. RHYNE: That is all.

JUDGE CLARK: Any further direct?

Mr. KLEINFELD: Yes, sir.

Redirect examination:

By Mr. Kleinfeld:

Q. Mr. Larrick, on pages 824 and 825 of yesterday's daily transcript, Mr. Rhyne asked you: "Did you know that I asked him"—meaning Dr. Dunbar—"in his deposition: 'Have you ever heard of any complaints from any users of Nutrilite that they had been injured or damaged' "?

And his answer was: "I have not." Do you know the date of Dr. Dunbar's deposition?

A. I recall that Dr. Dunbar's deposition was taken sometime in April of this year. I don't recall the exact day.

Q. And in his deposition Dr. Dunbar said: "Have you ever heard of any complaints from any users of Nutrilite that they had been injured or damaged?"—is that correct?

A. Yes, sir; that is correct.

Q. You were then asked by Mr. Rhyne yesterday with respect to Question No. 40 of the requests for admission—I refer to page 823 of yesterday's daily transcript—and the admission was this: that neither the Administrator of the Federal Security Agency nor the Commissioner of Food and Drugs have ever seen or heard
844 of any complaints from any users of Nutrilite that such users have been injured or damaged in any way from the labeling of Nutrilite.

Do you know when that request for admission was answered?

A. There was a request for admissions made and answered, I believe, in May of 1949.

Q. That was subsequent to Dr. Dunbar's deposition?

A. That was subsequent to the taking of all of our depositions.

Q. Yesterday, it was pointed out that your answer to Request 40 was that: "Defendants admit the statement contained in Request 40

as to the Administrator, but deny as to the Commissioner of Food and Drugs."

Will you explain the circumstances under which you made that admission to Request No. 40?

A. When this lengthy request for admissions came to the Food and Drug Administration it was delivered to our general counsel who got in touch with our director of litigations, Mr. Harvey. Mr. Harvey himself and various members of his staff worked on the files of the Food and Drug Administration for several days assembling and getting together the answers and the information that was required for the answers.

After they had done that, Mr. Gottlieb, of the general counsel's office, and Mr. Harvey came to my office and we sat down
845 and went over the questions and the answers very carefully. When we got to Question No. 40 a discussion ensued as to what the true and correct answer should be.

It appeared that there had been some complaints received by the Food and Drug Administration and that they were in the files. It appeared, further, that the Administrator, who doesn't concern himself with the details of the day to day work, didn't know anything about it. Mr. Harvey told me about them and informed me that he had told Dr. Dunbar about them. There were these complaints in the files. On that basis I made the reply that I did.

Subsequently, after yesterday's testimony, I have asked Dr. Dunbar if he recalls Mr. Harvey's telling him that, and he says that he doesn't, but the fact is the complaints were in the file.

JUDGE CLARK: That may be stricken. Dr. Dunbar is in the court room. He can testify to that himself.

THE WITNESS: I beg your pardon?

JUDGE CLARK: You can't tell what Dr. Dunbar told you.

By Mr. Kleinfeld:

Q. Are you through with your answer?

A. Yes, sir.

Q. Yesterday Mr. Rhyne asked you, on page 824 of the daily transcript:

"Question: Did you hear me ask him"—Dr. Dunbar—"have you ever seen any complaints from Nutrilite users?
846 The answer is: "No."

Is that correct?

A. That is my understanding. I believe that is correct.

Q. That question was limited to whether Dr. Dunbar had ever seen any complaints about Nutrilite?

A. Yes, sir.

Q. Mr. Larrick, has the plaintiff or any representative of the plaintiff ever submitted to the Food and Drug Administration for

comment or criticism any edition of "How to Get Well and Stay Well"?

A. Not to my knowledge.

Mr. KLEINFELD: That is all.

Recross examination:

By Mr. Rhyne:

Q. Mr. Larrick, do you recall filing an affidavit in this case some time ago in which you outlined the history of the relations between the Food and Drug Administration and the product Nutrilite?

A. May I, to refresh my memory, see it, Mr. Rhyne?

Q. Just a minute; I will find it.

A. I have a recollection of it but not in detail.

Q. Just a minute. You do recall such an affidavit?

A. Yes.

Q. Do you also recall any information in your files—all the
847 defendants admitted this—that on December 5, 1946, one of your inspectors visited our Los Angeles office and received copies of the book "How to Get Well and Stay Well"?

A. I don't recall that, but I don't doubt that it is so.

Q. So, then, your answer that copies of the book have never been submitted is not exactly accurate, is it?

A. I wouldn't regard it as submitted when it is obtained by an inspector in the course of a factory inspection. When he said "submitted," I thought he meant that the document had been sent to us or offered to us, not given in response to a normal factory inspection under the authority of the Federal Food, Drug and Cosmetic Act.

Q. In your affidavit which I have before me, do you recall stating that on 9 December 1946 Inspector Eric A. Gray visited the office of Mytinger and Casselberry, Inc., in Long Beach, California?

A. I don't recall specifically, but I had the records before me when I made the affidavit.

Q. This paragraph right here (indicating), doesn't that show that he did make a visit at that time?

A. Yes.

Q. Do your records also show that additional copies of the pamphlet "How to Get Well and Stay Well" were offered to him at that time?

A. I don't have personal knowledge of that.

848 Q. I am asking you what your records show?

A. I would have to see the records.

Q. You just don't know about the records?

A. I just don't know about the records.

Mr. RHYNE: That is all.

Mr. KLEINFELD: One more question, your Honor.

Redirect examination:

By Mr. Kleinfeld:

Q. Does the Food and Drug Administration ever give informal advice to drug concerns with respect to their labeling claims?

A. We have been doing that for 40 years, Mr. Kleinfeld. We give advice to anyone who asks.

Q. Did Mytinger and Casselberry, Inc., ever submit to the Food and Drug Administration in Washington, D. C., any edition of "How to Get Well and Stay Well," and ask for any comments by the Food and Drug Administration?

A. Not to my knowledge.

Q. Did Mr. Rhyne, counsel for the plaintiff, ever submit to the Food and Drug Administration in Washington any edition of "How to Get Well and Stay Well" and ask for the comments or criticism of the Food and Drug Administration, if you know?

A. When he took my deposition he asked me to point out what in my opinion was false and what was misleading, for
849 the purpose of this lawsuit; but other than that, not to my knowledge.

JUDGE GOLDSBOROUGH: Isn't there a letter there from Mr. Myers to the Food and Drug Administration?

Mr. RHYNE: Yes, there is, your Honor.

Mr. KLEINFELD: I would like to see that letter, if I may. If I may say, I believe this letter merely says they would like the Food and Drug Administration to tell them at some time what is generally wrong, but it does not submit any edition of "How to Get Well and Stay Well" with the letter.

JUDGE GOLDSBOROUGH: The witness has said that it is customary and has been for 40 years for the Food and Drug Administration to respond to requests or suggestions. He said that, and that is what this letter is, as I understand it.

JUDGE CLARK: What more submission can you have than for the attorney to write in and say: "In accordance with the provisions of the charges we are liable in New Jersey. We have struck out from pages 37 to 58 and if there are any other criticisms that you have of the book, I wish you would tell us and we will try to straighten that out."

That is certainly a submission.

Mr. KLEINFELD: We are discussing the situation that existed before this litigation arose. The procedure of the Food and
850 Drug Administration, as I understand it and as the witness has testified, is that when people come to the Food and Drug

Administration and say, "Here is our proposed labeling," Food and Drug Administration will then submit their comments.

This was never done by the plaintiff here. That is what I am trying to show. The plaintiff never came to the Food and Drug Administration and said, "Here is our proposed labeling; here is a copy of it; tell us, if you will, what your comments or criticisms are."

By Mr. Kleinfeld:

Q. Did the plaintiff ever come to the Food and Drug Administration in Washington or send to the Food and Drug Administration in Washington, before the institution of the present litigation—

JUDGE GOLDSBOROUGH: Of the first suit, you mean?

Mr. KLEINFELD: Of the first suit.

JUDGE CLARK: That is the New Jersey suit?

Mr. KLEINFELD: In New Jersey.

By Mr. Kleinfeld:

Q. (continuing)—and submit to the Food and Drug Administration in Washington any edition of "How to Get Well and Stay Well" and ask for the informal comments of the Food and Drug Administration?

A. Not to my knowledge.

Mr. KLEINFELD: That is all.

851 Recross examination:

By Mr. Rhyne:

Q. In our Interrogatory No. 76 we asked you this:

"Does the Food and Drug Administration render advisory opinions on the lawfulness of labeling submitted to it?" Response: "The Food and Drug Administration renders advisory opinions on the lawfulness of labeling submitted to it specifically for that purpose, but only if there is no litigation in process or pending before the courts of the United States relative to the labeling of the product in question."

Does that mean that you would not pass upon any labeling of Nutrilite at the present time?

A. While litigation is pending, we deal with your counsel, that is correct.

Q. And you didn't regard Mr. Myers' letter, pages 1 through 36, as a submission of that, and a request for your approval or disapproval?

A. I don't specifically recall that letter, but if it wasn't given, we obviously did not regard it as a submission for that purpose.

Mr. KLEINFELD: May I ask that the letter be given to the witness so he will know what he is talking about. Will you read that
852 letter, Mr. Larrick, so you can answer intelligently?

JUDGE GOLDSBOROUGH: For the Court's information, was that letter sent to the Federal Food and Drug Administration prior to every seizure except the first seizure?

Mr. RHYNE: Yes, your Honor.

JUDGE GOLDSBOROUGH: I would like to ask the witness whether or not—how many seizures were there—11?

Mr. RHYNE: Nine more after the first one.

Mr. KLEINFELD: I submit that the answer of Mr. Rhyne is not correct, that it wasn't written just after the first seizure.

Mr. RHYNE: The letter is dated October 12; the second seizure, October 14; the third one, October 28; the fourth one, November 25; and the others are all in December and January.

Mr. KLEINFELD: May I see the letter, please?

Mr. RHYNE: Yes. (A document was handed to Mr. Kleinfeld.)

JUDGE GOLDSBOROUGH: The question that this Member of the Court is interested in is whether or not after the Myers letter was received, the witness thinks that the other seizures were justified without recognizing Mr. Myers inquiry and as entertaining whether or not Nutrilite was willing to comply with the provisions of the Food and Drug Administration?

THE WITNESS: It was our view that this firm was well
853 aware that a dietary supplement should be sold as an article telling what proportion of the minimum daily requirement of certain nutritional requirements it provided, and a general therapeutic claim shouldn't be made for it.

They had a label which was entirely proper. Mr. Rehnborg, who was the manufacturer and worked closely with them, had correspondence with us way back in 1940; and, frankly, we thought this correspondence was part of the negotiations and tactics of a lawsuit.

JUDGE GOLDSBOROUGH: Tactics of what?

THE WITNESS: Of a lawsuit. We thought it was a self-serving document.

Mr. KLEINFELD: May I ask one more question?

JUDGE CLARK: Is it your idea, Mr. Larrick, that a manufacturer about to be put out of business does not dare to write to the august Food and Drug Administration?

THE WITNESS: I don't have any such views.

JUDGE CLARK: Without being accused of being a self-serving document?

THE WITNESS: No.

JUDGE CLARK: Citizens of this country still have some rights, as strong as bureaucracy has become.

Redirect examination:

By Mr. Kleinfeld:

Q. Is it the policy of the Food and Drug Administration,
854 Mr. Larrick, to comment on labels submitted by drug manufacturers or distributors if there is any litigation in courts pending?

A. No, sir. When we have litigation we are then the client of the Department of Justice, and we deal with the litigants through our lawyers. Any other time we deal with them man to man and across the table.

Recross examination:

By Mr. Rhyne:

Q. Mr. Larrick, there was no litigation pending with respect to pages 1 through 36 of our pamphlet at the time you received Mr. Myers' letter, was there?

A. I have forgotten the dates, but when was the citation issued, Mr. Rhyne, with respect to the criminal action? When did the citation issue? I don't know.

Q. I suppose the one you have reference to is June 1947.

A. There was then—

Q. But this was a different pamphlet.

A. When were the grand jury presentations made in Los Angeles? I don't recall those dates.

Q. I am just asking you about these particular pages, 1 thr-ugh 36.

A. With respect to the seizure involved, as you say, only
855 past 36. I don't know what the date was of the grand jury proceeding or the citation preceding that.

Q. My question was whether there was any litigation with respect to pages 1 through 36 at the time Mr. Myers wrote his letter to you?

A. I don't know. I don't know the date of the—

Q. You know that the first Belleville seizure didn't involve those pages, don't you?

A. That is right. I know that, positively.

Mr. Rhyne: That is all.

Redirect examination:

By Mr. Kleinfeld:

Q. When you received that letter from Mr. Myers there was litigation in the courts of this country involving Nutrilite?

A. Yes, sir.

Mr. Goodrich: May it please the Court. I call Dr. M. A. Blankenhorn.

We have one deposition, your Honor. We would like to put this doctor on out of turn, if we may. We have one medical deposition, but we would like to put this doctor on out of turn, if we may.

856 Dr. Marion A. Blankenhorn was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Goodrich:

Q. Doctor, in answering my questions, would you please speak up and address your remarks to the Court. State your name and address, please.

A. Marion A. Blankenhorn, Cincinnati.

Q. What is your profession?

A. I am a physician and a teacher.

Q. When were you licensed to practice medicine?

A. In 1914.

Q. What is your educational background?

A. I have a Bachelor's Degree in Philosophy. I have a Doctor of Medicine Degree. I have a Master of Medicine Degree; I have a Doctor of Science Degree.

Q. From what institutions did you receive those degrees?

A. My Bachelor of Philosophy is from Wooster College; my medical degrees are from the University of Western Reserve in Cleveland; and my Doctor of Science Degree is an honorary degree from my alma mater, Wooster College.

Q. What are your professional and honorary societies?

A. I am a member of the American Medical Association—
857 a Fellow of the American Medical Association—and past chairman of the section of internal medicine of the American Medical Association, and a past president of the Cincinnati Academy of Medicine, past president of the Central Society for Clinical Research, a member of the American Society for Clinical Investigation, a member of the American Society of Experimental Pathology, and numerous other medical societies.

Q. What has been your professional background since you began to practice medicine?

A. My training, which is my background, was in the Western Reserve University Hospital in Cleveland. I was a volunteer associate in the Rockefeller Foundation. I am now the professor of medicine in the University of Cincinnati and the chairman of the department of internal medicine at the Cincinnati General Hospital.

Q. How long have you been at the University of Cincinnati?

A. Since 1935.

Q. Is that your only hospital connection?

A. The only one in which I—I am also on the staff at the Holmes Hospital, which is the university hospital.

Q. Do you specialize in any particular branch of medicine at the present time?

A. In internal medicine.

Q. How does one become certified by the American Board
858 of Internal Medicine?

A. I became certified by courtesy of the Board when it was organized.

Q. At the present time?

A. At the present time a candidate must apply, write written examinations, and then submit to oral examinations by the Board.

Q. Is any specialized training required?

A. There is specialized training required.

Q. What is the nature of that?

A. A certain amount of it is basic science. A certain amount beyond that is specialized postgraduate training in a hospital, and a certain amount is experience in the practice of internal medicine only.

Q. Have you contributed papers—

Mr. Goodrich: I am sorry, withdraw that question.

Judge Clark: Just a minute, Mr. Goodrich. Doctor, this board you speak of has no official standing, has it? It is entirely a voluntary organization?

The Witness: It is entirely a voluntary organization.

Judge Clark: That is what I thought. You may proceed.

By Mr. Goodrich:

Q. Does the board have recognized standing in the field of medicine?

A. I am sure it has. The surgeons general of the
859 various armed forces have recognized its diplomates as having superior ability and training and give them preference in appointment and pay.

Q. Are diplomates recognized in the hospitals and other treating institutions in this country?

A. It is generally acknowledged as a true measure of training and experience.

Q. What is your teaching connection at the University of Cincinnati Hospital, if you would explain that briefly, sir?

A. Being a professor of medicine and chairman of the department, I organize and order my assistants in a plan of education of medical students in the hospital—third year students and fourth year students—who come in contact with patients.

In addition to that, I organize and lead the graduate teaching, these being the residents and the Fellows who submit voluntarily for graduate teaching, hoping for positions of teaching or hoping to pass the specialty boards.

In addition to that, we occasionally do postgraduate teaching. I have done postgraduate teaching, organized it and done it at the request of the American College of Physicians, where we offer courses to physicians who have been in practice and come for postgraduate courses or short courses of one week or two weeks, and graduates come there, pay their tuition and ask for our lectures.

860 Q. What type of teaching do you do in the field of nutrition, if any?

A. In all of my undergraduate—that is medical students, hospital fellows, and postgraduates—we have emphasized the importance of all the newer knowledge of nutrition as a part of internal medicine, and as a special effort we did, at the request of the American College of Physicians, give a postgraduate course of internal medicine, with special emphasis on metabolism and nutrition.

Q. Do you have any physicians who have studied under you who have obtained eminence in the field of nutrition?

A. Dr. Harold Jeghers who lives in Washington was a pupil of mine years ago; Dr. Tom Spies, a professor of nutrition in Northwestern University, was a pupil; and then a faculty colleague of mine, Dr. William Bean, professor of medicine at Iowa State University, was a pupil; and then a faculty colleague of mine, Dr. Richard Wilder, associate professor of medicine in my own school, was also a pupil of mine.

Q. Have you contributed to the medical literature papers dealing with the subject of nutrition?

A. I have written from time to time a goodly number of publications.

Q. Would you give some of those, without trying to give to- exhaustive a list?

861 A. In 1935, "On the Prevention, Treatment and Possible Nature of the Peripheral Neuritis Associated with Pellagra "The Treatment of Pellagra with Nicotinic Acid," also with Dr. Spies. "Pellagra of Kentucky Mountain Folk, Ambulatory Treatment with Nicotinic Acid," written with Dr. Koozer. "The Heart in Vitamin Deficiencies," written for a textbook entitled, "The Nelson System of Medicine." The last edition is 1949.

"Secondary Pellagra." That was written with Dr. Bean and Dr. Spies in 1944. "Pellagra and the Public Health, a Dietary Survey of Kentucky Mountain Folk in Pellagrous and Nonpellagrous Communities." That was written with Dr. Koozer in 1941.

"Deficiency Diseases, the Incidence in Ohio Hospitals." That was written in 1942. "The Diagnosis of Beriberi Heart Disease,"

written in 1945. "Occidental Beriberi Heart Disease," written with several associates in 1946. "The Incidence of Pellagra: Studies in the Cincinnati Hospital," in 1947 with Dr. Bean and Dr. Wilder.

862 "Deficiency Diseases in the Cincinnati Hospital, a Ten-Year Study." That was the chairman's address and was published in 1949. The precise page and volume is set forth and I would be glad to give it for the record if the stenographer wishes.

Mr. GOODRICH: One moment. Will you mark this, please?

(The document referred to was marked for identification as Defendants' Exhibit No. 16.)

By Mr. Goodrich:

Q. I show you a document which has been marked Defendants' Exhibit 16 for identification and ask if this is the paper that you have last testified about?

A. It is the paper I last mentioned.

Q. And you are the author of this paper?

A. I am the author of it.

Mr. GOODRICH: I offer this paper in evidence, your Honor.

Mr. RHYNE: Could I ask one qualifying question, if the Court please?

JUDGE CLARK: Certainly.

Mr. RHYNE: Doctor, are all the facts contained in this article based on your personal knowledge and observation—everything in here?

THE WITNESS: Yes.

Mr. RHYNE: You observed all these patients personally?

863 THE WITNESS: The article does not state that.

JUDGE CLARK: This is a short exhibit and I see no—unless Mr. Rhyne objects—reason to rule it out, but suppose the witness testified that he had written a work of eight great big volumes, would you still think that was admissible?

Mr. GOODRICH: No, sir, I wouldn't. But, your Honor, where the witness is present and available for cross examination—

JUDGE CLARK: He might have written an eight-volume work, too.

Mr. GOODRICH: He probably has as a basis of his experience. I offer this as the most recent and as representative of his work, also dealing with subject under inquiry at this moment.

JUDGE GOLDSBOROUGH: This Member of the Court thinks it is clearly not admissible in evidence, but this Member of the Court also has no objection to it.

Mr. RHYNE: I object on the ground it is hearsay. He said he didn't personally observe the patients. It is based on hearsay.

JUDGE GOLDSBOROUGH: It is hearsay testimony and is technically inadmissible, unquestionably.

Mr. GOODRICH: If your Honor please, the witness is here to testify about that.

864 JUDGE GOLDSBOROUGH: Let him testify then.

Mr. RHYNE: Are you offering it for the truth or just to show that he wrote an article?

Mr. GOODRICH: I am offering it both for the truth and that this is representative of his articles. He is here, available for cross examination; any part can be inquired into. And if it develops that this witness has no personal knowledge about that—

JUDGE GOLDSBOROUGH: The witness, of course, can testify that he has written articles and that the articles were respectfully received by various organizations. That tends to show his standing in the profession, but the specific material in the article, any article, is hearsay.

JUDGE CLARK: You are offering this for evidence, Mr. Goodrich, and the witness himself has testified that he has no personal knowledge of these cases to which the paper refers.

Mr. RHYNE: I couldn't possibly cross examine him without the underlying data. There has been case after case that you can't put in an exhibit unless you give the other side a chance to observe the underlying data so they can cross examine.

JUDGE CLARK: Tentatively, at least, that objection is sustained.

Mr. GOODRICH: Your Honor will recall that Dr. Myers
865 was permitted to testify about patients, the names of whom I could not inquire, the details of his work—

JUDGE GOLDSBOROUGH: Ask him about it.

JUDGE CLARK: If this witness wants to testify as to details of work that would put him in the same category as Dr. Myers—but Dr. Myers was testifying from his own personal professional experience. This witness has very frankly said he is not familiar with these particular cases that he is writing about and, therefore, it certainly falls within the hearsay rule.

The Court will take a recess for 5 minutes.

(Whereupon a short recess was taken.)

866 By Mr. Goodrich:

Q. What are the dietary deficiency diseases, as that term is known to medicine?

A. I would name pellagra, beriberi, scurvy, riboflavinosis, and certain types of anemia.

Q. Are these diseases commonly responsible for death among the American people in their fourth or fifth decades at the present time?

A. I think not.

Q. Doctor, have you, in your experience, given any special attention to the diagnosis of dietary deficiency diseases?

A. I have.

Q. Would you explain that experience?

A. That experience began in early 1930 in Cleveland, when I was concerned with the deficiency diseases that occur as a part of chronic alcoholism, in which my patients substituted alcohol for food and developed pellagra and beriberi and other deficiency diseases. That led to a great deal of intense experimenting with the treatment of these exaggerated forms of deficiency disease, and eventually to methods of examining the body and testing, and also questioning in the matter of diet history what the patients ate, so that we developed a technique of interviews of examination of
867 minute changes in the nature and behavior of the body, and a certain limited amount of chemical testing of the various body fluids, especially the blood, and then the testing with treatment—so-called test material—so that this substance and that substance, in the way of a vitamin, would be given to the patients to find, by curing the disease, what is the nature of the disease and perhaps the cause of the disease.

By those methods we built up a long experience in the recognition of the clinical forms of deficiency disease and a suspicion of the subclinical, so that by extending the methods we think that we understand the milder phases of the disease.

Q. What, in your experience, Doctor, is the rate of incidence of dietary deficiency diseases, as they occur in that portion of the public that is served by you?

Mr. Rhyne: Unless he defines "that portion of the public served by you," it is a rather speculative answer, it seems to me.

Mr. Goodrich: If it please your Honor, I am only attempting to ask this doctor about his own experience at Cincinnati General Hospital.

Judge Clark: I think that is a proper question, Mr. Rhyne.

Mr. Goodrich: Do you want it read back, Doctor? Do you understand the question?

868 The Witness: Yes.

Mr. Goodrich: Will you answer it, please?

A. The population served by me I construe to be a large population, being a teacher and investigator.

By Mr. Goodrich:

Q. Explain, in your own terms, what that population is and what your conclusion is.

A. The population served by me in Cincinnati is a large population. They come into the hospital in an out-patient clinic in large

numbers, and they are sent into the hospital to go to bed in relatively smaller numbers. Those patients I consider served by me, because I direct the doctors who actually work with them. I see many of them myself, hundreds of them, and it is with that kind of service that I collected the hospital records in Cleveland and collected the hospital records in Cincinnati and published in 1942 that we had an incidence in the hospital of about one per cent of the patients who came into the hospital did have pellagra.

That was the only deficiency disease we published on, and that was the only deficiency disease that I think occurred among the adult population.

Q. What has been your experience since 1942, and what is the rate of incidence of these deficiency diseases in the people you have seen?

869 A. That I and my associates have seen?

Q. You and your associates.

A. That was the basis of the publication and my address in 1947, which was submitted for evidence to the Court.

We found that the incidence since publication in 1942 was greatly reduced, the highest figure being 1.3 per cent if I remember correctly, to gradually be reduced, so that in 1947 and 1948, we had no patients with pellagra.

JUDGE GOLDSBOROUGH: Is it your testimony, sir, that an individual has to have affirmative symptoms of pellagra of such a nature that they can be definitely diagnosed as such in order to show that he has an adequate diet; is that your testimony?

THE WITNESS: I am not certain of your question.

JUDGE GOLDSBOROUGH: I will repeat the question: Is it your testimony that an individual has to show such symptoms of pellagra as to be diagnosed as pellagra, before he can have even symptoms at all of any inadequate diet?

THE WITNESS: No, sir. I would not mean that from the testimony.

JUDGE GOLDSBOROUGH: What is the force of it then? What are you trying to do: just to be on one side of this case?

Mr. GOODRICH: If it please your Honor, we are coming
870 to the subclinical. Our first part is that there is no clinical deficiency.

Mr. RHYNE: But your questions were not so qualified, Mr. Goodrich.

JUDGE GOLDSBOROUGH: I hadn't heard anything about subclinical when I asked the question.

Mr. GOODRICH: I respectfully submit, your Honor, that I have asked this witness What are the dietary deficiency diseases which he sees? He has answered that, and he has stated that clinically he sees practically none at the present time.

Now we are coming to the subclinical, and that seems to be the question that is disturbing your Honor, if I might venture an opinion.

JUDGE GOLDSBOROUGH: You may proceed.

By Mr. Goodrich:

Q. How does your experience, Doctor, as to the incidence of clinical dietary deficiency disease compare with the experience of others with whom you are in contact and that you see reported in the medical literature?

A. My experience is almost identical with experience reported in Baltimore, Atlanta, and New Orleans.

JUDGE GOLDSBOROUGH: How about Washington?

THE WITNESS: Washington—to my knowledge there has been no publication on incidence, Judge.

871 JUDGE GOLDSBOROUGH: All right.

A. (continuing) Statistics on incidence are extremely meager.

By Mr. Goodrich:

Q. Have you undertaken an investigation to determine the rate of incidence of dietary deficiency disease in the Cincinnati area?

A. Only of the people who submit themselves voluntarily to the hospital for examination.

Q. How are those people examined? From a standpoint of nutrition, of course. I will limit it that way.

A. They are interviewed by a physician who asks of their ailments and examines them physically, and if there is any suspicion of deficiency disease the patient is then interviewed by a dietician skilled in diet-history taking. That then adds to the doctor's suspicion that the patient may have the deficiency disease. If he has outspoken deficiency disease he is then sent into the hospital for study and treatment.

Q. How many patients were included in this ten-year study?

A. We have received in the hospital about 200 patients per month on the medical service. Our residents and interns see a good many patients on other services, and if a deficiency disease is seen

872 among those patients they are then transferred to the medical service, but these statistics, in order to be valid, apply only to patients received on my own service and diagnosed by myself and my associates. In the outpatient—that is, in the ambulatory clinic—we have no records as to how many are brought under suspicion and may be subclinical.

It is in that zone that it is just impossible to get statistics that are of any value in terms of sickness.

JUDGE GOLDSBOROUGH: You are not claiming, then, that 99-2/3 per cent of the people you see have adequate diet—you are not claiming that?

THE WITNESS: Indeed not, sir.

JUDGE GOLDSBOROUGH: All right, sir.

By Mr. Goodrich:

Q. How did you classify the economic status of these 200 patients per month that are seen by your service.

A. They are the indigent and the medically indigent.

Q. Does your study justify the conclusion that the American diet—

Mr. GOODRICH: I am sorry. Strike that, please.

By Mr. Goodrich:

Q. What do you understand by subclinical dietary deficiency disease?

A. That is largely a state of mind rather than a disease entity.

873 Q. What has been your experience, or the experience of your group, in finding cases of subclinical dietary deficiency disease among these many patients that you see each month?

A. We have searched and used many methods, and find it such a difficult—find them so rarely, that none of my associates will ever make the diagnosis of a subclinical deficiency disease.

Q. Do you know Dr. Tom Spies?

A. I do.

Q. What has been your past association with Dr. Spies?

A. He was a fellow under me in Western Reserve University. He came to Cincinnati when I moved to Cincinnati, as assistant professor, and then was promoted to associate professor, and then he accepted a position in Northwestern University as a professor of nutrition.

Q. Are you familiar with Dr. Spies' work in the nutritional field at Birmingham, Alabama?

A. I am, to a certain point.

Q. Explain that, if you wish.

A. I have visited in that clinic on a number of occasions. Since perhaps the past four years I have not visited the clinic. I have not assumed any responsibility for the publications that were made from that clinic, nor have I assumed any responsibility about

874 the work done there, it being too remote from my department.

Q. To your knowledge, has Dr. Spies at any time in the past, had a hospital full of pellagrans in Birmingham, Alabama?

A. I have no knowledge of his having a hospital full of pellagrans.

Q. Would you tell the Court what his experience was, so far as you know it, in finding pellagrans in that area?

A. His first experience—and I share that experience because I was there at the time—

JUDGE CLARK: Doctor, you can testify to what you saw yourself, of your own experience; you can't testify what Dr. Spies told you.

A. (continuing) There were a few pellagra patients in the hospital in Birmingham, and to do an experiment we admitted more patients, to find a cure. It took a considerable amount of searching to find enough patients to make a critical experiment.

Eventually, if I remember correctly, 55 patients were received in the hospital over a period of six months or thereabouts, and to my knowledge that is the most—those 55 over a period of six months, coming and going, was the greatest number of patients that were received in that hospital.

875 By Mr. Goodrich:

Q. Doctor, does Dr. Spies' work support the conclusion that 90 per cent of the people in the South suffer from pellagra?

A. I think it does not.

Q. Does Dr. Spies' work show that deficiencies of Vitamins B and C are largely responsible for sudden cardiac collapse and death?

A. I am very sure that it does not. In my visits to Birmingham I have searched for heart disease due to deficiency states in his clinic and found none.

Q. Even among the active pellagrans?

A. Even among the active pellagrans I did not find it. To the best of my knowledge Dr. Spies has never published a case record of a patient with beriberi heart disease, which is the only known deficiency disease of the heart—has not published that—and I did publish, from our series of patients in Cincinnati, I searched and asked Dr. Spies to search his records, and he was not able to furnish me with a case record of beriberi heart disease at that time.

Q. Do you know Dr. Norman Jolliffe?

A. Yes.

Q. Do you know, of your own knowledge, whether he has a hospital full of pellagrans in Bellevue Hospital in New York City?

876 A. I haven't visited on his wards. All I know about his patients is what he told me.

Mr. RHYNE: I object.

JUDGE CLARK: You can't testify as to that, Doctor.

Mr. GOODRICH: If your Honor please, Dr. Myers testified on his direct examination that Dr. Spies has a hospital full of pellagrans at Birmingham, Alabama—Dr. Jolliffe had a hospital full.

JUDGE CLARK: You can't prove that by this witness, because he says he doesn't know anything about it. What he has been told is certainly hearsay.

Mr. GOODRICH: I respectfully submit, your Honor, that I have established a much closer connection between these doctors and the witness on the stand than Dr. Myers was able to present.

JUDGE CLARK: You are making an argument now, Mr. Goodrich.

Mr. GOODRICH: I am sorry, sir. May I address the Court?

JUDGE CLARK: Yes.

Mr. GOODRICH: I was attempting to justify the question that I have asked, and that has been ruled out. Of course I was arguing.

JUDGE CLARK: The doctor has testified that he knows these
877 other doctors, and he has testified, of his own observation, when he was down in Birmingham, in Dr. Spies' hospital.

Now he says he has never visited the wards in Bellevue Hospital, and all he knows about it pure hearsay. That was your statement, wasn't it, Doctor?

THE WITNESS: Yes, sir.

By Mr. Goodrich:

Q. Doctor, is vitamin deficiency, either clinical or subclinical, a significant factor in the causation of other diseases?

A. No.

Mr. RHYNE: That question is very leading.

JUDGE CLARK: I think that is a proper question and a proper answer.

By Mr. Goodrich:

Q. What diseases, if any, are more likely to occur or to develop in the presence of a vitamin or mineral deficiency other than the specific diseases which you have mentioned?

A. I know of none, because if it occurs in any great frequency it is then included as a part of the deficiency disease and becomes, by definition, a deficiency disease.

Q. Do you know, of your own knowledge, of any relationship between the incidence of pneumonia and subclinical deficiency disease?

878 A. I made an extensive study of that by studying the patients in the Cincinnati General Hospital with pneumonia, of which there were over a thousand over a period of ten years, to discover, if possible, any factor of malnutrition, and that might be undernutrition or it might be a specific deficiency or a mixture, and it might be subclinical, and I was not able to show that there was any increase in the liability to pneumonia in that group.

JUDGE GOLDSBOROUGH: Doctor, is it your testimony that an individual who has been on a drunk for two weeks is not more apt to catch pneumonia than a person who hasn't?

THE WITNESS: No, it is not my testimony to that effect.

JUDGE GOLDSBOROUGH: Then what is it? I just don't get it. You said that if a person relies upon whiskey for food he has a nutritional deficiency. You have also said, as I understand you, that a nutritional deficiency doesn't make anyone more liable to pneumonia than if he didn't have it.

Now as I understand it, you admit that if a man has been on a drunk for two weeks he is more apt to catch pneumonia than the same individual would be apt to if he hadn't been.

THE WITNESS: In the time in which the man is drunk he is
879 more liable to catch pneumonia than a healthy person, but that is not because of a deficiency in his nutrition; that, sir, is because of the narcotic effect of the drug which permits him to lie exposed, or permits him to inhale into his lungs the germs of pneumonia, and it interferes with his coughing and the clearing of his air passages while he is under the influence of alcohol, but in such moments as he is sober, and merely is deficient in his diet, in my opinion he is no more liable to pneumonia.

JUDGE GOLDSBOROUGH: Your testimony, then, as I understand you, is that a couple days after he is drunk and is able to take some nourishment, but still weak, he is no more apt to catch pneumonia than he would have been if he hadn't been on a drunk; is that what you say?

THE WITNESS: Yes, sir.

JUDGE GOLDSBOROUGH: All right, sir.

By Mr. Goodrich:

Q. Is your experience the same with respect to tuberculosis?

A. I have no experience, from my own efforts, with tuberculosis.

Q. In your opinion does tuberculosis have an underlying dietary deficiency disease, as it is called, in any case?

880 A. Only so far as the patient has suffered weight loss and a loss of protein and a loss of certain qualities of his blood.

JUDGE GOLDSBOROUGH: Isn't tuberculosis more prevalent among people who are undernourished than among people whose diet is adequate?

THE WITNESS: Yes, sir.

By Mr. Goodrich:

Q. Would the taking of a vitamin pill, supplying an abundant amount of all the vitamins known to be needed in human nutrition, added on top of the regular diet which a person who was mal-

nourished was taking, have an effect on the incidence of tuberculosis?

A. I have no opinion about the incidence of tuberculosis.

JUDGE CLARK: Questions about tuberculosis and cancer have been ruled out consistently in this case. There is no claim in this booklet about tuberculosis or cancer, and you persist in coming back to it.

Mr. GOODRICH: If your Honor please, we are trying to develop our theory of the case so that we—

JUDGE CLARK: I understand that your theory of the case must be based on that booklet. That is what is on trial.

Mr. GOODRICH: Yes, sir. I have pointed out several times—
881 and I don't wish to belabor the point—the basis on which we claim tuberculosis and cancer are in this case. Dr. Dunbar has testified—

JUDGE CLARK: The Court has ruled on that repeatedly, Mr. Goodrich.

Mr. GOODRICH: And the record may show at this time that that is the Court's ruling, that those questions were improper?

JUDGE CLARK: That has been the Court's ruling from the very beginning of this trial.

By Mr. Goodrich:

Q. Doctor, does supplementation to the diet with vitamins and minerals assure the average individual any significant protection against disease processes in general?

A. I think not.

Q. If a person were on a diet deficient in vitamins and minerals, would you prescribe a multiple vitamin and mineral preparation costing $200 per year, payable in monthly installments of $19.50?

Mr. RHYNE: I object to the question as pure argument, not a question at all.

JUDGE CLARK: Will you state the question over again, Mr. Goodrich?

Mr. GOODRICH: Yes, sir.

By Mr. Goodrich:

882 Q. Doctor, if a person were on a diet deficient in vitamins and minerals, would you prescribe a multiple vitamin and mineral preparation costing as much as $200 per year, payable in monthly installments—

JUDGE CLARK: The question of cost certainly can't enter into the doctor's expert opinion.

Mr. GOODRICH: If your Honor please, I respectfully submit that this doctor is entitled to say the effect—to point out the difference between a $200 a year expenditure on this and a $200 a year ex-

penditure on food. That is the purpose I am leading up to, and I respectfully submit that I would like to be permitted to continue this line.

JUDGE CLARK: I don't see that the question of the $200 cost has anything whatever to do with the doctor's expert opinion.

The doctor can testify to any expert opinion he has himself, from his experience and observation and studies, as far as that is concerned, but without knowing anything more than is contained in your question he can't pass on the question of whether this treatment may be worth $200 a year or not.

Mr. GOODRICH: May I state for the record the purpose that I have?

JUDGE CLARK: Certainly; you may state anything you please for the record.

883 Mr. GOODRICH: If this witness were permitted to testify in response to this question he would answer that the overcoming of vitamin and mineral deficiencies in this way is most uneconomic, and that the deficiencies are more readily overcome by supplying a diet which would supply foods purchased with the same money.

JUDGE CLARK: Objection sustained.

By Mr. Goodrich:

Q. Doctor, are such conditions as irritability, gastric distress, headache, and insomnia, commonly caused by subclinical vitamin deficiency diseases?

A. I do not know, sir.

Q. You do not know what they are commonly caused by?

JUDGE CLARK: He has testified.

Mr. RHYNE: He has answered. You can't argue with him.

JUDGE CLARK: You can't cross-examine your own witness, Mr. Goodrich.

By Mr. Goodrich:

Q. What are the causes of irritability, gastric distress, headache, and insomnia, as you see them?

Mr. RHYNE: He has about six questions in one. I object to it on that ground.

JUDGE GOLDSBOROUGH: Let him answer the whole thing at once.

Mr. RHYNE: I will withdraw the objection.

884 A. There are many causes and, if he were my patient and made those complaints, I would not give him vitamins only.

By Mr. Goodrich:

Q. What would be your course of treatment for a patient complaining of those symptoms?

A. First of all I would study him and go beyond his complaints, and I would study him as carefully as means would permit. If I did find that his diet was not the prescribed and accepted and sufficient diet, I would give him advice to correct his diet.

Q. Is it possible, Doctor, for a normal person to develop scurvy after subsisting for two weeks on a high carbohydrate diet consisting of bananas and cane sugar.

Mr. RHYNE: I object unless he gives all the other factors relating to the case. I don't see how the doctor could possibly answer it—the physical condition of the man before he starts.

Mr. GOODRICH: I respectfully submit that that is a question for cross examination, that he can bring out.

JUDGE CLARK: I don't think it is. You are asking about whether it was possible for this thing to happen without giving all the facts, surrounding circumstances, and everything else. I presume you are referring to Dr. Myers' testimony, and he most specifically gave all the surrounding facts.

JUDGE GOLDSBOROUGH: While you are looking that up,
885 I would like to ask the doctor a question, because I want to find out just what he has in mind.

Suppose a man in a rural community has been eating sweet potatos and fresh pork, as his principal articles of diet, through the winter—

THE WITNESS: Sweet potatos and fresh pork?

JUDGE GOLDSBOROUGH: Yes. —and along about the first of February he finds his mouth is full of ulcers, and he is so tired he can hardly stir, and his mental operations are also tired: Would you say that he was probably suffering from a dietary deficiency?

THE WITNESS: I certainly would suspect it, yes.

JUDGE GOLDSBOROUGH: In other words, you don't have to have these specific diseases, such as pellagra, in order to show a dietary deficiency?

THE WITNESS: Your sweet potato and pork—

JUDGE GOLDSBOROUGH: He had scurvy, did he?

THE WITNESS: He probably had scurvy, and I would certainly look into the methods—

JUDGE GOLDSBOROUGH: I have seen him cleaned up in about two weeks with spring food. It happened to me when I was at college; therefore I know about it.

Mr. GOODRICH: This question on scurvy requires reading two or three pages. For that reason I will withdraw it.

JUDGE CLARK: Very well.

886 By Mr. Goodrich:

Q. Doctor, is riboflavin the commonest cause of sudden death through cardiac collapse?

A. In my experience, riboflavin deficiency has not caused sudden death.

Q. Is riboflavin deficiency at all commonly associated with heart disease?

A. I think it is not. It is not associated, in my thinking and in my experience.

Q. Are such common complaints as fatigue, lack of pep, ordinarily due to a vitamin deficiency disease?

A. I am not clear enough—I do not have clearly in mind the situation that you describe when you say "ordinarily." I would rather not answer that question.

Q. If a person comes to you, in your practice, complaining of tiredness, fatigue, lack of pep, do you find, in any significant number of cases, that that person is suffering from a vitamin deficiency disease?

A. No, sir; I do not, because they have all been taking pills by the time they come to me.

Q. Do you find such conditions as fatigue, lack of pep, in conditions other than vitamin deficiency disease?

A. Yes, sir; in many.

Q. Is there any scientific basis for the conclusion that coronary disease is caused by a deficiency of Vitamins K and C?

887 A. I think there is no basis for that.

Q. Is there any scientific basis for the conclusion that coronary disease is caused by a deficiency of any other vitamin?

A. There is not.

Q. Do you believe that vitamins and minerals taken in abundant amounts would prevent rheumatic heart disease?

A. It is my opinion that it would not.

Q. Is beriberi heart disease, either in its clinical or its subclinical form, at all common in the United States of America?

A. I think it is very uncommon.

Q. Are most cases of cardiac dilation relieved by injection of thiamin?

A. I think most of them are not.

Q. Is arthritis caused by a deficiency of vitamins?

A. I know of no vitamin which, being deficient, will cause arthritis.

Q. May rheumatoid arthritis be treated successfully with Vitamin C?

A. To the best of my knowledge rheumatoid arthritis has not been treated successfully with Vitamin C.

Q. Doctor, I show you a document which has been marked in evidence as Government Exhibit No. 13, and ask that you
888 look over the part of that exhibit headed "Findings of Fact," signed by Robert C. Butz, dated 30 September 1948.

A. Is it your wish that I read this all and understand it?

Q. Yes, sir; please.

Have you read it and studied it?

A. I can not answer this Yes or No.

Q. I wouldn't care to have you answer it that way. You can answer it any way you wish.

Mr. RHYNE: I didn't hear the question.

Mr. GOODRICH: I haven't asked it yet.

By Mr. Goodrich:

Q. Doctor, having studied the exhibit will you tell us whether, in your opinion, the finding of fact made by Dr. Butz on September 30 accords with the present-day consensus of informed medical opinion, according to what you have seen?

Let me repeat the question: Based upon your study of the finding of fact, will you advise the Court whether Dr. Butz correctly stated the present-day consensus of informed medical opinion in that finding?

A. I think informed medical opinion can not give an answer yes or no to this statement.

Q. No such answer Yes or No is required. You may answer with an explanation if you wish.

JUDGE GOLDSBOROUGH: The answer has to be responsive.
889 It doesn't have to be Yes or No, but it has to be responsive.

Mr. RHYNE: I object to his arguing with his own witness as he goes along.

JUDGE GOLDSBOROUGH: It has been going on now for nearly a week, so there is no use stopping it now; it is too late.

Mr. GOODRICH: If you don't understand the question, Doctor, I will withdraw it.

I have no further questions.

Mr. RHYNE: I have no questions.

JUDGE CLARK: All right, Doctor; you may step down.

(Witness excused.)

JUDGE CLARK: The Court will take a recess until two o'clock.

(Whereupon at 11:50 a.m., the trial was recessed, to reconvene at 2:00 p.m. the same day.)

890 AFTERNOON SESSION—(2:00 p.m.)

Mr. GOODRICH: May it please the Court, may we request permission at this time to recall Dr. Blankenhorn for a few more questions?

Mr. RHYNE: I object to that. They have had him on the stand and asked him everything they could think of, and now they have talked to him during the noon recess and want to put him back on. I think that is highly improper. They could have asked him anything they wanted to.

JUDGE CLARK: Did you talk to the doctor?

Mr. GOODRICH: Yes, sir, I did. There was a misunderstanding between myself and Dr. Blankenhorn about the meaning of my last question. When I gave him the exhibit and asked him the question he didn't understand it fully. What my purpose was, was to ask him to come back and then ask him some specific questions which would be more to the point, which he fully understands. That was the purpose.

It wouldn't take more than about 15 or 20 minutes.

Mr. RHYNE: He says he has talked to him.

Mr. GOODRICH: Yes, I have talked to him.

JUDGE CLARK: Mr. Goodrich, you have had five months to talk to this witness and after the witness once takes the stand he should not be coached by counsel any further. To go out and consult with
891 him during a recess and then try to put him back on, it seems to me is very objectionable and the objection is sustained.

Mr. KLEINFELD: May it please the Court, I did not talk to the witness during recess. I am really appearing as counsel for the Attorney General defendant and Mr. Goodrich as counsel for the Federal Security Administrator. I would like to ask the witness a few questions, if I may.

JUDGE CLARK: You didn't ask him when you had the opportunity, Mr. Kleinfeld. The same consideration would apply in the case of your associate talking to the witness and you talking to him yourself. It doesn't make any difference who talks to him.

Mr. KLEINFELD: I did not confer with him or coach him in any way.

JUDGE CLARK: You had an opportunity to cross examine him if you pleased when he was on the stand this morning. You could have asked him then.

Mr. KLEINFELD: That was near noon and that was the main reason I didn't ask him any questions. All I want to ask him is three or four questions.

JUDGE CLARK: It doesn't make any difference which counsel talked to him. If counsel talked to him, I don't think his testimony this afternoon would be admissible. The Court doesn't think so.

Mr. KLEINFELD: There are at least four individual de-
892 fendants here. Mr. Goodrich does represent the Federal Security Administrator.

JUDGE CLARK: You gave no notice that you wished to examine the witness and didn't do it now until after Mr. Goodrich tried. Objection sustained.

Mr. KLEINFELD: All I want to do is ask him a few specific questions.

JUDGE CLARK: The objection is sustained.

Mr. GOODRICH: I will call Dr. Nelson.

DR. ELMER M. NELSON was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Goodrich:

Q. Will you state your name and address for the record, please?
A. Elmer M. Nelson, 1830 Jackson Street, Washington, D. C.
Q. What is your occupation or profession?
A. I am a biochemist.
Q. By what organization are you employed?
A. I am employed by the Food and Drug Administration.
Q. In what capacity and for what period of time?
A. My position is Chief of the Division of Nutrition, and I have been so employed since 1935. I was employed by the Food
893 and Drug Administration prior to that time in a slightly different capacity.
Q. What is your educational background?
A. I am a graduate of the University of Wisconsin, and I received a Bachelor of Science degree in agricultural chemistry in 1918. I received a Master of Science degree from the same institution in 1919. I received a Doctor of Philosophy degree from the University of Wisconsin in 1923.
Q. What are your professional and honorary societies, if any?
A. I am a member of the American Institute of Nutrition, served a term as president, and I have served two terms as associate editor of the Journal of Nutrition which is the official publication of that organization.

I am a member of the American Society of Biologieal Chemists. I am a member of the Council on Pharmacy and Chemistry of the American Medical Association. I am a member of the vitamin advisory board of the United States Pharmacopeia. I am a member of the food and nutrition board of the National Research Council. I served at an international vitamin conference as a representative of the United States in London in 1934.

I was a member of a committee that dealt with vitamin standards for the World Health Organization that met in London in April this last year. I am a member of the American Chemical Society,
894 and I have served one term as president of the biological division—or chairman of the biological division—of the American Chemical Society.

And I belong to some other professional societies.

Q. Have you contributed basic research papers in the field of nutrition?

A. I have.

Q. Would you name a few of them, without going into an exhaustive list?

A. During the period from 1920 to 1925 I was on the staff of the department of agricultural chemistry at the University of Wisconsin and I published a number of papers that dealt with the stability of vitamins when treated with various chemical reagents, studies that were directed toward the isolation of the compounds, studies relating to the requirements for vitamins. And during the period 1926 to 1935 I carried out many studies that related to the stability of vitamins, the effect of commercial processes on the vitamin content of foods.

Q. Do the duties of your present position require you in any way to keep abreast of the medical and scientific literature?

A. My duties do require that, yes, sir.

Q. Do the duties of your present position bring you into contact with any scientific groups interested in nutrition problems?

895 A. Yes, they bring me in contact with the scientific groups that I have mentioned and many others.

Mr. GOODRICH: I ask the clerk to show to the witness Plaintiff's Exhibit 3, which is the 42-page booklet

(The clerk handed a document to the witness.)

By Mr. Goodrich:

Q. Doctor, have you read the booklet "How to Get Well and Stay Well," Plaintiff's Exhibit No. 3 which is now before you?

A. I have read an edition of 42 pages that appears to be the same as Exhibit 3.

Mr. GOODRICH: I ask the clerk to show Dr. Nelson Exhibit No. 8, which is the package of Nutrilite, if I may—Plaintiff's Exhibit No. 8.

(The clerk handed a package to the witness.)

By Mr. Goodrich:

Q. Doctor, are you familiar with the label of the product Nutrilite Food Supplement Double X, Plaintiff's Exhibit 8 which you now have?

A. Yes. I have had reason to examine this label before.

Q. From your reading and consideration of the book have you reached a conclusion, or arrived at an opinion, as to the views expressed in that book, as to the adequacy of diets in the United States, in terms of vitamin and mineral content?

896 A. Yes, I have reached an opinion.

Q. What is that opinion, as to the views expressed there?

A. I have reached an opinion, from reading this book, that a great many of the dietaries of this country are deficient in the vitamins and minerals contained in Nutrilite.

Q. Is that evaluation of the American dietary a correct one?

A. Not in my opinion.

Q. Would you explain the reasons for your opinion?

A. I have had occasion to give much consideration to the adequacy of dietaries in this country, particularly as a member of the food and nutrition board of the National Research Council. The food and nutrition board was appointed as an advisory body to all federal government agencies on problems that relate to food and nutrition.

The board was created in 1940. That board has given consideration to the possible deficiencies that may occur in our dietaries as indicated by surveys giving consideration to what the requirements for various vitamins and minerals are. It has made recommendations as to measures that should be taken to eliminate as far as possible any deficiencies of vitamins and minerals. And most of those recommendations have been put into effect. And the problem of widespread deficiencies is, in my opinion, rather small.

897 Q. What are the recommendations of the National Research Council in this respect that have been put into effect?

A. One of the recommendations is the enrichment of flour and bread. Enrichment means the addition of three vitamins: vitamin B-1, riboflavin, nicotinic acid; and one mineral, iron; with the optional addition of calcium salts or vitamin D. Bread is fortified in the same way.

Enriched corn meal—when corn meal is enriched it has the same vitamin content with respect to vitamins and minerals I mentioned as enriched flour.

The board has also recommended the addition of vitamin A to margarin.

JUDGE CLARK: To what?

THE WITNESS: Oleomargarin.

A. (continuing) It recommends the use of iodized salt. That is salt to which a trace of sodiumiodide has been added. About 40 percent of the table salt that has been used in this country contains small traces of iodine that has been added, and the salt is sold under the name "Iodized Salt."

The board also recommended the fortification of evaporated milk with vitamin A, and at the present time all evaporated milk sold is so fortified.

With respect to the enrichment of flour and bread and
898 corn meal, there are 23 states or more that require that all bread and flour sold within those states must be enriched. In the other states, where the enrichment is not required, it is quite generally practiced.

For example, in the District of Columbia it is very difficult to find bread that is not enriched. There are five states in the South—North Carolina, South Carolina, Georgia, Alabama, and Mississippi—that require the enrichment of all corn meal, all degerminated corn meal.

One state requires also that the whole corn meal be enriched as well. That is South Carolina.

By Mr. Goodrich:

Q. Are those the principal ones?

A. Yes, they are.

Q. Doctor, do you have an opinion as to the extent to which the effectuation of these recommendations has overcome vitamin and mineral deficiencies in the American diet?

A. Yes, I have.

Q. What is that opinion.

A. It has been one of the factors that has reduced tremendously the occurrence of pellagra in the South. Pellagra is a diet disease due to nicotinic acid deficiency. Before the enrichment of corn meal and flour—before it was recognized that nicotinic acid was of value in the treatment of pellagra—

899 Mr. RHYNE: I object to this doctor talking about treatment. They wouldn't let any of my witnesses who were not MDs talk about treatment.

Now, he is talking about treatment of pellagra. I object to statements about treatment.

JUDGE CLARK: What do you say about that, Mr. Goodrich?

Mr. GOODRICH: I believe this witness is very well qualified.

JUDGE CLARK: You objected consistently to testimony about treatments, didn't you?

Mr. GOODRICH: We only objected when Dr. Casselberry was on the stand, who hasn't any qualifications in this field in our opinion.

I believe all of those objections were consistently overruled, however.

Mr. RHYNE: He had a Ph.D.

JUDGE CLARK: Doctor, do I understand you are simply testifying about results? A layman can testify about results.

Mr. RHYNE: I didn't understand that.

THE WITNESS: Yes. The statement I made can perhaps be rephrased by saying that—

JUDGE CLARK: What you are testifying now is just a matter of statistics, isn't it?

THE WITNESS: That is right.

JUDGE CLARK: He may answer.

900 A. Before it had been established that the disease pellagra results from a deficiency of nicotinic acid, deaths from pellagra were of the order of 3,000 a year. At the present time the deaths from pellagra are very few. That in itself is evidence of the effectiveness of the enrichment program in eliminating a deficiency of nicotinic acid. The program is just as effective in eliminating possible deficiencies of riboflavin and nicotinic acid, because flour and bread are used the country over, and there is no better way of reaching all classes of people than by the fortification of those foods.

By Mr. Goodrich:

Q. Has the fortification of those foods been accompanied by a price differential between the enriched flour and the unenriched?

A. It has.

Q. To what extent.

A. The present difference is of the order of 10 cents per hundred pounds of flour.

Q. In your opinion, based upon your training and your experience, is a person on a diet containing generous quantities of vitamins and minerals better capable of resisting disease than a person whose diet is deficient in one or more of those?

901 Mr. RHYNE: I object. That is certainly a medical question.

JUDGE CLARK: I think that is. I don't think the doctor is qualified as a medical doctor.

Mr. GOODRICH: If your Honor please, this witness testified that it is part of his job to read and be thoroughly familiar with the medical literature. He holds a Ph.D. degree in biochemistry; he has devoted his lifetime to a study of this subject; he has contributed important papers in the field. I respectfully submit that he is thoroughly qualified.

JUDGE CLARK: You went clear into the medical field in your question, Mr. Goodrich.

Mr. GOODRICH: The witness, I believe, sir, is qualified to answer that question, on the basis of his training and experience.

JUDGE CLARK: I understood the doctor to say he was simply testifying as to results, Mr. Goodrich.

Mr. GOODRICH: On the previous question, of course. This is a new question.

JUDGE CLARK: What is your question again?

Mr. GOODRICH: On the basis of his training and experience, does he have an opinion whether a person who is on a diet supplying ample amounts of vitamins and minerals, is better able to resist disease than a person whose diet is deficient in one or more of these vitamins.

902 JUDGE CLARK: I think that is strictly a medical question. He may answer.

THE WITNESS: I have an opinion.

By Mr. Goodrich:

Q. Would you state that opinion, please?

A. That question cannot be answered categorically Yes or No. There are certain indications that a well nourished person may be more susceptible to disease. There are other indications that he may be less susceptible to disease.

Taking up the latter first, I think it is well recognized that a person who is in a good nutritional status and is stricken with a disease, so that he can't eat the foods that he eats ordinarily, and has to live on his body tissues, will not waste away to the same extent as a person who is malnourished to start with.

I think there is also very satisfactory evidence, based on animal experimentation, that for an animal to develop resistance to disease when he is infected he must be supplied with protein of the proper quality and of the proper amount. The substances that are formed in the body that overcome the effects of the organism are protein in nature, and the body requires certain materials for the manufacture of those substances.

On the other hand, studies with monkeys have shown that a monkey that is deficient in vitamin B-1 is more resistant
903 to the disease poliomyelitis—it is more difficult to infect them—than one that has an adequate supply of vitamin B-1.

Similar studies have also been carried out with a mouse. They showed that a mouse that is deficient in vitamin B-1 is more difficult to infect with poliomyelitis than one that has an adequate supply.

There is taken in with our food, when it gets into the body, microorganisms of various types. Some of these are beneficial to the body; others are not, like those that cause disease. Some of these

microorganisms require the same vitamins that the body does, and we make use of that fact in our routine determination of vitamins.

In a product like Nutrilite we will determine riboflavin and nicotinic acid by the use of certain bacteria. The body must compete with these organisms for these vitamins and if the vitamins are present in generous supply it may be that the organism will thrive better than if the diet is deficient in some of these vitamins.

No generalization can be made. All of the facts aren't in. They are being very thoroughly studied, but it is wholly unscientific to make the statement that a person who is well fed is more resistant to disease.

JUDGE GOLDSBOROUGH: Is it your statement that you have
904 no opinion as to whether or not a body that has a proper diet is not more able to resist disease in general—not some specific disease like poliomyelitis—than a body which is not properly supplied with the proper diet, that you have no opinion as to which is the most susceptible to disease in general?

THE WITNESS: Well, in many cases that is true. In some cases I have a definite idea that—

JUDGE GOLDSBOROUGH: What is your overall opinion, if you have one?

THE WITNESS: My overall opinion is that there hasn't been sufficient scientific work done to permit a general conclusion that a person who is well fed is less susceptible to disease than one—

JUDGE GOLDSBOROUGH: In China they die like flies and they do in Central America and they do in South America, where they are exceedingly poor and have exceedingly poor diets. Isn't that so.

THE WITNESS: I don't know just what you mean when you say "they die like flies."

JUDGE GOLDSBOROUGH: They do die like flies. I have lived in China for six years and they die by the thousands.

THE WITNESS: I have never been in China.

JUDGE GOLDSBOROUGH: Don't you know that to be true?

THE WITNESS: I imagine there are large numbers of deaths
905 there, but to what they are attributed, I am not prepared to say.

JUDGE GOLDSBOROUGH: Isn't it true that there is less disease in the countries where the standard of living is highest; isn't that true?

THE WITNESS: The standard of living includes sanitary conditions as well.

JUDGE GOLDSBOROUGH: That is what I mean, of course. I am trying to speak from a rational standpoint—I mean the best substantial diet. Isn't there less disease in general in races that have the best substantial diet?

THE WITNESS: Yes, I think that is true.

906 By Mr. Goodrich:

Q. Doctor, do you have any information that would entitle you to an opinion as to the causes of deaths in areas such as Judge Goldsborough has mentioned?

A. Will you repeat the question, please?

Q. Do you have any factors which would indicate to you what the causes of death were in areas of the kind mentioned by Judge Goldsborough?

A. I have some information concerning the causes of death in that area.

Q. What would you state that to be?

A. One of the frequent causes of death in China is malnutrition, beri beri, and other vitamin deficiency diseases, and certainly in China they do not have the protection from a sanitary standpoint—protection against organisms that we have in this country.

Q. Do you have an opinion as to whether the composition of the soil in which food is grown has an important bearing upon the vitamin content of the plants grown in that soil?

A. I do.

Q. What is that opinion?

A. It hasn't been possible to change materially the vitamin content of plants by changing the minerals in the soil on which a plant is grown. There are other environmental factors that
907 may influence the amount of vitamin in a plant, such as the amount of light to which the plant is exposed, but so far as the mineral content of the soil is concerned, it seems to have no important bearing on the vitamin content of the plants.

Q. Do you have an opinion as to whether the mineral content of the soil has an important bearing upon the mineral content of the plants grown in that soil?

A. Yes.

Q. And what is that opinion?

A. The mineral content of the soil does not influence the mineral content of the plant to an important degree. If you grow wheat in one area, it will have essentially the same mineral composition as if grown in another area, and it will be characteristic of wheat and quite different from corn that is grown in the same area.

If there is an insufficient amount of the minerals that a plant needs, the plant doesn't grow, but the plant is very discriminating in the elements that it takes from the soil, and it takes up those that it needs. There is an exception to this general statement, and that deals with the so-called trace elements.

JUDGE GOLDSBOROUGH: What elements?

THE WITNESS: Trace elements. Elements that occur only in very minute quantities.

908 A. (Continuing) An example of that is iodine. There are large areas in this country where there is little or no iodine in the soil or in the water in the soil and plants grown in those areas are essentially free from iodine, whereas if they are grown on a soil that is rich in iodine, they will take up that iodine.

The plant doesn't require the iodine for growth, but it is brought along with the plant more or less accidentally. The same may be true with respect to a few other elements that the plant does not need, and which are not important in human nutrition. In fact, some of them may be dangerous.

By Mr. Goodrich:

Q. What is the present day status of trace elements in the field of nutrition?

A. First we must consider what the trace elements are. I believe the elements that would be placed in that category that are required by man, or may be required by man, would be fluorine, copper, iodine, possibly zinc.

Fluorine is a substance that has to be used with great care because the margin between a safe intake and a dangerous intake is very small, and there have been no attempts to increase the fluorine content of our foods generally.

With respect to the copper, that seems to occur so generally in our foods that there is no need for any particular concern about that; except in a very small area in Florida, I believe, it
909 hasn't been found that copper is deficient in the foods that we eat ordinarily.

Zinc also occurs so uniformly in foods that there is no possibility of a deficiency of that element.

Q. Doctor, is it difficult to obtain a diet at the present time that is entirely safe in so far as vitamins and minerals are concerned?

A. It presents no difficulty at all for a person who has money enough to buy the food.

Q. Would you explain your answer on that?

Mr. Rhyne: He is really getting into medical subjects again. If it is the Court's ruling he can discuss them—I just don't want to waive objection to it. I just think this is a medical question and if you want to ask medical questions, you should have a doctor on the stand.

Judge Clark: Don't you think that is a medical question, Mr. Goodrich?

Mr. Goodrich: No sir, I do not. This is a pure and simple nutrition question now. This is one that is clearly within the field of nutrition in that I am asking him of the composition of the diet.

That is his specialty. That is the field in which the nutritionist is primarily concerned.

JUDGE CLARK: You may answer.

A. Foods are very readily available for anyone that will supply all the vitamins and minerals, and the Food and Nutrition
910 Board has reached the conclusion that it isn't necessary to fortify any further foods in order to meet any important deficiencies of vitamins or minerals in our dietary.

Q. Doctor, are you familiar with the vitamin C content of bananas?

A. I am.

Q. What is the quantity of vitamin C found in a banana of ordinary size?

A. About 10 milligrams.

Q. What quantity of vitamin C has been found necessary to prevent scurvy or to cure scurvy?

A. 10 milligrams has been found to be sufficient to either prevent scurvy or cure scurvy, and that has been done in very carefully controlled studies on human beings.

Q. Is Doctor Sir Robert McCarrison's book entitled "Study of Dietary Deficiency Diseases" put out in 1921—which is incidentally, your Honor, the book mentioned by Doctor Myers in his examination—a present day reliable treatise with respect to dietary deficiency diseases in the United States?

A. No sir, not in my opinion.

Q. On what do you base your opinion?

A. On what I have read in the book since I have heard Doctor Myers testimony.

911 Q. Would you explain why, in your opinion, the book is not a present day reliable treatise?

A. This book describes studies that were begun in 1914 on pigeons, in which the author attempted to determine how much heat treatment was necessary to destroy a substance in rice that would prevent the occurrence of polyneuritis in pigeons.

That substance we now know as vitamin B1 and he found that by autoclaving the rice—autoclaving means heating under steam pressure—at a temperature of 130 degree Centigrade, for a period of three-quarters of an hour he could destroy a substantial quantity of the substance that we now know as vitamin B1.

Doctor McCarrison was in service during the first World War and returned to his studies in 1918 and carried out certain studies on monkeys. In these studies he fed monkeys a diet consisting of wheat bread that had been autoclaved, evaporated milk that had been autoclaved, rice that had been autoclaved, ground nuts—and I don't know just what is meant by ground nuts, except that peanuts

fall in the class of ground nuts but I don't know what was used in India—these studies were all conducted in India—and in one case fresh onions were added to that ration.

JUDGE CLARK: Fresh onions?

THE WITNESS: Fresh onions.

912 A. (Continuing) It was on that ration that some of the animals died, and he took pictures of their intestines and made other observations. The type of diet that he fed to monkeys bears no particular relation to the diets that are used in this country.

The food that we eat is not subjected to the type of treatment that he subjected these foods, and I do not believe the observations he made have any particular application to the adequacy of our diets with respect to vitamins and minerals.

Q. Doctor, would you turn to page 4 of plaintiff's Exhibit No. 3, which you have before you?

A. I have it, sir.

Q. Would you read the paragraph—the next to the last I believe—I haven't the book before me, but I believe it is the next to the last on the page—speaking of a survey conducted by a large eastern college.

A. "A survey made by a large eastern college shows that out of 2511 people studied in Pennsylvania, 2509 lacked the proper nutrition."

Q. You may read the rest of the paragraph if you will. It won't be necessary to read it into the record. I believe it is sufficiently identified. I would like to ask you a question on it.

A. I have read it.

913 MR. GOODRICH: I will ask the clerk to mark this as the government's next exhibit for identification.

(Defendant's Exhibit No. 17 was marked for identification.)

MR. GOODRICH: I ask that the clerk hand the witness the exhibit which has been marked for identification defendant's exhibit No. 17.

(The clerk handed a document to the witness.)

MR. GOODRICH: May I address Mr. Rhyne?

JUDGE CLARK: Yes sir.

MR. GOODRICH: I believe I gave you a copy of the photostats of this one.

MR. RHYNE: I don't believe you did.

MR. GOODRICH: If not, here is one.

By Mr. Goodrich:

Q. I ask you, Doctor, on the basis of your knowledge of the medical literature and the surveys of diets in this country, whether you can identify the survey mentioned on page 4 of plaintiff's Exhibit 3?

A. Whether I can identify what?

Q. Whether you can identify the survey that is reported on page 4 of plaintiff's Exhibit No. 3—the paragraph you have just read.

A. I am certain that Exhibit 17 is a report of the work that is referred to on page 4 of Exhibit 3.

914 Mr. GOODRICH: I would like to offer the exhibit in evidence at this time with the reservation—

JUDGE CLARK: Isn't the whole book in evidence, Mr. Goodrich?

Mr. GOODRICH: This is the report of the survey, sir, and I would like to ask leave of the Court to substitute photostatic copies of this work.

JUDGE CLARK: That is perfectly all right, Mr. Goodrich, but have you identified the survey referred to in the 42-page booklet with this thing that you sent up here?

Mr. GOODRICH: This witness testified, your Honor, that he was certain that the exhibit—

JUDGE CLARK: Does he profess to be familiar with all surveys that have ever been made in the United States?

Mr. GOODRICH: Let me ask him a few more questions if you are not satisfied on that score.

JUDGE CLARK: I don't think he is qualified to identify that exhibit at all.

By Mr. Goodrich:

Q. On what basis do you identify government exhibit No. 17 with the survey that is reported on page 4 of plaintiff's Exhibit No. 3?

A. On page 4 reference is made to a survey that involves 2511 people.

JUDGE CLARK: I may interject there that the statement in
915 the booklet would be much more effective if they identified the survey instead of saying, "a large eastern college".

Mr. GOODRICH: We are trying to develop that point.

A. (Continuing) I have tried to keep abreast of important surveys that were made, and page 4 also refers to the fact that the people studied in Pennsylvania were involved. This publication is from the Pennsylvania State College which is located at State College, Pennsylvania, and obviously to me refers to the same study.

Mr. GOODRICH: May we offer the exhibit in evidence, your Honor?

JUDGE CLARK: It will be temporarily admitted. I don't think it has been sufficiently identified.

Mr. RHYNE: I don't see what relevance it has and I don't think it has been identified properly.

JUDGE CLARK: It has been identified as the one referred to in the booklet.

Mr. GOODRICH: We inquired of Doctor Casselberry—

Mr. RHYNE: I will give it to you right now. Here it is. Here are photostatic copies. How many do you want?

(Handing to Mr. Goodrich.)

Mr. GOODRICH: Where did this come from?

Mr. RHYNE: From the Lee Foundation of Nutritional Research.

Mr. GOODRICH: Mr. Rhyne has just shown me a paper
916 that I would like for the Court to look at.

JUDGE CLARK: Does this purport to be the survey referred to in the book?

Mr. RHYNE: Yes. This in the information we used. He asked for the information we used and from which we took the information in the book and this is it.

Mr. GOODRICH: Have you had a chance to look it over, sir?

Mr. RHYNE: I would like to advise the Court that we secured this from—what is it?

Mr. GOODRICH: The Lee Foundation for Nutritional Research.

Mr. RHYNE: In Milwaukee, Wisconsin, which I believe we can stipulate is a well-established nutritional research foundation.

Mr. GOODRICH: You can't stipulate that with me. I ask that Exhibit No. 17 for identification be passed up for the examination of the Court too.

JUDGE CLARK: A contribution to the study of nutrition?

Mr. GOODRICH: Yes sir. If your Honors, having looked at these documents—

JUDGE CLARK: We haven't had a chance to look at them yet, Mr. Goodrich.

Mr. GOODRICH: All-right, sir.

JUDGE CLARK: I am a fast reader but not that fast.

917 Mr. GOODRICH: I beg your pardon.

JUDGE CLARK: All right, Mr. Goodrich, do you offer these in evidence?

Mr. GOODRICH: Yes. I have offered the survey and Mr. Rhyne has objected.

Mr. RHYNE: I haven't objected to it yet except that you hadn't established any connection with it.

JUDGE CLARK: The objection was on the ground it hadn't been identified, Mr. Goodrich, and if Mr. Rhyne hadn't objected, the Court would.

Mr. RHYNE: The only thing you asked me was where did we get our information and now I have given you the release that we used.

Mr. GOODRICH: If it please the Court, it will be immediately apparent from looking at the tear sheet which Mr. Rhyne has supplied that that is not the survey. The purpose of our placing the statistics in, or this entire data on this survey in, is to prove of course that the statements in the book are untrue.

I believe we have adequately identified it.

JUDGE GOLDSBOROUGH: Not yet you haven't. Can you cite anything to the Court that talks about two persons in every 2511? Is that in this pamphlet anywhere?

Mr. GOODRICH: This pamphlet is concerned with 2511 subjects. The only thing in that pamphlet that mentions two people is that only two people in that survey had no dental caries and were otherwise up to all standards.

Now this survey having been conducted at a large eastern college in Pennsylvania, this witness having testified on the basis of his thorough familiarity with the survey work, says that in his opinion, or that he is reasonably certain, that this is the survey. Mr. Rhyne doesn't challenge that at this time, and these reprints that he has given us bear out the identification.

Mr. RHYNE: I don't know whether it is the survey that is discussed in this press release on which we relied or not.

JUDGE GOLDSBOROUGH: As I understand it, counsel for the defendants admit that the survey says that theoretical perfection was not attained in more than two cases out of 2511, and he says in effect, by necessary implication, that that statement is not in accordance with the statement made in the pamphlet of How to Get Well and Stay Well. Isn't that what you said?

Mr. GOODRICH: I will go one step further than that, your Honor. The pamphlet says directly that only two persons out of this group were receiving the vitamins, minerals and proteins that they required. I am offering to prove by this witness that that statement is a downright falsehood.

Mr. RHYNE: I would think that you would have to offer
919 the proof of the release on which we relied which I have given to you.

Mr. GOODRICH: I respectfully submit, your Honor—

JUDGE CLARK: This witness can't testify as to what is in this pamphlet. The pamphlet speaks for itself.

Mr. GOODRICH: Yes sir, but this witness has offered to testify, your Honor, only that what is in the pamphlet is untrue. The pamphlet of course doesn't identify the survey specifically. Obviously not.

JUDGE CLARK: Since I have had a chance to examine it there is some internal evidence in this tear sheet that it is the same pamphlet referred to because the booklet mentioned having appeared in the pamphlet as having conducted the investigation.

Doctor Pauline Beery Mack is mentioned in the tear sheet also as the Director of the Ellen H. Richards Institute.

Mr. GOODRICH: My contention is that that is another identifying factor.

JUDGE CLARK: I don't think that the Doctor can testify that the statements in the pamphlet are downright falsehoods.

Mr. GOODRICH: In How to Get Well and Stay Well, your Honor, the statement is made that this survey shows that only two persons out of the 2511 studies were receiving all of the vitamins, minerals and proteins that they required.

920 JUDGE CLARK: The Court hasn't had a chance to read the pamphlet.

Mr. GOODRICH: I am talking about How to Get Well and Stay Well.

JUDGE CLARK: This pamphlet here that you have just offered.

Mr. GOODRICH: How to Get Well and Stay Well is in evidence. That is the place where the statement is made.

JUDGE CLARK: Certainly.

Mr. GOODRICH: I am offering it by this witness who is an expert in nutrition, well qualified to speak on the scientific literature, he can identify the survey, he can read this literature, and he will testify, if allowed to do so, that the survey supports no such claim. Whether Mr. Royal Lee of the Lee Foundation misinterpreted the survey is entirely irrelevant it seems to me except possibly on the issue of good faith.

I am not going to that issue. I am going to the truth or falsity of the statement on page 4 of plaintiff's exhibit No. 3 that this survey shows that only two out of 2511 people were receiving the nutrition they wanted. Now the best way to prove that, it seemed to me, was to bring the original evidence here and to put an expert on the stand who was qualified and able to interpret that evi-

921 dence, to testify that statement in How to Get Well and Stay Well is a downright falsehood. That is the purpose of my interrogation.

JUDGE CLARK: The Court will take a recess for five minutes.

(A short recess.)

922 JUDGE CLARK: Now, Mr. Goodrich, you have arrived at the conclusion which you stated that this statement in the book "How to Get Well and Stay Well" is an absolute falsehood which I always understood is a matter for the court to determine instead of you.

If you will notice that book, it doesn't say what is in this survey. It specifically refers to this tear sheet. You don't attack the good faith of the book by proving something out of the actual survey, right on this tear sheet.

Mr. GOODRICH: If your Honor please, the booklet "How to Get Well and Stay Well" refers only to a survey. As far as I know it doesn't refer to this tear sheet at all, as far as I can identify it. We tried to prove this on cross examination and we were told at that time that we should wait for our own case to do that.

Now we have offered here not my opinion as to this thing being a downright falsehood. I said that we have an expert witness here who has read "How to Get Well and Stay Well," who has identified the survey and who is now ready——

JUDGE CLARK: Is he an expert on falsehoods?

Mr. GOODRICH: He can tell that this survey which he now has in front of him and which he can identify does not make the statement attributed to it in "How to Get Well and Stay Well".

923 JUDGE GOLDSBOROUGH: What page of this booklet——.

Mr. GOODRICH: Page 4, the next to the last full paragraph: "A survey made by a large Eastern college".

JUDGE GOLDSBOROUGH: Assuming that that statement was based on the article in the New York Times, it accords with that article.

Mr. GOODRICH: If your Honor please, I am not referring to the New York Times story.

JUDGE GOLDSBOROUGH: I know you are not, but I am for the moment. I say assuming that this book "How to Get Well and Stay Well" relied upon the truth of this article in the New York Times. Then it is in accordance with the statements made in that article.

That statement says:

> "The study covered 2,511 Pennsylvanians. Just two rated high in all tests. All others showed deficiencies, the poor worse off than the rich, but both classes below the best rating."

So the statement made on page 4 of "How to Get Well and Stay Well" is in accordance with the statement made by the New York Times. Your position is, as I understand it, that because the statement doesn't correspond to the survey then it is a false statement.

Mr. GOODRICH: Yes, that is my position.

JUDGE GOLDSBOROUGH: I don't think so.

924 JUDGE CLARK: I don't think so.

Mr. GOODRICH: Going one step further, in my opinion the booklet "How to Get Well and Stay Well" does not refer to the New York Times. This tear sheet that Mr. Rhyne has given is not from the New York Times.

JUDGE GOLDSBOROUGH: I understood that was conceded. I don't know about that.

Mr. GOODRICH: No, sir, that is not conceded. This tear sheet I passed up to the Court is a release put out by Royal Lee, who runs a nutritional foundation in Milwaukee. He is no more competent to judge the truth or falsity of this statement than is Dr. Casselberry, who is a non-professional man.

Dr. Lee has been in much litigation. I can cite all those cases to you. I didn't want to get off onto that side issue, but the point is that we are attempting to prove that a statement in this book,

namely, a survey made by a large Eastern college, shows thus and so, that the survey shows no such thing, it shows just the opposite, therefore the statement is false.

Now it may be, if the issue of good faith were in this case and that were the only issue in this case——

JUDGE CLARK: The issue of good faith has been in it from the beginning. The Court has ruled on that repeatedly.

925 Mr. GOODRICH: I say, your Honor, that if that were the only issue then Dr. Casselberry would be justified in going around the country writing up stories of this kind and relying on releases made by Dr. Lee, who is not a doctor either.

JUDGE CLARK: This witness is not a doctor either.

Mr. GOODRICH: This witness is a Ph.D., as he has testified.

JUDGE CLARK: I am an LL.D., but that doesn't make me a doctor.

Mr. GOODRICH: The point is, your Honor——

JUDGE GOLDSBOROUGH: Just one moment. This bulletin states:

"The Pennsylvania State College. A contribution to the study of nutritional status in rural and urban populations."

It seems to this member of the Court that you can offer this in evidence then. If the Court is able to identify this study with what is on page 4 of "How to Get Well and Stay Well" this Court will draw its own conclusions as to whether or not the statement is true or false.

Mr. GOODRICH: Naturally, your Honor.

JUDGE GOLDSBOROUGH: That is the way I look at it.

926 Mr. GOODRICH: May I make one further statement. In an attempt to supply evidence on which this Court may act, I have offered through this witness to identify that survey. This witness has testified that this is the only survey he knows of, and he is thoroughly familiar with the literature that involves exactly 2,511 people.

I am offering further to show by this witness what this survey says—in other words, get an interpretation of the scientific literature which this witness is peculiarly qualified to pass on as to the meaning of a scientific article. That is the only purpose.

Mr. RHYNE: I submit the article speaks for itself.

JUDGE GOLDSBOROUGH: That is what I say.

JUDGE CLARK: I do, too. If we admit this survey in evidence, Mr. Goodrich, we don't need anybody to read it for us. We can read this document just as readily as the witness.

Mr. GOODRICH: I fully appreciate that you can read it. I have always understood up until this time that an expert witness was more qualified to read in the scientific literature and to express an opinion on that than a layman, without any disrespect.

JUDGE CLARK: In this release on which the statement in "How to Get Well and Stay Well" was based, was a simple question of sta-

tistics. Now I haven't read this thing that you have just
927 submitted in evidence and I can't tell without reading it whether it makes a statement that is borne out by that press release or not.

Mr. RHYNE: I can say this: I don't like to argue evidence as we go along but there is a statement:

> "Of all the subjects studied, only two boys—brothers of junior high school age—were free from dental caries and were uniformly high in all of the tests given to them."

JUDGE CLARK: Where are you reading now?

Mr. RHYNE: From page 26.

JUDGE CLARK: In "How to Get Well and Stay Well"?

Mr. RHYNE: No. In this study he is offering. I say it is a matter of argument. If Mr. Goodrich wants to pick out the statement and say those two boys don't count, I can argue the other way. He can argue that way. We don't need an expert.

JUDGE CLARK: We don't care about the argument. Let's stick to the case. It is three paragraphs from the bottom over there on page 26. This pamphlet shows that Dr. Pauline Beery Mack was the director of this survey.

Mr. GOODRICH: Also, 2,511 people, which is a rather unusual number. That was the only statement that Mr. Rhyne read.

JUDGE CLARK: Here is is on page 26.

928 "This is a report of the dietary habits and state of 2,511 urban and rural subje-ts comprising two family and nine child groups representing a broad range of incomes."

I think it is sufficiently identified.

Mr. GOODRICH: So that the record may be clear, may we offer this tear sheet which Mr. Rhyne has passed to me as Government Exhibit No. 18.

JUDGE CLARK: It may be admitted.

(Defendants' Exhibit No. 18 was received in evidence.)

Mr. GOODRICH: Is it the ruling of the Court that I am not to ask this witness any questions about the survey? I should like to ask him one question which I will state——

JUDGE CLARK: We will pass on it at the time you ask the question.

By Mr. Goodrich:

Q. Doctor, does that survey reported in Government Exhibit 17, which is in evidence, show that only two persons out of 2,511 studied, were receiving the vitamins, minerals, and proteins they needed?

A. I do not find a basis for that statement in the publication.

Q. Why do you answer in that way, will you explain?

A. There is no similar statement in the bulletin other than
929 the one which appears in the next to the last paragraph, which reads:

"Of all the subjects studied, only two boys—brothers of junior high school age—were free from dental caries, and were uniformly high in all of the tests given to them."

That refers only to dental caries and it is recognized that there are causes of dental caries other than the food that has been consumed.

JUDGE GOLDSBOROUGH: It not only says dental caries. It says: "Uniformly high in all of the tests," in addition to dental caries, doesn't it?

THE WITNESS: That is true so far as these two subjects were concerned but I do not gather from reading the whole pamphlet that there were only two subjects who were uniformly high in all of the tests given to them.

Mr. RHYNE: I move that that be stricken as a conclusion—that last part of it.

JUDGE GOLDSBOROUGH: What did you say?

Mr. RHYNE: He said that—he didn't answer your question directly. He said he didn't gather from the whole pamphlet that they were the only ones.

JUDGE GOLDSBOROUGH: I didn't agree with him so I didn't think it was necessary to go into any further discussion.

By Mr. Goodrich:

930 Q. From a reading of the entire pamphlet, do you have an opinion as to the incidence——

JUDGE CLARK: Are you referring now to the——

Mr. GOODRICH: I will restate it.

JUDGE CLARK: We have talked about so many pamphlets here that it is hard to tell at any one time what any man is talking about.

By Mr. Goodrich:

Q. Referring now to Government Exhibit No. 17, which is in evidence, do you find upon reading that entire pamphlet that it supports the statement that only two persons studied, out of 2,511, were receiving the vitamins, minerals and proteins they needed?

Mr. RHYNE: I object. That question is not only leading, by suggesting the answer, but the question of interpretation of that pamphlet is for the Court. It is in writing. It is in evidence.

JUDGE CLARK: I think that is true, Mr. Goodrich, assuming that the Court can all read the English language.

Mr. GOODRICH: It is the ruling of the Court, then, that that question is objectionable?

JUDGE CLARK: Yes.

Mr. GOODRICH: I hand this document to the Clerk and ask that he mark it Government Exhibit No. 19 for identification.

931 (Defendants' Exhibit No. 19 was marked for identification.)

By Mr. Goodrich:

Q. Doctor, I will ask the Clerk to pass up to you a document which has been marked Government Exhibit No. 19 for identification:

"Medical Statistics Bulletin No. 2, Causes of Rejection and Incidence of Defects, Local Board Examination of Selective Service Registrants in Peace Time. An Analysis of Reports of Physical Examination from 21 Selected States",

the document being put out by the National Headquarters of the Selective Service System, Washington, D. C., August 1, 1943.

JUDGE CLARK: Of course, as I suggested the other day, Mr. Goodrich, the standards of the Selective Service and the Army varied very much with the progress of the war.

Mr. GOODRICH: As your Honor will see from this document, the standards are fully explained herein and as you will recall this was the early stage of Selective Service prior to the recent unpleasantness, we will say. Again the booklet "How to Get Well and Stay Well" discusses on page 6 rejections in the draft during World War 2. I am laying a foundation for examining this witness on
932 the causes of those rejections.

Mr. RHYNE: I will object that this has no possible connection with the book that I can see. We haven't referred to this particular bulletin. This is Bulletin No. 2, published in 1943, and for all I know there have been 43 more of them since then, every one of them different, so I object to this on the ground it proves nothing.

Mr. GOODRICH: We, of course, your Honor, have——

Mr. RHYNE: It has no connection with the book.

Mr. GOODRICH: We, of course, your Honor, have the entire series of pamphlets——

Mr. RHYNE: Are you testifying now, Mr. Goodrich?

Mr. GOODRICH: No, I am answering your objection, your assertion that we were not putting in the whole story, and I am explaining to the Court that while we have those we do not wish to burden the entire record with them.

What I would suggest is that I show these to Mr. Rhyne and then if he believes they should go into evidence, assuming that this one

will go into evidence, we will be perfectly willing to put the entire story in.

JUDGE CLARK: Very well. Show it to Mr. Rhyne.

Mr. GOODRICH: The Clerk calls my attention to the fact that this booklet has previously been identified as Government Exhibit 5 for identification and I want the record to show that that is the correct number for identification.

933 Mr. Clerk, will you pass Government Exhibit 5 for identification to the witness?

(The Clerk handed the document to the witness.)

By Mr. Goodrich:

Q. Doctor, in the course of your work, have you become familiar with Government Exhibit No. 5 for identification?

A. I have.

Q. Have you become familiar with the causes of rejection in the draft during World War 2, through a study of that book and other books?

A. I have seen the data in this book that relate to that subject.

Q. Doctor, according to the data in Government Exhibit No. 5 for identification, was nutritional deficiency an important cause of rejection during World War 2?

Mr. RHYNE: I object. He is asking about something that is not in evidence.

Mr. GOODRICH: I beg your pardon. I had not offered the booklet in evidence on the assumption that I would straighten that out with Mr. Rhyne at a later time. He, of course, may move to strike this testimony if the booklet is not offered. If he prefers, I can offer the booklet at this time.

JUDGE CLARK: I think you should straighten it out with

934 Mr. Rhyne now.

Mr. RHYNE: I do, too.

JUDGE CLARK: If it is not admissible I don't think he should examine the document.

Mr. GOODRICH: All right. I offer the booklet in evidence.

Mr. RHYNE: I object.

JUDGE CLARK: At the present time the objection is sustained.

Mr. GOODRICH: May I inquire what the basis of the objection was, sir?

JUDGE CLARK: We just discussed that at some length. The original basis of the objection was that this was one pamphlet out of a whole series and we didn't know whether it was representative of the series. It only purports on its face to be 21 selected areas.

Mr. RHYNE: I also object on the ground that it is a loose-leaf pamphlet. I don't know about its authenticity. This witness hasn't

said that he helped prepare it or that it was prepared under his direction.

I also object on the ground that it has no relevancy whatever since it has no connection with the book.

Mr. GOODRICH: This, of course, is an official publication of the National Selective Service System. It shows its regularity on its face.

935 JUDGE CLARK: I have seen a great many official publications that were not worth the paper they were written on.

Mr. GOODRICH: This one may be judged accordingly, your Honor, but I respectfully submit that putting this in evidence doesn't necessarily mean that it has worth, great weight.

JUDGE CLARK: There is no necessity for cluttering up the record with a lot of documents unless they are admissible.

Mr. GOODRICH: I didn't wish to do that. I wished to give in evidence only one booklet which is very representative of the entire picture. Counsel has objected on the ground that I haven't shown the entire picture. For that reason I am now prepared to offer the other documents.

I hadn't wished to clutter the record with this, but if that is the objection, of course I have no alternative.

JUDGE CLARK: That is one of his objections.

Mr. GOODRICH: Is there another?

JUDGE CLARK: The other is that there is no proof of the authenticity of the book. The Government Printing Office doesn't vouch for its authenticity.

Mr. GOODRICH: No, sir. These were put out by the Selective Service System. Of course, as you probably know, that system is fairly well nonoperative at this time.

936 For that reason it is difficult to get people to prove authenticity of a thing of this kind. If that is the ruling of the Court we certainly——

JUDGE CLARK: What has that got to do with the booklet "How to Get Well and Stay Well"?

Mr. GOODRICH: This shows that nutritional deficiency had practically no effect on the rejection rate in World War 2, contrary to the statement made on page 6 of "How to Get Well and Stay Well".

Mr. RHYNE: That statement is not made on page 6 of "How to Get Well and Stay Well". It says:

> "In the First World War, we rejected 20 to 25 per cent of the men and women eligible for service. Twenty-five years later, in the Second World War, we rejected about 32 per cent—considerably more. Fifty-two and one half per cent of those called up for service had some disability."

There is no connection in that paragraph with nutritional diet or any other deficiency.

"And remember, your 4-F was, in almost every case, a 4-F when he was eight years old—not suddenly when he was eighteen or twenty-eight. This means that if you don't want sickly children you must see that they are properly nourished, and if you want healthy adults you must see that they
937 are well nourished as children."

If your Honor rules that that does connect the two together I misread it, I guess, but you interpreted it the other way.

JUDGE GOLDSBOROUGH: If the Government had put on witnesses subject to cross examination, to testify as to the cause of rejections in the Second World War, I think it is admissible, but this document, just because it happens to be a document written by God knows who, doesn't make it admissible in evidence. It is purely hearsay and I think it ought to be rejected.

JUDGE CLARK: I think so, too.

Mr. GOODRICH: May we then, to obviate any difficulty with the record, offer Medical Bulletin No. 3 and ask that it be marked for identification?

JUDGE CLARK: What is Medical Bulletin No. 3?

Mr. GOODRICH: Will you pass it up?

JUDGE CLARK: Is it the same series?

Mr. GOODRICH: Yes. It is just a later one. I just wanted to tie the whole thing up.

JUDGE CLARK: That is all right. Go ahead and mark it.

(Defendants' Exhibit No. 19 was marked for identification.)

938 Mr. GOODRICH: Medical Statistics Bulletin No. 4, I ask that it be marked as Defendants' Exhibit No. 20 for identification.

(Defendants' Exhibit No. 20 was marked for identification.)

Mr. GOODRICH: Would you pass it up to the bench, please? That, your Honor, brings it up to August, 1945, throughout the wartime period. If your Honor please, I am in a serious quandary as to the method of proof on these causes of rejection. I would like to be heard one moment on it, if I may.

If we bring one person here from the Selective Service System to testify as to the causes of rejection during the draft, obviously no one person would have that information. The only place that information appears is in these official Government publications.

Now if one person comes here and attempts to give his explanation of the causes, I am certain that it would be objected to on the ground of hearsay, and properly so. It is only because of the

difficulty of proof in matters of this kind that Government publications, regularly issued, contemporaneous with the event, and regular on their face, are admissible, as the exception to the rule.

JUDGE GOLDSBOROUGH: A man is brought into the room. There are a great many more to be examined. A doctor
939 examines his heart, looks at his throat, looks at his feet and hands, tests his chest and then decides about it. The doctor can't possibly know whether his general condition is the result of a nutritional deficiency or not. The doctor has got to examine him to find out why he is in the condition he is.

He is just trying to find out what his condition is. I don't think the document is worth the paper it is written on insofar as this case is concerned. They are not subject to cross examination.

Mr. GOODRICH: And the reason they are not here for cross examination, your Honor, is that the number is so large that it is physically impossible to bring them all here. Also in this is the circumstantial guarantee of trustworthiness. There is no incentive to lie, there is no incentive to misrepresent.

This meets all of the criteria of the exceptions to the hearsay rule. It has been generally and well recognized that a document of this kind comes well outside of the hearsay rule and as I have attempted to point out, it is absolutely impossible to prove this in any other way. No other person has that information.

JUDGE CLARK: In the first place I don't think it is material because it only goes to the question of Selective Service. Now
940 a great many of those fellows that have gone through the mill, as Judge Goldsborough said, with a very cursory examination, were rejected promptly when they were examined by the Army Surgeon.

Mr. GOODRICH: That was rejected in these statistics. That was the reason I offered the complete and honest story. The application, the forms, all the statistics, are in these publications. For us to offer oral evidence of those facts would require the time of this Court for literally months, if not years.

We are attempting to establish a well understood, well proved fact, which is contrary to the fact as represented in "How to Get Well and Stay Well".

JUDGE CLARK: Selective Service certainly wouldn't have the statistics about how many men were rejected on a surgeon's certificate of admissibility in the Army, would it?

Mr. GOODRICH: They have reported the entire story here to the best of their ability. It is what will be relied on in the next war.

JUDGE CLARK: As a matter of fact, on the reliability of this thing, Selective Service naturally wouldn't have the statistics available on what happened to these fellows after they were inducted into the service. A lot of them were discharged after they got overseas.

What would Selective Service know about that? They
941 didn't make any reports to them.

Mr. GOODRICH: "How to Get Well and Stay Well," your Honor, deals with rejections at the time of the draft. Without belaboring the point unduly, an examination of one of these pamphlets will show that the entire situation is taken into account here.

Those persons who were rejected for obvious defects, when they walked into the draft board—a crazy man, a man with one leg, a man with one arm, things of that kind. That is all that is shown here.

This also shows the rejections by the local examining boards. This also shows the rejections when the men moved on from the local examining board to the Army examining board, and shows an entire change in the procedure which your Honor is very well familiar with, I am sure, where the local examining boards eventually become very cursory and the medical examining board of the Army becomes more severe.

Then after some difficulty with that it went back to the other extreme. All of those facts are explained in these simple documents. These documents are trustworthy, I respectfully submit to your Honor.

They are trustworthy and for that reason they are, we believe, admissible at this time to prove these simple facts of what were the causes of rejection during World War 2, and these sta-
942 tistics show that nutritional deficiency was one of the elements taken into account. It was. It is in the statistics, and it was less than one-tenth of one percent. Now that being so——

JUDGE CLARK: Now, Mr. Goodrich, you don't mean to argue your evidence on the question of its admissibility before the Court. Naturally nobody in a cursory medical examination such as the Army gives you—and I have taken many of them—can possibly determine the question of nutrition——

JUDGE GOLDSBOROUGH: They haven't the background.

JUDGE CLARK: —unless a man's condition is just sticking out. In other words, it takes some time to determine that. When a man goes to the Army camp and seems to be dragging and not doing any good after observing him for some time, the surgeon may say "This fellow has got something the matter with him", but when they are lined up one after the other, going through a hundred of them in an hour, it is impossible to go into the question of nutrition sufficiently.

At least I have never known any doctor who could do it and I have known a great many.

Mr. GOODRICH: I didn't write "How to Get Well and Stay Well." Mr. Casselberry did. He is the one to represent to the people that rejections in the draft were in large measure due to nutritional deficiency.

943 Mr. RHYNE: That is an argument. It doesn't say that in the book and I think we can argue that out when we argue the others.

Mr. GOODRICH: And I am attempting, if I may, to prove that if that representation is in the book, as we say it is, that it is untrue. I believe that I have brought here the best evidence there is on the subject. So to speak, it is right from the horse's mouth. It is the people who did it.

Now if they are incompetent of course we haven't any way of measuring that in this trial, but this is the best evidence there is. The burden was on Dr. Casselberry and he presented nothing. Notwithstanding that, we are trying to show what the true and correct facts are here, and this is the only way that we know of to prove this fact.

We respectfully urge that the Court consider very seriously the admissibility of these documents.

JUDGE CLARK: They may be admitted.

(Defendants' Exhibits Nos. 19, 5, and 20 received in evidence.)

JUDGE CLARK: Mr. Rhyne, I think that the nature of your objection goes largely to the probative value of these documents.

Mr. RHYNE: I think it does.

JUDGE CLARK: And I don't think it has any probative
944 value.

JUDGE GOLDSBOROUGH: If it has no probative value it is not admissible. If it won't assist the Court any it is certainly not admissible.

By Mr. Goodrich:

Q. Doctor, in your experience have you, as a part of your job——

Mr. GOODRICH: Strike that.

945 By Mr. Goodrich:

Q. Doctor, in your experience in the jobs that you have explained to the Court in your preliminary answers, have you had occasion to become familiar with any of the early vitamin research?

A. Yes, I have.

Q. Would you explain the nature of your familiarity with that part of the scientific literature?

A. I have had occasion to review that literature for the purpose of gaining information to guide me in my own experimental work, and I have also written reviews of some of the early literature in the field of vitamins.

Q. Do you find in the reports of early vitamin research any work contributed by Carl F. Rehnborg?

A. I have found none, sir

Mr. RHYNE: I object and move that that be stricken on the ground he hasn't said he has read everything that has been published in the whole field.

JUDGE CLARK: That might very well be. In the first place, I don't see what materiality it has where one person who doesn't profess to be anything except a manufacturer, and not a writer, has written everything published or not, and in the second place the doctor hasn't qualified as having read everything.

Mr. GOODRICH: The objection is sustained?

946 JUDGE CLARK: The motion to strike is sustained.

By Mr. Goodrich:

Q. Doctor, are you familiar with Dr. Quigley's book, "National Malnutrition," which has been referred to here in the testimony of Dr. Casselberry?

A. I have seen copies of that book and read considerable parts of it.

Q. Is that book a present-day reliable medical treatise on the subject of nutrition?

A. It is not.

Q. Doctor, is the term "nutrilites" commonly used in the field of nutrition?

A. No, sir.

Q. Have you seen the word used at all in your experience?

A. Yes. I have seen it used in an article that appeared in Science —that is, the Journal of the American Association for the Advancement of Science—in 1937, an article by a man by the name of R. J. Williams who is head of the chemistry department of the University of Texas.

Q. In what sense did he use the word "nutrilites"?

A. He used it in connection with the things that may be required by yeast for its growth. The article referred to the things that may be required by yeast in small quantities.

Q. Would you turn to page 16 of Plaintiff's Exhibit No. 3, "How to Get Well and Stay Well"?

947 JUDGE GOLDSBOROUGH: Which exhibit?

Mr. GOODRICH: Exhibit No. 3, your Honor, the 42-page booklet. I believe they are all the same at that point, however.

By Mr. Goodrich:

Q. Doctor, I will ask you to go through pages 16 down to 19, which include a statement of the activities or the values of vitamins, and indicate to the Court which of those statements are true, which are part-true and which are false, if any.

A. I do not agree with the statement, "Vitamin A raises the body's resistance to infections."

Q. When you say you do not agree, please explain the basis for your disagreement.

A. I have found no evidence to support that statement. Resistance to infections depends on a number of things wholly unrelated to vitamin A. Among them are the immunity that the body has acquired to various diseases, and vitamin A will not increase a person's immunity to disease. It will not raise resistance to infections of the respiratory tract unless an individual is suffering from vitamin A deficiency.

If he has no vitamin A deficiency any additional vitamin A taken will not increase resistance to respiratory infections such as the common cold.

There have been many studies relating to that.

948 "It preserves the integrity of the epithelial linings of the body."

That is true so far as vitamin A is concerned. It is necessary for preserving the integrity of those linings, but having all the vitamin A you need does not insure that those linings will be preserved.

The next paragraph:

> "Vitamin A has an interesting link-up with vitamin E in fertility, partly due to the keratinization of the epitheal linings of the sexual glands when it is deficient, but also in other ways connected with the development of cells, because it is an essential part of the nuclei of all cells."

Well, that may be said of almost any vitamin or nutrient that is essential. If you don't have enough it may interfere with fertility or reproduction.

Under vitamin B-1:

> "Vitamin B-1 is a typical example of the fact that the action of the vitamins in the body is enzymatic."

It hasn't been shown that all of the vitamins function as enzymes. It appears to be generally true of the vitamins of the B complex which includes vitamin B-1, riboflavin, nicotinic acid, and some other vitamins that have not been shown to be necessary in human nutrition.

949 I have no particular criticism of most of the statements that appear under the heading of vitamin B-1, but they are not very exact except to come to the next to the last sentence: "The ability of these tissues to function is lowered, pain and paralysis——"

JUDGE CLARK: What are you reading now?

THE WITNESS: Page 17, the last paragraph before the heading "vitamin B-2."

JUDGE CLARK: I see it.

A. (continuing) The paragraph begins, "if there is too little vitamin B-1." Now the next to the last sentence:

"The ability of these tissues to function is lowered, pain and paralysis result, and we say the individual has neuritis, shingles, beriberi, sprue, or celiac disease."

There is a type of neuritis that appears with vitamin B-1 deficiency. Shingles has not been associated with vitamin B-1 deficiency, nor has sprue.

JUDGE CLARK: What is "sprue"?

THE WITNESS: It is more frequently spoken of as "tropical sprue." It is a disease that occurs primarily in the tropics, but it does occur in the southern states in this country. It manifests itself by the blood picture becoming abnormal instead of having normal red cells. There are only large cells. It is a so-called microcyte anemia. The new cells are not being formed:

950 JUDGE CLARK: I shouldn't have interrupted you. I was just interested in that term. I never heard of it before.

THE WITNESS: There is a severe diarrhea associated with the disease, and general weakness. It can be cured promptly by the use of folic acid or the very new vitamin called vitamin B-12.

A. (continuing) Celiac disease occurs primarily in infants. There is a severe and continuous diarrhea and the cause of that disease has never been established and is not known at the present time. Certainly, it is not due to vitamin B-1 deficiency. It says: "Vitamin C is, among other things, the cement which holds the cells of the organs and tissues together as a functioning group." Vitamin C doesn't occur in the tissues in sufficient quantities, to act as a cement. The tissues that hold the cells together are not properly formed in vitamin C deficiency so that in the bones the bones are more brittle.

In the blood vessels the walls are more easily ruptured, and so that bleeding will occur if there is injury.

The last paragraph under vitamin C on page 18:

"Vitamin C also appears to be the chief defense of the body against infections."

As I have said before, the chief defense against infections is the development of immunity with most diseases. You
951 can't prevent diseases by an adequate intake of vitamin C.

The last statement in that paragraph is: "The patient can't drink enough lemon juice to get enough vitamins for his requirements."

Dr. Myers testified that he took the juice of 12 lemons a day and was cured of scurvy. It is not difficult to get the amount of vitamin C you need from lemon juice.

Under vitamin D:

> "Vitamin D has to do with the metabolism (the chemical changes by which a living organism utilizes nutrients) of minerals. When it is effective in rickets it is because it enables the body to utilize calcium and phosphorus, but its effects also extend to all other minerals."

Vitamin D has been shown to be important in connection with the assimilation of calcium from our foods and phosphorus. It hasn't been shown to be important with respect to the functioning of other minerals or the utilization of them.

Now, there are several paragraphs referring to vitamin E. There is no satisfactory evidence that deficiency of vitamin E is the cause of sterility in man or that the sterility in man can be cured by taking vitamin E.

There is some evidence, in cases of so-called habitual abortion—
952 that is, where there are repeated abortions with no other explanation—that it may be due to vitamin E, because in some cases the administration of vitamin E has proven beneficial. But that point is very much under dispute in the medical profession.

These statements relate to what changes take place:

> "If there is a deficiency of the vitamin, the woman is sterile because the foetus dies and is aborted, or is aborted before it has died because the placenta is developing inadequately. This 'sterility' is not permanent."

I have found no evidence that would support such a statement or any such observation in the men.

And the next paragraph:

> "In a man, the mechanism by which the sperms evolve from the protean cells of the tubules in the testes is interfered with, and they are incomplete and inactive. If it is of long duration, the deficiency for vitamin E will result in permanent sterility."

That has been observed in the rat and some other animals. It has never been observed in man to my knowledge.

The statement: "At any rate in a vitamin E deficiency there is a progressive paralysis of muscle tissues, especially, as might be expected, in a growing child, but also in adults." Medical literature is wholly lacking of any evidence to support that statement.

The last paragraph at the bottom of the page:

953 "Finally, vitamin E seems to play some vital part in proper function of the brain cells, because in even partial vitamin E deficiency there is a marked deterioration of mental vigor and the ability to think clearly or for long periods."

I am familiar with no evidence that would support that statement.

At the top of page 19 is a statement: "Vitamin B-6 has something to do with the integrity of cartilages." I have seen nothing in the literature to support that statement.

The same is true of the following statement: "Pantothenic acid in some way is concerned in the metabolism of fats." I have found no basis for such a statement.

I think that takes me down to the point where you asked me to discuss it.

JUDGE CLARK: The Court will take a recess until 10 o'clock tomorrow morning.

The Court would like to say that the Court is going to make every effort to finish this case tomorrow.

MR. GOODRICH: We have only a short amount of evidence left, your Honor.

JUDGE CLARK: We have been at this for nearly two weeks. The Court is going to make every effort to get it through tomorrow. The Court has been extremely liberal in regard to the examina-
954 tion and much of the examination has been going far afield. Tomorrow there is not going to be much going afield, if the Court can prevent it.

The Court will stand in recess.

(Whereupon, at 4:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., October 26, 1949.)

954a Reporter's Certificate to foregoing transcript omitted in printing.

955 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Washington, D. C., Wednesday, October 26, 1949.

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward

A Tamm, of the United States District Court for the District of Columbia, at 10:00 a.m.

APPEARANCES:

On behalf of the plaintiff: Mr. CHARLES S. RHYNE and Mr. LESTER L. LEV.

956-957 On behalf of the defendants: Mr. VINCENT A. KLEINFELD, Attorney, Department of Justice, and Mr. WILLIAM W. GOODRICH, Attorney, Federal Security Agency.

958 PROCEEDINGS

Mr. GOODRICH: May it please the Court, I request permission to withdraw Dr. Nelson temporarily from the stand to present one short medical witness. My direct won't take more than 15 minutes.

JUDGE CLARK: Very well.

Mr. GOODRICH: Dr. Myers.

DR. WALTER K. MYERS was called as a witness and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Goodrich:

Q. State your name and address for the record, please.

A. Walter K. Myers, 1834 I Street, Northwest.

Q. That is in Washington, D. C.?

A. Washington, D. C.

Q. What is your profession?

A. Physician.

Q. When were you licensed to practice medicine in the District of Columbia?

A. 1934.

Q. Have you been practicing here since that time?

A. Since September 1934.

Q. What are your hospital connections, Doctor?

959 A Associate physician at the Emergency Hospital, consultant physician at Gallinger Hospital, consulting physician at the Glenn Dale Tuberculosis Sanatorium.

Q. What has been your training and experience in the field of medicine, briefly? You need not go into it in detail.

A Graduate of Johns Hopkins Medical School, class of 1929; five years' interneship and residency, two of which were at Johns Hopkins Hospital, three of which were at the Boston City Hospital in Boston, connected with Harvard University.

Q. Have you made contributions to the medical literature?

A. Some 36 publications.

Q. Would you mention the ones that have particular reference to nutrition, if you will?

A. One paper dealing with cirrhosis of the liver which is considered at the present time to be related to nutritional disorders; one paper on the role of diet in arthritis.

Q. Do you limit your practice in any way, at the present time?

A. To internal medicine.

Q. I ask the clerk to show the witness Plaintiff's Exhibit No. 8, the box of Nutrilite.

(The clerk handed a box to the witness.)

960 By Mr. Goodrich:

Q. Doctor, the clerk has handed you——

JUDGE CLARK: Is that the Butz document?

Mr. GOODRICH: No, sir. This is the box of Nutrilite which is in evidence, the package.

By Mr. Goodrich:

Q. I ask the doctor to examine the package and familiarize himself with the ingredients and the amounts of vitamins and minerals that would be contributed by a daily dose of this product. Doctor, have you examined the label?

A. I have.

Q. According to the consensus of present-day informed medical opinion, will a vitamin and mineral preparation of the composition of Nutrilite, the product in front of you, be effective in the treatment of low vitality?

A. Low vitality covers a multitude of sins, and may be due to innumerable causes, only rarely, or at the most, very uncommonly, due to vitamin deficiency.

Q. According to the consensus of present-day informed medical opinion, would Nutrilite, taken in the dosage recommended on the package, be effective in the treatment of over-fatigue?

A. Again, over-fatigue may be due to many diseases or many disorders, a small percentage only of which would be associated with vitamin deficiency.

961 Q. According to the consensus of present-day informed medical opinion, will a vitamin and mineral product of the composition of Nutrilite, taken in the dosage suggested, be effective in the treatment of insomnia?

A. No. In marked vitamin deficiencies we may see insomnia, but that is an extremely rare cause of insomnia.

Q. What are some of the other causes of insomnia?

A. Most frequently, functional disorders, by which we mean the emotional disorders, psychiatric disorders, excessive fatigue.

JUDGE CLARK: You can get so tired you won't go to sleep, can't you?

THE WITNESS: Yes, sir.

JUDGE CLARK: I have done that frequently.

THE WITNESS: Yes, sir.

By Mr. Goodrich:

Q. The same question, Doctor, without repeating it over, as to poor appetite?

A. Again, poor appetite may be due to some fundamental medical disorder, physical or functional. Vitamin deficiency of a gross nature is so uncommon that it doesn't play a very great role in poor appetite.

Q. According to the consensus of present-day informed medical opinion, would Nutrilite, taken in the dosage suggested, be
962 effective in the treatment of gastrointestinal distress?

A. Gastrointestinal distress may be due to various disorders, beginning from an organic nature, a lesion of the esophagus through the 25 feet of the gastrointestinal tract. This preparation would have no effect upon such a lesion. If the same symptom were due to a functional disorder, again this would have no effect.

Q. The same question with reference to aches and pains?

A. In gross deficiency of certain parts of the vitamin B complex we may have peripheral neuritis, various aches and pains, and again we may much more commonly have various aches and pains due to numerous other things. I think all of us have had after chopping wood or horseback riding. Any vitamin will have very little effect on that.

JUDGE CLARK: Doing what?

THE WITNESS: Riding horseback.

By Mr. Goodrich:

Q. Is that the only type of vague aches and pains that would not be affected by using vitamin B-1?

A. I was using that as an example.

JUDGE CLARK: There isn't but a small percentage of the American people now that would be able to ride horseback.

By Mr. Goodrich:

Q. According to the present-day consensus of medical
963 opinion, would a vitamin product of the composition of Nutrilite, taken in the dosage on the package, be effective in the treatment of weak eyes?

A. Eyes may be weak from a great many things. Vitamin A is of value if gross deficiency has led to weak eyes; however, again that is an extremely rare disorder.

Q. Defective teeth—the same question for defective teeth?

A. At the present time I don't believe the physiologists have very much sound information as to what makes teeth defective. It certainly has not been shown that a deficiency in calcium or a deficiency in vitamin D have any effect on it.

Q. The same question as to nervousness?

A. Nervousness is a symptom, if I may use that term, with a great many causes. I can't conceive of how a vitamin preparation will cure nervousness. It doesn't in my office.

Q. According to the consensus of present-day informed medical opinion, will a vitamin and mineral product of the composition of Nutrilite, taken in the dosage suggested, be effective in the treatment of heart disease?

A. No. Heart disease has several very common organic causes. There is a question as to whether there is such a thing as beriberi heart, which is a vitamin B deficiency heart disorder of a chemical nature that is extremely rare in this country, occurring only in the—again to use the term—very rare gross disease.

964 Q. The same question for stomach pains?

A. Stomach pains—I can't conceive of how this would be of value in stomach pains, for example, from a duodenal ulcer, gastric ulcer, appendicitis.

JUDGE GOLDSBOROUGH: Green apples are not good for it either, are they?

THE WITNESS: No, sir.

JUDGE GOLDSBOROUGH: Proceed.

By Mr. Goodrich:

Q. The same question for a disease condition requiring surgery?

A. I happen to be practicing internal medicine, and, if I may digress a minute, one of my dear old teachers remarked, when I started to practice medicine, that one of my chief jobs was going to be to protect the patient from surgeons. We attempt to do that. There are, however, certain definite disorders that will be helped only by surgery. We hope that some day we will have some other way to do it; but in an acute appendictis, removal of the prostate gland, removal of infected gall bladder—I can't see how this substance would be of any value.

We do occasionally use a supplementary vitamin feeding, post-operative, because of the low intake of food and inadequate
965 intake of food—immediately postoperative for a few days.

Q. The same question, if you remember it, for feeble-mindedness?

A. If this were of value, I am certain that St. Elizabeth's would have a great many fewer patients.

Q. The same question for diabetes.

A. In diabetes, vitamin B supplement is of value because of occasional complication. I may say a little more than occasional direct complication of peripheral neuritis, vitamin B deficiency. However the use, which is pretty general, of vitamin B preparation in diabetes, treats or prevents complications. It can have no effect upon the basic disease of diabetes itself.

Q. In your opinion, can the insulin requirement of the diabetic be redueed through the giving of a preparation of this kind?

A. No. The insulin requirement can be reduced by the adjustment of the diet, and that consists of the balance between the carbohydrate, fat and protein components, and not the vitamin components.

Q. Doctor, according to the present-day consensus of medical opinion, would a product of the composition of Nutrilite, taken in the dosage suggested on the package, be effective in the treatment of hemorrhage connected with the menopause?

966 A. No. Hemorrhage connected with the menopause is due to one of several organic disorders, one of which is cancer. If this were given for such a disorder and carried any length of time, it would prolong the period for which the patient would get adequate care.

Q. The same question for indigestion?

A. Indigestion follows along the same line, it seems to me, as stomach disorders.

Q. Sneezing or weeping—the same question for sneezing or weeping?

A. I doubt—if the weeping is due to depressed spirits—whether a vitamin preparation will buoy the spirits sufficiently to stop the weeping.

Q. And sneezing?

A. And sneezing is usually due to some local disorder of the nasal mucous membranes, whether due to a foreign body or due to an allergy, and it is certainly not—there is no evidence that supplementary vitamins will cure an allergic rhinitis.

Q. The same question for anemia?

A. There are two general groups of anemias, two large groups, one of which is an iron deficiency anemia, in which iron is the essential substance to be given. This preparation, I believe, has 10 milligrams of iron. When I treat iron deficiency anemias, 967 the smallest dose I use is two grams, which is many times this much.

Q. Ten times?

A. No. Two grams, and this is 10 milligrams.

Q. What is the proportion of two grams to 10 milligrams—20 times as much?

A. Now, you are making me do mathematics: several hundred times.

The other type of anemia, that of primary anemia or pernicious anemia, requires liver extract and folic acid, or vitamin B-12, which are not present in this preparation.

JUDGE GOLDSBOROUGH: Doctor, is it your testimony that inadequate diet is a very rare thing now in this country? Is that the effect of your testimony?

THE WITNESS: Inadequate diet is pretty uncommon in this country, except in association with certain psychiatric disorders and in association with alcoholism.

JUDGE GOLDSBOROUGH: Take the poor sections of a metropolitan area: Is it your view that in general they have adequate diet?

THE WITNESS: In general, they have fairly adequate diet.

JUDGE CLARK: Doctor, if you will walk one block in any direction from this court house, even a layman—anybody—can tell with the naked eye that they have encountered many, many cases of undernourishment. You only have to go just one block in any direction.

968 THE WITNESS: Your Honor, I spend a certain amount of my time in the free clinics, and one of our tasks is to advise patients of the less expensive foods that they may spend their money for. I don't think that spending their money for a vitamin preparation will cure their malnutrition.

JUDGE CLARK: I am not talking about that, but you testified just a minute ago that you thought that the general class of people were very well nourished.

JUDGE GOLDSBOROUGH: And had adequate diet.

JUDGE CLARK: And had adequate diet. As I say, you can walk one block in any direction from this court house and strike scores of people who are undernourished, and even a layman can tell it with the naked eye.

THE WITNESS: I was speaking of vitamin deficiency.

By Mr. Goodrich:

Q. What are the other elements that would be deficient in the diets that the Court is speaking about?

A. The most important things are proteins, vegetables, fruits, as well as the carbohydrates—the energy-supplying foods such as starches and sugars.

Q. Did you finish your answer on pernicious anemia?

A. Yes, sir.

Q. Doctor, in your opinion, according to the consensus of present-

day informed medical opinion, would Nutrilite, taken in the
969 dosage suggested on the package, be effective in the treatment of leukemia?

A. No. Leukemia—the etiology is not entirely understood, but in all probability it is a malignant disease of the bone marrow, and vitamins have no effect whatsoever in the treatment of leukemia.

Q. The same question for sinus trouble?

A. Sinus trouble covers various disorders of the sinuses. Generally, it is an infection, with or without an allergic component. The addition of vitamins to any other treatment would have no effect upon the infection, the bacteria present, nor upon any underlying allergic phenomenon.

Q. The same question for constipation?

A. Constipation is a symptom. It may be due to a number of disorders, either organic, as due to a lesion of the bowel, which would certainly have no effect upon malignancy, for example, or due to a functional basis.

It is true that in a rare individual the addition of vitamin B may aid in constipation. However, this is the exception, not the rule, according to my experience.

Q. The same question for tuberculosis?.

A. Tuberculosis is due to a definitely known infective organism. Vitamins have no effect upon the organism. Malnutrition does play a role, both in the incidence of tuberculosis and in the
970 progress of the disease. However, we see a very fair percentage of tuberculosis—I do—in patients of good economic status, who have plenty to eat.

JUDGE CLARK: That answer may be stricken because the question of tuberculosis has been ruled out of this case time and time again.

Mr. GOODRICH: I beg your Honor's pardon on this. This is going through the findings that Dr. Butz made to show that there is a basis in medicine for his findings. That is the sole purpose of this examination.

JUDGE CLARK: If the question of tuberculosis is not in it, I don't see any foundation for inquiring as to Dr. Butz' finding on it, because there is no claim as to tuberculosis in that book. However, the answer may stand. It doesn't amount to anything anyhow.

By Mr. Goodrich:

Q. Doctor, according to the consensus of present-day informed medical opinion, would Nutrilite, taken in the dosage suggested on the package, be effective in the treatment of headache?

A. Headache, again, is a symptom of many diseases.

JUDGE GOLDSBOROUGH: It is a hangover, isn't it, Doctor?

THE WITNESS: It certainly is.

By Mr. Goodrich:

Q. The same question for dizziness?

971 A. Dizziness is a symptom of a great many diseases, and this would not cure or improve the whole field of such dizziness.

Q. The same question for vomiting?

A. Vomiting, again, is a symptom. There are certain types of vomiting in which vitamin B-6, which is present here in small amount, is caused—for example, the vomiting in pregnancy, the vomiting which results after the use of X-ray therapy; the dosage and the treatment of those types of vomiting is 100 milligrams by injections, certainly, at least, twice a week.

JUDGE GOLDSBOROUGH: If a diet is entirely adequate, are vitamins assistance at all?

THE WITNESS: I beg your pardon?

JUDGE GOLDSBOROUGH: If a diet is entirely adequate, do vitamins add anything to the benefit of the individual?

THE WITNESS: No, sir, not in my opinion.

JUDGE GOLDSBOROUGH: Then, if they don't do any good to the individual who has an adequate diet and don't do any good to the individual who has an inadequate diet, what are they good for?

THE WITNESS: They will be of value to the patients who have a grossly inadequate diet.

JUDGE GOLDSBOROUGH: That isn't what you said.

THE WITNESS: I beg your pardon?

JUDGE GOLDSBOROUGH: Proceed.

972 By Mr. Goodrich:

Q. According to the consensus of present-day informed medical opinion, would Nutrilite be efficient in the treatment of all deficiency diseases?

A. I will separate deficiency diseases into those which are vitamin deficiencies and those which are deficiencies in other factors of diet. Protein is seen not infrequently. The addition of vitamins will not relieve protein deficiency—the administration of protein.

MR. RHYNE: I move to strike all that out. There has never been any evidence here that we have claimed that Nutrilite had any effect on protein deficiencies. It seems this is far afield. I have tried to keep quiet in the interest of conserving time, but I think we have gone a long way afield.

JUDGE CLARK: As I understand it, the question was too broad in the first place. That may be sustained.

MR. GOODRICH: No further questions.

Cross examination:

By Mr. Rhyne:

Q. Doctor, who asked you to come here and testify this morning?

A. The attorney for the defense.

JUDGE CLARK: Who did?

973 THE WITNESS: The attorney for the defense.

JUDGE CLARK: Mr. Goodrich?

THE WITNESS: Yes.

By Mr. Rhyne:

Q. Did he tell you that this product was being sold as a cure for all these things you have been discussing?

A. He gave me a summary of what was claimed.

Mr. RHYNE: Read the question.

(The last question was read by the reporter.)

Mr. RHYNE: Can you answer the question?

THE WITNESS: I thought my answer was adequate.

By Mr. Rhyne:

Q. What did you think your answer was?

A. My answer was that it was being sold with a claim for curing the disorders that have been mentioned.

Q. In an acute stage or a subacute?

A. It didn't mention an acute stage.

Q. Did your testimony relate to acute or subacute stages?

A. It related to both stages.

Q. Is it your testimony that low vitality is not a symptom of subacute vitamin deficiency?

A. It may be, but there are a great many other things that cause low vitality—many more things.

Q. It is a symptom, though?

974 A. It may be a symptom, yes.

Q. Is over-fatigue a symptom?

A. It may be.

Q. Is insomnia a symptom of vitamin and mineral deficiency?

A. I don't believe so.

Q. Is poor appetite a symptom?

A. It may be the cause of vitamin deficiency.

Q. Is gastrointestinal distress a symptom?

A. In a very small percentage of patients.

Q. Is recurrent vague aches and pains a symptom?

A. In peripheral neuritis, yes.

Q. Is weak eyes a symptom?

A. As I have testified, one of the causes of weak eyes may be a vitamin A deficiency.

Q. Is nervousness a symptom?

A. No.

Q. You found the first question of Mr. Goodrich amusing, did you not?

A. The first question?

Q. Yes. I noticed that you were laughing on the stand.

A. I didn't intend to be laughing. It is too serious to be laughing.

Q. Your testimony is you did not laugh?

975 JUDGE CLARK: Mr. Rhyne, I don't see that that is material at all. The witness can laugh if he wants to.

By Mr. Rhyne:

Q. Is it your testimony that constipation is not a symptom of vitamin and mineral deficiency?

A. I indicated that constipation would rarely be relieved; occasionally we will say be relieved by vitamin addition.

Q. Do you know anything about the base of alfalfa, watercress and parsley contained in Nutrilite?

A. Very little.

Q. Have you ever analyzed that base?

A. No. I am not a laboratory technician.

Q. Did you consider that base when you gave your answer with respect to the crystalline vitamins and minerals contained in Nutrilite?

A. I did.

Q. How did you consider it?

A. I just wanted to see that it didn't have any effect on it.

Q. You gave it no value whatever?

A. That is right. I gave it no value.

Q. Have you ever heard of the trace vitamins and minerals?

A. Yes, sir.

976 Q. Do you know that they are contained in alfalfa, watercress and parsley?

A. Yes, sir.

Q. Do you think that they have no value in human nutrition?

A. They have value, but we get them from other sources, when we eat a reasonable diet of vegetables.

Q. But your testimony is that you gave that base no value in your answers; is that right?

A. I said it would not cure these various disorders.

Q. So you did include the base, then, in evaluating what Nutrilite might do?

Mr. KLEINFELD: Your Honor, I object to this badgering the witness. The witness has answered that question.

JUDGE CLARK: This is cross examination, Mr. Kleinfeld.

Mr. KLEINFELD: He has answered the question before.

By Mr. Rhyne:

Q. Doctor, are you familiar with the National Research Council?

A. Yes, sir.

Q. In 1943 that council issued a statement as follows:

"All the evidence from numerous surveys over the past 10 years to the present among persons of all ages in many localities is, without exception, in complete agreement that inade-
977 quate diets are widespread in the nation."

Do you agree with that statement?

A. Yes, sir.

Q. They also said:

"All the data from numerous surveys with new methods, among persons of all ages, in many regions, are entirely in accord in showing that deficiency states are rife throughout the nation. Relatively few are the traditional severe, acute types. Most are milder in intensity and gradual in their course. Predominantly, they are subacute or chronic states: some marked, but very many, mild or moderate."

Mr. GOODRICH: We object to this question on the ground that the status of the diet in 1943 is not particularly relevant here at this time.

JUDGE CLARK: That is overruled. You have been thoroughly into the history of these vitamins and Mr. Rhyne has too; and this is in pursuance of the same question.

Mr. RHYNE: I gave him the date of the study.

JUDGE CLARK: I understand.

Mr. GOODRICH: May I state for the record one further objection, that it is outside the scope of the direct examination?

JUDGE CLARK: It is not outside the scope. He has testified
978 here as a general expert. He hasn't testified up to date that he has read this booklet which is the subject of this controversy, but he has been testifying as a general expert. You have asked him everything on the face of the earth that you could think of.

Answer the question.

A. I have not read this article. The persistent studies—continued studies—into vitamin deficiencies have lead us to be less enthusiastic than we were five and ten years ago.

By Mr. Rhyne:

Q. Doctor, I haven't given you the title of this article, have I?
A. No, sir.
Q. How can you say that you haven't read it, then?
A. I have to take your word for it.
Q. If I tell you that the title of it is "Adequate Diets and Nutritional Deficiencies in the United States, Their Prevalence and Significance"——
A. I have not read it.
Q. You still say that the National Research Council is a recognized agency to make such surveys?
A. I do. However, might I add that medical information is quite progressive and we change ideas as we get new information.

JUDGE GOLDSBOROUGH: How is that, Doctor?
979 THE WITNESS: I say the medical field is very changing.
JUDGE GOLDSBOROUGH: Five years ago would you have agreed with that statement?
THE WITNESS: I can't tell you whether I would have agreed with it or not, honestly.
JUDGE GOLDSBOROUGH: I have no doubt of that.

By Mr. Rhyne

Q. Doctor, you testified that you gave two grams of iron to patients; is that right?
A. Yes, sir.
Q. This is 2,000 milligrams of iron?
A. Yes, sir.
Q. How much iron sulphite, which is a common USP product, is this equivalent to?
A. I am sorry; I can't answer that question.
Q. If I told you it was 154 grains, would you agree?
A. I am sorry, sir.
Q. Do you know what the USP dose of iron sulphite is?
A. I use iron sulphate myself.
Q. Do you know what it is?
A. It is a minimum of 20 grains, and I use 30 grains of minimum, personally.
Q. You disagree that it is five grains?
A. It is inadequate.
Q. I am just asking you about the USP dose?
980 A. Yes.
Q. If I tell you it is five grains, do you disagree with that statement?
A. That may be the dose, but it is an inadequate dose to treat patients.

Q. Is it your testimony that you do not know the USP dose of iron sulphite?

A. That is right.

Q. Is it your testimony that you gave 30 times the standard dose?

A. I said 30 grains, and only one grain is suggested.

Q. Two grains?

A. Thirty grains is suggested, yes, sir. That is the dose recommended by such laboratories and such men as those at Harvard University, dealing with the anemias.

Q. In acute stage?

A. No.

Q. In subacute stage?

A. Yes. Any anemia.

Q. Doctor, have you read or seen or heard of the pamphlet "How to Get Well and Stay Well"?

A. I know of it. I have not read it in detail.

Q. What have you heard about it?

A. I have not read it enough to discuss it in detail.

JUDGE CLARK: What was that, Doctor?

981 THE WITNESS: Not enough to discuss it in detail.

By Mr. Rhyne:

Q. From whom did you hear about it?

A. From patients.

Q. You heard from patients about "How to Get Well and Stay Well"?

A. Yes. I have also seen advertisements for it.

JUDGE GOLDSBOROUGH: How is that, Doctor?

THE WITNESS: I have also seen advertisements for it—literature.

By Mr. Rhyne:

Q. Where did you see those advertisements?

A. My memory doesn't——

Q. Do you think you saw them in newspapers?

A. I wouldn't know. I don't believe so.

Q. If I told you that Nutrilite has never been advertised in any newspaper or magazine and only been advertised through this pamphlet, would that refresh your recollection as to where you saw it?

A. No, sir.

Q. You have never seen this pamphlet?

A. I have never seen it, sir.

Q. But you have seen advertisements of Nutrilite?

A. Not that I remember, I don't, no.

Q. I thought your testimony was——

982 A. I said possibly I had seen advertisements. I have insufficient memory. I know patients have spoken about it.

Q. Do you want to change your testimony that you have seen advertisements, then?

A. I will say that I have not seen advertisements.

Mr. RHYNE: That is all.

JUDGE CLARK: Any further direct, Mr. Goodrich?

Mr. GOODRICH: No, sir.

JUDGE CLARK: All right, Doctor.

(Witness excused.)

Mr. GOODRICH: I will call Dr. Nelson to the stand.

DR. ELMER M. NELSON was recalled as a witness, having been previously sworn, was further examined and testified as follows:

Direct examination (resumed):

By Mr. Goodrich:

Q. Doctor, were you consulted during the war by the Surgeon General's office of the Army and by the Quartermaster General's office of the Army with respect to problems of nutrition?

A. I was.

Q. Do you know whether or not the armed forces found it necessary or desirable to supplement the diets of our fighting men during World War II with vitamins?

983 Mr. RHYNE: I object unless he has personal information. He has asked him for a hearsay answer.

JUDGE GOLDSBOROUGH: One difficulty about the question is this: It is definitely understood that if the diet at the beginning of the war was entirely adequate, vitamins were not necessary, so you are begging the question. You are assuming that the diet was not a proper diet.

Mr. GOODRICH: If your Honor please, I am referring to page 23 of the booklet again, where down at the bottom it says——

JUDGE CLARK: This is the 42-page booklet?

Mr. GOODRICH: Yes. I take it, it is the same all the way through up to this point, though, your Honor.

JUDGE CLARK: What is this, page 23?

Mr. GOODRICH: Yes, sir, down at the bottom: "Our armed services know. They supplement the diets of our fighting men with vitamin concentrates."

Mr. RHYNE: I will withdraw the objection. Let him go ahead and answer.

JUDGE CLARK: All your have to do is go down and get ration C. to know that statement is true.

Mr. GOODRICH: I have asked Dr. [illegible]son—

Mr. RHYNE: I have withdrawn the objection.

JUDGE CLARK: He has withdrawn the objection.

Mr. GOODRICH: Do you understand the question?

984 THE WITNESS: I have lost the question.

Mr. GOODRICH: May I restate the question, plea e?

JUDGE CLARK: Yes.

By Mr. Goodrich:

Q. Doctor, do you know of your own knowledge whether the armed forces found it necessary or desirable to supplement the diets of our fighting men during World War II with vitamins and minerals?

A. I am bothered by the question saying do I know of my own knowledge as to just what that means. I can tell you just how much I do know about it.

Q. All right. Would you do that?

A. To my knowledge vitamins were used only in a very limited extent in an experimental way in supplementing the diets of soldiers in the Pacific area. Vitamin supplements were not used to supplement the diet that was used for soldiers in this country, and they were not used to supplement the diets of the soldiers generally —soldiers, sailors or marines.

Q. Doctor, do you know what inositol is?

A. Yes.

Q. Will you tell the Court what it is?

A. It is a chemical compound that occurs generally in cereals.
It is found particularly in bran. I could give the chemical
985 structure, which doesn't mean anything, but it is a part of a substance called phytin.

JUDGE CLARK: I don't think it is necessary, unless Mr. Rhyne wants to cross examine.

JUDGE GOLDSBOROUGH: Doctor, is it your testimony that at times in the Army when it was impossible to get entirely adequate diet to them, that their diet wasn't supplemented with vitamin concentrates?

THE WITNESS: It wasn't supplemented with vitamin concentrates. That is my testimony. In a few instances, where soldiers had been fighting over a considerable period of time and where they were on so-called combat rations, they were put on special diets including vitamin supplements to see if any benefit could be derived; and the conclusions were reached that they had no particular value and they weren't used further for that purpose.

Mr. GOODRICH: I am referring now to page 27, if the Court wishes to know the relevancy to this booklet.

By Mr. Goodrich:

Q. Is inositol needed in human nutrition?

A. Inositol has not been shown to be needed in human nutrition. It has been shown to be necessary in the nutrition of the mouse.

Mr. RHYNE: I object to all this. It is just cumulative. We say right on our label the need for inositol in human nutrition has not been established. I don't see the purpose.

986 Mr. GOODRICH: On page 27 inositol is one of the spokes of this great wheel of life, which when flattened out causes the person to go into some serious difficulty according to the next page.

JUDGE CLARK: It can't be misleading if they put right on the label of the page that the need for inositol hasn't been proved.

Mr. GOODRICH: We take the position that if a false statement appears in the labeling at any time, then it comes within the statutory definition of false or misleading in some particular.

Mr. RHYNE: That doesn't say it is false, the mere fact that the need hasn't been established. It seems to me he is trying to tilt at windmills.

JUDGE CLARK: The label states very clearly, Mr. Goodrich, that it hasn't been proved, which necessarily means that it is in the experimental stage. That is no claim.

Mr. GOODRICH: Yes, your Honor. May I ask, for the record, the same question with respect to bios, and I assume the ruling will be the same?

JUDGE CLARK: Yes.

Mr. GOODRICH: May I ask the same question for chlorophyll?

JUDGE CLARK: Is that in this "wheel of life"?

Mr. GOODRICH: Yes, sir. That is one of the main spokes.

987 What I meant by that was that there was only one element there on that spoke.

By Mr. Goodrich:

Q. Doctor, would you look at the package and see whether there is a disclaimer of the nutritive value of chlorophyll on the package?

A. I see no such disclaimer in the labeling of the package.

JUDGE CLARK: Very well; you may answer the question, then.

By Mr. Goodrich:

Q. Is chlorophyll needed in human nutrition?

A. It is not.

Q. What are the plantauxins referred to in this wheel of life?

Mr. Goodrich: Mr. Clerk, would you pass up to the witness, Plaintiff's Exhibit No. 3?

By Mr. Goodrich:

Q. I ask you to turn to page 27.

A. Auxins are so-called plant hormones that stimulate the growth of plants. They have not been shown to be related in any way to human nutrition.

Q. Do you know what is meanb by "other nutrilites" as one of the spokes of the "wheel of life"?

A. No. I don't know what that would cover. It might
988 include anything, in the same way that plant auxins and chlorophyll, inositol and bios are included, a number of other things that exist in the plant kingdom.

Q. Do you know, Doctor, whether all factors required in human nutrition come from plant sources?

Mr. Goodrich: Page 31, now, of the 42-page booklet, your Honors.

A. Vitamin D is one of the factors required in human nutrition, and that does not come from plant sources. There is also vitamin B-12, which is the substance in liver extract which will cure—or a substance in liver extract which will cure pernicious anemia. That has not been found in plant material. I think those are two examples that refer to the statement here.

By Mr. Goodrich:

Q. Doctor, do you know whether the Food and Drug Administration has ever required that labeling of a vitamin and mineral preparation state that the need for niacin or nicotinic acid in human nutrition has not been established?

Mr. Goodrich: I am directing this question, your Honor, to the testimony of Attorney Myers who testified by deposition.

A. The Food and Drug Administration has never required such a statement.

989 By Mr. Goodrich:

Q. How long has the need for nyacin in human nutrition been established?

A. Since early in 1938 or late in 1937.

Q. In what year were the labeling requirements for special dietary foods, referred to by Attorney Myers, promulgated?

A. They appeared in the Federal Register for 22 November 1941.

Q. Doctor, on the basis of your experience and the supervision of your laboratory, do you have an opinion as to the deterioration rate of properly encapsulated vitamin preparations?

A. I have.

Q. And what is that opinion?

A. If vitamins are properly encapsulated there would be no measurable deterioration of vitamin A, vitamin D, riboflavin, or vitamin B-2, or of nicotinic acid, in a period of a year or even in two years.

With respect to vitamin C and vitamin B-1, there is some deterioration even in the best made preparations, and those that the Army purchased—multivitamin preparations that the Army purchased during the war—some of them showed a deterioration of the order of 5 percent per year—about 10 percent in a period of two years.

990 Q. Do you have an opinion as to the deterioration rate of properly tableted mineral tablets?

A. There is no deterioration in mineral tablets, except possibly for a tablet that contained some iodine preparation, because iodine is notably volatile. There might be some loss of iodine, but with respect to other minerals, there would be no loss.

Q. Doctor, I wish you would look at the label of Nutrilite which you have before you as Plaintiff's Exhibit No. 8 and advise the Court whether the amounts of vitamins and minerals supplied in a daily dose of Nutrilite, are rational amounts in the treatment of subclinical dietary deficiency diseases.

Mr. RHYNE: I object to this witness testifying about treatment of anything. He is not a medical doctor.

JUDGE CLARK: That objection will be sustained. The examination is going too far afield. The doctor hasn't qualified as a medical man at all.

Mr. GOODRICH: Perhaps I could restate it so it would not be offensive. May I have permission to do that?

JUDGE CLARK: Yes, certainly.

By Mr. Goodrich:

Q. Doctor, would you look at the label of Nutrilite which you have before you as Plaintiff's Exhibit No. 8 and
991 advise the Court of the comparison between the daily requirement in human nutrition of the elements there found and the amount present in a daily dose—

Mr. RHYNE: I think that question is subject to the same objection.

JUDGE CLARK: The witness is qualified in many respects. He took up a half- or three-quarters of an hour yesterday stating his qualifications, none of which had anything to do with the treatment of medical cases.

Mr. GOODRICH: If your Honor please, this witness has testified that he is a member of the food and nutrition board of the National

Research Council. Mr. Rhyne has referred to the work of that board in a number of instances. That board of which this man is a member, an active member, has established amounts that should be included in the daily diet. That is essentially a nutritional question.

JUDGE CLARK: You are going to the question of treatment.

JUDGE TAMM: Your second question asked about dosage.

Mr. GOODRICH: If so, I used it in a loose sense, your Honor. What I wished was the—perhaps I can state it to eliminate that, if that is the difficulty.

JUDGE CLARK: He can testify to what the board has set up as to what they think should be the proper standard, and he can testify as to what is on that label, as to the amount contained in a
992 daily dose of Nutrilite; but he can't be expressing his opinion about treatment because he is not qualified as a doctor.

By Mr. Goodrich:

Q. Doctor, would you state for the record a comparison between the minimum daily requirement of vitamins and minerals that has been established by the Food and Drug Administration—

JUDGE CLARK: Now, you have shifted from the board to the Food and Drug Administration.

Mr. GOODRICH: I am going to give all three, your Honor, in this, because there are three comparisons to be made.

JUDGE CLARK: I would suggest you put them in separate questions, Mr. Goodrich. You have been mentioning two or more questions in one from the very beginning of this trial.

By Mr. Goodrich:

Q. Doctor, would you state what the minimum daily requirements are that are established by the Food and Drug Administration for any of the elements included in the product Nutrilite?

JUDGE CLARK: Mr. Goodrich, it is to be said that the Food and Drug Administration is on trial in this case, and it doesn't seem that their standards ought to be taken as the standards of scientific research.

Mr. GOODRICH: If your Honor, please, those standards were established pursuant to law after a formal public hearing in
993 1941. They were not challenged. There is a review provided in the statute, direct review to the Circuit Court of Appeals. They have been applied universally by all vitamin—

JUDGE CLARK: That has nothing to do with this question. They are being challenged now, which is the subject of this lawsuit.

Mr. GOODRICH: These regulations are not in issue at all.

Mr. RHYNE: Why are you offering them at all if they are not in issue?

JUDGE GOLDSBOROUGH: The witness has been testifying that the whole attitude of the medical profession has changed since 1943, and you say that this attitude of the Food and Drug Administration took place in 1941, so your witnesses are contradicting each other, don't you see?

Mr. GOODRICH: I beg your pardon. I don't believe they are. This witness has testified that the medical profession's ideas have changed as to the effectiveness of these vitamins. There have been no changes in the amounts required for daily intake.

JUDGE GOLDSBOROUGH: That is a distinction without a difference.

Mr. GOODRICH: No further questions.

JUDGE CLARK: The Court will take a recess for five minutes.

994 (Whereupon a short recess was taken.)

JUDGE CLARK: All right, Mr. Rhyne.

Cross examination:

By Mr. Rhyne:

Q. Dr. Nelson, has the need for vitamin K in human nutrition been established?

A. Yes, sir.

Q. Have you ever made a statement under oath to the contrary?

JUDGE CLARK: What was the main question?

Mr. RHYNE: Has the need for vitamin K in human nutrition been established. His answer was Yes, and I asked him has he ever made a statement under oath to the contrary.

A. I do not recall. I may have made such a statement at one time.

By Mr. Rhyne:

Q. Would you say that you have not made such a statement this year, 1949, under oath?

A. I do not recall that I made such a statement.

Q. Is it possible that you made such a statement under oath?

Mr. KLEINFELD: Your Honor, he has answered the question. I don't know why he should be asked again.

JUDGE CLARK: Mr. Rhyne has now asked him if it is possible that he made such a statement. In other words, if
995 the witness made a statement under oath it was a direct contravention. I haven't seen the statement, and I don't know what it is.

Mr. KLEINFELD: He says he doesn't recall it.

JUDGE CLARK: He said he doesn't recall it. Then Mr. Rhyne asked him if it was possible. I think in testing the credibility of the witness it is perfectly proper to find out whether he categorically denies that he ever did make such a statement or that he couldn't recall making it.

Answer the question.

JUDGE GOLDSBOROUGH: That was in 1949, sir?

A. I do not recall having made such a statement.

JUDGE CLARK: The last question was, was it possible that you made such a statement under oath?

Mr. RHYNE: In 1949.

JUDGE CLARK: In 1949.

THE WITNESS: I don't believe I made such a statement in response to just that question.

By Mr. Rhyne:

Q. I call your attention to the affidavit which you filed in this case, which was sworn and subscribed to on the 17th day of January 1949. Is that your signature?

A. That is my signature.

Q. Will you look at this affidavit and tell me whether or
996 not that is a copy of the affidavit that you swore to on that date?

JUDGE GOLDSBOROUGH: If you swear to an affidavit that is a double decker, isn't it?

Mr. RHYNE: I think you are right, your Honor.

A. I did sign this affidavit, sir.

By Mr. Rhyne:

Q. And you just read the statement to which I referred, did you not, where you said that the need for vitamin K in human nutrition has not been established, didn't you just read that statement?

A. That statement does appear in here, yes, sir.

Q. Doctor, you referred to the National Research Council, did you not—membership or service on that Council as one of your qualifications?

A. Service on what?

Q. The National Research Council.

A. No, sir. On the food and nutrition board of the National Research Council.

Q. That is the same thing, isn't it?

A. No, sir.

Q. Well, that is a part of the National Research Council, is it not—the nutrition board?

A. It is a committee appointed by the National Research Council. The food and nutrition board is a committee appointed by the National Research Council. But the members of that
997 committee are not necessarily members of the National Research Council.

Q. Doctor, are you familiar with the pamphlet you have heard me refer to in questioning Dr. Myers this morning—this bulletin of the National Research Council, No. 109, November 1943, entitled "Inadequate Diets and Nutritional Deficiencies in the United States, their Prevalence"?

A. Yes, sir.

Q. Do you agree with the statement made in that report: "All the evidence from numerous surveys over the past years to the present, among persons of all ages in many localities, is without exception in complete agreement that inadequate diets are widespread in the nation"?

A. I think that statement appears in that bulletin.

Q. Do you agree with the statement?

A. At the time the statement was made, I think there was a basis for reaching that conclusion.

Q. Do you say that the situation has changed as of today?

A. It has changed greatly.

Q. Doctor, do you agree with the statement that appears in this same report: "All the data from numerous surveys, with new methods, among persons of all ages, in many regions, are entirely
998 in accord in showing that deficiency states are rife throughout the nation. Relatively few are the traditional severe, acute types. Most are milder in intensity and gradual in their course. Predominantly, they are subacute or chronic states."

Do you agree with that statement?

A. No, sir.

Q. Do you know Dr. Russel M. Wilder of the Mayo Clinic?

A. Yes, sir.

Q. Are you familiar with an article that he wrote for the book, "Modern Home Medical Advisor," edited by Dr. Fishbein, in which he discussed the deficiency diseases?

A. I have not read the entire article. I am familiar with the table that appears in that article, but *but* I haven't read the entire article.

Q. Is this the table, Doctor (indicating).

Mr. GOODRICH: If it please the Court, may we object to cross examination on this booklet on the ground that it has not been established that it is a recognized medical treatise, two, that it is hearsay.

JUDGE GOLDSBOROUGH: He is just asking whether he agrees with certain statements made by certain people. That is not hearsay.

Mr. GOODRICH: I understood the rule to be that the cross examination of a medical witness is permitted on a recognized scientific work, but not on a work put out for the laity, which this work appears to be.

999 JUDGE CLARK: He has asked him if he agrees with something that appears in this book. The doctor is qualified on that, not as to dosage of medicine.

Mr. GOODRICH: My objection is that it was not a recognized scientific work.

JUDGE GOLDSBOROUGH: You can take him on redirect and show that it isn't, if you wish.

By Mr. Rhyne:

Q. Have you seen this particular table that appears in the article by Dr. Russel Wilder?

JUDGE GOLDSBOROUGH: Mr. Rhyne, what is the date of that article?

Mr. RHYNE: 1949.

A. Yes, I have seen this table.

By Mr. Rhyne:

Q. Do you think that Dr. Wilder is qualified to prepare such a table or write an article on deficiency diseases?

A. If he is qualified, he has made some notable mistakes in this table.

Q. Have you ever made statements under oath that practically everything in that table is false and misleading?

A. No, sir.

Q. What is false and misleading in that table, starting with vitamin A?

1000 A. Starting with vitamin A, under the heading "excellent purpose," "promotes growth and vigor" is, in my opinion, misleading in that any of the nutritional essentials is necessary for growth and vigor, and to pick it out and feature it under vitamin A creates a misleading impression.

Under the heading "deficiency leads to," the statement "lowered resistance to—" No, I have no comment on that particular sentence that I started.

Q. Do you agree with the statement that vitamin A deficiency leads to lowered resistance to infection of many organs?

A. No, I don't agree with the impression that that creates, because resistance to infection depends, in a large measure, on immunity of the individual to disease; and that is established by exposure to the disease, so that taking additional vitamin A does not increase resistance to infection.

I think the statement "failure of growth of children" may be misleading, for the same reason that I said "promotes growth and vigor" may be misleading.

Also, the statement "loss of vigor" may be misleading. Also, the statement "night blindness" may be misleading, in that while vitamin A deficiency causes nightblindness, nightblindness is also congenital—that is, it occurs in individuals and cannot be—the
1001 condition cannot be cured by the administration of vitamin A.

Q. Do you see anything under vitamin B-1 that you think is misleading? It says "promotes appetite and digestion." Do you think that is misleading.

A. Yes. It is misleading to a person whose appetite was poor and he thought vitamin B-1 would be recommended for that condition. If a person had a diet that was deficient in vitamin B-1 to the extent that it became important to him, he would lose his appetite. But just the taking of vitamin B-1 alone will not increase appetite for an individual.

The statement "stimulates body activity" is, in my opinion, misleading. I was incorrect in what I said about vitamin A in the second column here, where I see the heading is "deficiency leads to."

There would be loss of vigor and failure of growth in children, if there was a deficiency of vitamin A and there would be a lowered resistance in the body if there was a deficiency of vitamin A.

Q. So you change your testimony—

A. I didn't see that heading when I made that statement before. And deficiency does lead to nightblindness.

JUDGE CLARK: Mr. Rhyne's last question was: "Do you want to change your testimony?"

THE WITNESS: Yes, I do change my testimony.

MR. RHYNE: I will not ask any more questions on that
1002 table at this time.

By Mr. Rhyne:

Q. Do you testify that Dr. Russel M. Wilder of the Mayo Clinic was unqualified to write such an article?

JUDGE GOLDSBOROUGH: When and where?

MR. RHYNE: Friday, April 15, 1949, in a deposition taken in this case.

A. I don't know.

JUDGE CLARK: This is Dr. Nelson's deposition?

MR. RHYNE: Yes, your Honor.

By Mr. Rhyne:

Q. I ask you if you didn't state:

"The senior author is Dr. Russel M. Wilder, whose specialty is internal medicine at the Mayo Clinic. He has been interested in nutrition in recent years, but I am not sure that he has made a thorough study of all of the available literature with respect to vitamins."

"Question: What about the other author, Dr. Butts?"

JUDGE CLARK: That is not the Dr. Butz mentioned in these proceedings?

MR. RHYNE: Not at all. He is an entirely different man. His name is spelled B-u-t-t-s.

By Mr. Rhyne:

Q. "Answer: The work of Dr. Butts that relates to nutrition, so far as I know, relates only to vitamin C.

1003 "Question: You don't think he is particularly well qualified, then, to write an article and come to the conclusions that are set forth there? "Answer: I don't think that either one of the authors is well qualified to make statements of this kind on the basis of their own experience and observations, but they should be well qualified to make a survey of the literature.

"Question: Is it your opinion that they have read the literature wrong and come to the wrong conclusions. "Answer: I can reach no other conclusion, sir."

Did you so testify?

A. I believe I would so testify now, and I believe I so testified then. I am not sure that that was my exact testimony. I will accept it.

Q. If you are not sure, I will show you the—

JUDGE GOLDSBOROUGH: He said if he didn't do it he ought to have done it, and he would do it now. That is all there is to it.

1004 By Mr. Rhyne:

Q. Do you disagree with Dr. Jeghers, then, that Dr. Russell M. Wilder is well qualified in this field?

A. I don't recall what Dr. Jeghers said with respect to Dr. Wilder's qualifications.

Q. If I inform you that he did say that Dr. Russell M. Wilder of the Mayo Clinic was well qualified to write this article, would you agree or disagree?

A. Obviously I have disagreed with him.

Mr. KLEINFELD: If it please the Court, since Mr. Rhyne has referred to Dr. Nelson's deposition and has read part of it, we offer the remainder of it in evidence here. We would like the whole deposition to go in. It was a deposition taken by counsel for the plaintiff.

JUDGE CLARK: That may be admitted.

(Defendant's Exhibit No. 21 was received in evidence.)

JUDGE CLARK: The rule is that if one party reads part of a deposition the other party is entitled to put in the whole deposition.

Mr. RHYNE: I don't object to it going in, but since it is in I have a lot of questions about it which I will just take up in argument, to show inconsistencies, rather than ask questions.

1005 By Mr. Rhyne:

Q. Doctor, didn't you testify that the first time the word "nutrilite" was ever used in the literature was in 1937?

A. No, sir.

Q. What was your testimony?

A. The first time I recall that I saw the name—or the first reference that I have seen to it—appeared in an article in Science in 1937.

Q. Science is a well-known and recognized publication?

A. Very well known.

Q. I show you a photostatic copy of two pages from Science and ask you to look at the date 15 June 1928 at the top, and I direct your attention to the middle of this page which says "nutrilites."

Mr. GOODRICH: We respectfully object to the cross examination with this photostatic copy, unless the book is produced.

JUDGE CLARK: Mr. Goodrich, there is ~~no such~~ rule of law as that, that I have ever heard of. Have you?

JUDGE GOLDSBOROUGH: No. He is just trying to indicate that the doctor did see this as early as 1928, as I understand it.

1006 JUDGE CLARK: He is indicating that he saw it if he read the Science Magazine.

Mr. RHYNE: He is saying he saw it in 1937. I am asking him if he didn't see it in 1928?

Mr. GOODRICH: He is examining on the photostat and not on the book.

JUDGE GOLDSBOROUGH: He has a right to show that.

THE WITNESS: What was the question.

By Mr. Rhyne:

Q. Did you see this in 1928?

A. Undoubtedly I did. I am a member of the American Association for the Advancement of Science, and I received this weekly.

Q. Are you changing your testimony about 1937?

A. No, I don't change my testimony.

JUDGE GOLDSBOROUGH: The doctor simply says that he took that magazine and read it, and in all probability he saw what was on the page. It was in 1928. That is what he says. Isn't it, Doctor?

THE WITNESS: Yes, sir. My first recollection of it was, when I was asked yesterday about the origin of the term "nutrilites," I referred to the same person having used the term in 1937.

JUDGE GOLDSBOROUGH: I don't think there is any contradiction in that testimony at all.

1007 By Mr. Rhyne:

Q. Then you didn't intend to imply that the word "nutrilite" had not been used earlier?

A. No, I did not.

JUDGE CLARK: I think the inconsistency, if there was any, came about from the fact that the witness' answer was not responsive to your question. You asked him if it had been published and he answered as to when he first remembered seeing it. It was not responsive to the question.

By Mr. Rhyne:

Q. Doctor, are you familiar at all with the publication entitled, "The Land Letter"?

JUDGE CLARK: The what?

MR. RHYNE: "The Land Letter." L-a-n-d L-e-t-t-e-r.

A. No, sir.

By Mr. Rhyne:

Q. Have you ever heard of Dr. William A. Albrecht, chairman of the Department of Soils, University of Missouri, Columbia, Missouri?

A. I have.

JUDGE GOLDSBOROUGH: It must have been a good department.

JUDGE CLARK: Yes, and he is a good man.

1008 By Mr. Rhyne:

Q. He is one of the foremost leaders in the field of soils and agriculture, isn't he?

A. I don't know that—I don't know what standing he has in his own particular field. I know that he is in some department of soils in either the Agricultural Experiment Station of Missouri or the Univerity of Missouri, I don't know which.

Q. It states here that he has made a significant contribution—

JUDGE CLARK: The experiment station is at the university.

By Mr. Rhyne:

Q. I will ask you if you disagree with this statement:

"He has made a significant contribution to his profession in presenting information which has directed our thinking to the relationship existing between soil and health."

Have you heard anything about his studies?

A. No; not in that connection.

Q. Would you agree or disagree with this statement:

"A mass of research information, secured under dif-
1009 ferent conditions and different standards, seems to warrant conclusions that the mineral content of vegetables is influenced by the available soil nutrients. A mineral-deficient land would result in a mineral-deficient diet."

A. I would disagree with that statement. There have been very extensive studies carried out at the University of Cornell, or a branch of the department of agriculture at the University of Cornell, to determine to what extent the constitutents of the soil influenced the nutritive value of the plants, and after several years of study they have reached the conclusion that there are no important advantages in modifying the composition of the soil to improve the nutritive value of the plant, and the answer to that question lies in genetics, in plant breeding, selection of plants that are of a different composition than the ordinary plants we have.

JUDGE CLARK: Isn't it a general custom to inoculate soil so the soil will grow alfalfa? Some soil will grow alfalfa and some will not. That has been so ever since I was a small boy: If a fellow had some soil that wouldn't grow alfalfa, and he wanted to grow alfalfa, he doctors the soil.

THE WITNESS: That is right. In order for the alfalfa plant to grow it requires the presence in the soil of a certain organism.
1010 Alfalfa belongs to a certain class of plant called legumes, which have small nodules on the roots, and these organisms must be present in the soil in order for the alfalfa to grow. If you

don't have them there the alfalfa doesn't grow, but they don't have any important function in modifying the composition of the plant.

By Mr. Rhyne:

Q. I ask you if you agree with this statement:

"Another type of supporting evidence recently released is the longevity records. Citizens live to be older in the mineral-rich soil areas."

A. I don't know of any evidence to support that statement.

Q. I hand you this paper relating to Dr. Albrecht's work and ask you whether you have seen this chart (indicating). Have you ever seen that?

Mr. GOODRICH. We respectfully object to this, on the ground that Mr. Rhyne has torn one page out of the paper and now hands it to the witness.

Mr. RHYNE: I just asked him whether he has seen it.

JUDGE GOLDSBOROUGH: The witness can say he has never seen it.

A. No.

By Mr. Rhyne:

Q. You have never seen it?

A. No.

1011 Q. Isn't it true that the first time you ever heard of Nutrilite or this pamphlet (indicating) was when the American Medical Association called it to your attention in January 1948?

A. The American Medical Association didn't call it to my attention in January 1948.

Q. Did not Mr. Field of the investigation division of the American Medical Association call it to your attention in January 1948?

A. No. I received a letter from Mr. Field in October of 1948, just about a year ago.

Q. That is the first time that it came to your attention?

A. Well, when I read the pamphlet that Mr. Field had sent me—

Q. My only question is: Is that the first time it came to your attention?

A. I would like to explain my answer. I am not sure whether I saw that before or not.

By Mr. Rhyne:

JUDGE CLARK: The question was not about what he concluded when he saw this pamphlet. The question had to do with whether he had ever seen the thing before. Wasn't that it, Mr. Rhyne?

Mr. RHYNE: Yes, sir; that is right.

1012 By Mr. Rhyne:

Q. When was the first time you saw it, and who called it to your attention?

A. My recollection is very vague with respect to when I first saw it. When this pamphlet came to my attention from the American Medical Association there was something about it that seemed to be quite familiar, and I think I testified, at the time my deposition was taken, that I thought I had read it before.

I didn't read all of it when I got it from the American Medical Association. Since that time, I am sure I hadn't read all of that pamphlet, but I must have seen some of it, because it was quite familiar to me.

Q. Do you recall my taking your deposition?

A. Yes, sir.

Q. Was it your testimony then that a person outside the Food and Drug Administration asked you to look at certain passages and offer an opinion on it?

A. I may have so testified with respect to the request from the American Medical Association. I think I testified that someone in the Food and Drug Administration—I thought someone in the Food and Drug Administration had asked me questions that related to the pamphlet.

Q. Doctor, had Mr. Crawford discussed this pamphlet with you before his decision of 30 September 1948?

1013 A. No, sir.

Q. Had Mr. Larrick discussed this pamphlet with you before his decision of 2 December 1948?

A. No, sir.

Q. Had Dr. Dunbar discussed this pamphlet with you before his decision of 9 December 1948?

A. No, sir.

Q. Had Mr. Kingsley discussed this pamphlet with you before his decision of 28 January 1949?

A. No, sir.

Q. He states:

> "Despite our progress in acquiring knowledge about nutrition, people are still dying of the effects of nutritional deficiency.
>
> "The widespread effect of inadequate diet is evidenced in poor resistance to disease."

Mr. KLEINFELD: Could I request that Mr. Rhyne state where the statement comes from?

Mr. RHYNE: It comes from "The Nation's Health, A Ten-Year Program; A report to the President by Oscar R. Ewing, Federal Security Administrator," published in 1948.

By Mr. Rhyne:

Q. Would you agree with the statement I just read?
A. I would agree with a part of it, and I would disagree with a part of it.

1014 Mr. RHYNE: That is all.
JUDGE CLARK: Any redirect?

Redirect examination:

By Mr. Goodrich:

Q. After reading over the booklet, How to Get Well and Stay Well, do you have any opinion as to whether the booklet is false or misleading in any particular?
A. I have.
Q. What is that opinion?
A. That there are statements in the booklet that are incorrect and would be false and misleading.

Mr. GOODRICH: That is all.
Mr. RHYNE: No further questions.
JUDGE CLARK: You may step down.

(Witness excused.)

JUDGE CLARK: Call your next witness.
Mr. KLEINFELD: We have a deposition of J. Donald Kingsley, formerly acting administrator of the Federal Security Agency. I would like to put on a witness to read it into the record.
If the Court will permit me I would like to stand close to the witness. We have only one copy.
JUDGE CLARK: Very well.

1015 Whereupon, A. L. GOTTLIEB was called as a witness on behalf of the defendants and, being first duly sworn, was examined, and testified as follows:

Direct examination:

By Mr. Kleinfeld:

Q. Examination by counsel for plaintiff; question by Mr. Rhyne: "Will you give your full name and official title to the reporter?" A. "My name is J. Donald Kingsley. I am Assistant

Federal Security Administrator, and today I am Acting Federal Security Administrator in the absence of the Federal Security Administrator."

Q. "Mr. Kingsley, you have been served with a subpoena to produce certain correspondence and records in this case, have you not?" A. "Yes, sir; I believe I have."

Q. "Would you produce those now?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the deposition:

"I assumed we were going to wait until we had seen the order signed. I thought we agreed to that this morning."

1016 Mr. Rhyne, at the time of the taking of the deposition:

"Of course, the motion has been denied. If you want to take that position, it will necessitate us coming back."

Mr. Kleinfeld, at the time of the taking of the deposition:

"I think we will have to take that position until the order is signed—there seems to be some dispute about it—unless you have some specific documents in mind, which we will be glad to produce. If you want Mr. Kingsley to produce all the records of the Administration, we are not in position to do so now."

Mr. Rhyne, at the time of the taking of the deposition:

"Let the record so show and we will probably have to come back some time if we cannot get the records. I will ask such questions as I can without that."

Question by Mr. Rhyne:

Q. "Mr. Kingsley, when is the first time you ever heard of this Nutrilite?" A. "I cannot give the precise date, but sometime early in January."

Q. "Of this year?" A. "Yes, of this year."

Mr. KLEINFELD: May I say: I believe the witness meant 1949.

1017 Mr. RHYNE: Well, now—

Mr. KLEINFELD: I will withdraw it if you would rather.

Mr. RHYNE: One thing about this deposition that is quite obvious to the Court: I never got a chance to complete it. Having read part of it myself, I don't suppose I have a right to object to the reading of the rest of it, but it is obviously a very incomplete deposition, and I think it shouldn't be argued as we go along, for that reason.

I never got a chance to fill out changes, and I don't think Mr. Kleinfeld should.

Mr. KLEINFELD: I am not doing any arguing, your Honor. I am just trying to place the date correctly.

By Mr. Kleinfeld:

Q. "How did it come to your attention?" A. "It came to my attention because Dr. Dunbar, the Commissioner of Food and Drugs, came into my office and said that action had been taken in court by the Nutrilite Company challenging the right of the Federal Security Administrator, if I recall correctly, to delegate to the Commissioner of Food and Drugs authority to make seizures and findings, and so on. He asked me in view of that if I would examine the case and make a direct finding myself, which I did."

1018 Q. "And he asked you to do that as Acting Administrator?" A. "As Acting Administrator. Mr. Ewing was ill at the time."

Q. "Now, could you give me the names of all the persons to whom you have talked about Nutrilite?" A. "Well, I can try. I believe Dr. Dunbar; the Associate Commissioner of Food and Drugs, Mr. Crawford, at one point; the General Coinsel of the Federal Security Agency, Mr. Wilcox. I have talked with Mr. Kleinfeld very briefly. To the best of my knowledge and recollection, that about covers it."

Q. "Now, those are people in the Government. Do you recall talking to Congressman Doyle of California?" A. "I recall that some Congressman from California called me on the phone. Whether it was Doyle or not I am not certain; but I do recall talking to a Congressman from California."

Q. "If I refreshed your recollection by telling you that he had called you on the 24th of January to request that you do what you could to get a hearing for Mytinger and Casselberry on their labeling; does that refresh your recollection?" A. "I recall the call. But, as I remember, he suggested that we had closed down a plant, or had seized a plant in Cali-
1019 fornia, and I took that matter up with Dr. Dunbar. He said, 'As a question of fact, of course, we have not seized the plant.'

"I reported that back to the Congressman and that was the end of the conversation, as far as I recall."

Q. "Do you recall having talked to Congressman Phillips of California?" A. "No. I recall talking to only one Congressman from California. I do not know which one of these it was."

Q. "Do you recall talking to Mr. Phair, the administrative assistant to Senator Downey?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of the deposition:

"Pardon me. Are you asking the witness whether these Congressmen or assistants called Mr. Kingsley?" Mr. Rhyne, at the time of the taking of the deposition:

"Yes."

THE WITNESS: "I have talked to Senator Downey on a large number of matters and to Mr. Phair on several. I do not recall that I ever talked to him about this."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"I can tell you my information was that they also
1020 called you to request that Mytinger and Casselberry be given a hearing on their labeling. That is the reason for my question." A. "It is possible."

Q. "Now, Mr. Kingsley, have you talked to Mr. Field of the American Medical Asspciation about Nutrilite?" A. "No, sir, I have not."

Q. "Or to anyone else in the American Medical Association?" A. "I believe not."

Q. "Do you recall having talked to anyone else outside the Government, a private organization or company, about Nutrilite or its labeling?" A. "No, I think not."

Q. "You referred to the visit from Dr. Dunbar in January. I assume that was after January 24, the date on which the Court made the decision to which you refer?" A. "I assume so. I probably could ascertain the exact date by checking through my old calendars, if it has any materiality."

Q. "Are you a doctor?" A. "I am not a doctor of medicine, no."

Q. "What degrees do you have?" A. "I have an AM and PhD degree."

Q. "You are not an expert upon vitamins or nutri-
1021 tion?" A. "Not in the slightest."

Q. "Have you read any of the labeling of Nutrilite?" A. "I have read a pamphlet, 'How to get well and stay well,' which I have here, which is marked Exhibit A."

Q. "Could I see that?" A. "Yes. I may have read some other version of that at some other time, because it has gone through revision."

Mr. KLEINFELD: Mr. Rhyne, at the time of the taking of the deposition:

"Could we stipulate that it is a 42-page pamphlet which was Exhibit A to the original complaint in the case?"

Mr. Kleinfeld at the time of the taking of the deposition: "Yes."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"Now you refer to other versions. When did you read those, Mr. Kingsley?". A. "I am uncertain as to what version I read, as a matter of fact, at the time at which Dr. Dunbar came to see me in January, whether it was his version or some other version—"

Mr. RHYNE: "—this version or some other version—"

1022 THE WITNESS: Excuse me.

A. (continuing) "—whether it was this version or some other version; I am not entirely certain."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"When you rendered this decision to which you refer, was any representative of Mytinger and Casselberry present?" A. "No, sir."

Q. "The only people you heard was Dr. Dunbar?" A. "I rendered the decision on the basis of the findings by one of our medical examiners as to the effect of the product upon various common ailments, and a review of this pamphlet."

Q. "You do not recall the date on which you made that decision, do you?" A. "No, sir, I do not, but that should be easily ascertained."

Q. "It is undated is the reason I asked you. I have a copy that was filed in the court and there is no date on it." A. "Well, I am certain that we can ascertain that from the files."

Q. "There was a letter statement to the effect that it

1023 was made on the 26th of January." A. "I am sorry, I just have no recollection of the date. Although as I say, I am sure we can find it in the files."

Q. "You have no knowledge of deficiency diseases or anything of these referred to by Dr. Butz and you relied entirely upon his statement?" A. "No, sir, to the first part of the statement, and yes, sir, to the last part."

Q. "Did you discuss this personally with Dr. Butz?" A. "I did not. I had before me only his statement of finding of fact."

Q. "Were you told that the finding of fact and conclusion, which were prepared for your signature, were identical with those signed by Dr. Dunbar, Mr. Crawford, and Mr. Larrick?" A. "I have no recollection of what I was told. But my impression is that they were."

Q. "Do you understand the term 'consensus of medical opinion'?" A. "I would have an understanding of that term, yes."

Q. "What would be your understanding of it?"

Mr. KLEINFIELD: Mr. Kleinfield, at the time of taking the deposition:

"I will object to that question and any similar ques-
1024 tions and that line of questioning, which attempts to probe the mental processes of Mr. Kingsley, on the ground that that issue is not relevant to the issue before the Court, and further, on the ground that such probing into the mental processes of an administrative official is unauthorized."

THE WITNESS: "Shall I go ahead and answer?"

Mr. KLEINFELD: Mr. Rhyne, at the time of taking the deposition:

"I will withdraw the question and phrase it this way."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"In the facts set forth by Dr. Robert G. Butz, upon which you say you relied, there is the term 'consensus of informed medical opinion.' What is your understanding of that term?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of taking the deposition:

"My objection still stands. That is an attempt to probe into the mental processes of the witness and therefore unauthorized and irrelevant. You may answer the question."

THE WITNESS: "I would understand by that agreement by a substantial proportion of the medical profession, some-
thing more than a majority, of competent authority on
1025 the subject."

Mr. RHYNE: May I just ask, as a point of inquiry: Are you withdrawing your objection, Mr. Kleinfeld?

Mr. KLEINFELD: I am withdrawing my objection, because of the nature of the trial.

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"In your conclusion you had that the labeling of Nutrilite would be and is, in material respects, misleading?" A. "Yes, sir."

Q. "What do you understand by the term 'misleading'?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of taking the deposition:

"Same objection; and the further objection on the ground that the language referred to is language specified in the Federal Food, Drug and Cosmetics Act, and speaks for itself; and on the ground that is another attempt to probe into the mental processes of the witness, which is unauthorized and irrelevant."

THE WITNESS: "I would understand by 'misleading' that the language conveyed a false or exaggerated impression or was likely to do so to the average reader."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

1026 "Were you presented with any facts showing that Nutrilite or its labeling had injured or damaged any purchaser or consumer?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of taking the deposition:

"Same objection, attempting to probe into mental processes."

THE WITNESS: "No, sir."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"Were you presented with any facts showing that any purchaser or consumer had complained of injury from Nutrilite or its labeling?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of taking the deposition:

"Same objection on the same ground."

THE WITNESSS: "Not to my knowledge, no; not to the best of my recollection."

1027 Mr. RHYNE: Just so the record may be clear: Do I understand that you are withdrawing all of your objections, Mr. Kleinfeld?

Mr. KLEINFELD: When I wish to make an objection now, I will do so.

Mr. RHYNE: Any you made in the deposition you are not insisting that the Court pass upon at this time?

Mr. KLEINFELD: Unless I make an objection at this time.

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"When you found that Nutrilite labeling was misleading to the injury or damage of the purchaser or consumer, you did not then have before you any facts whatever on injury or damage?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of taking the deposition:

"Please do not answer that until it turns into a question."

Mr. Rhyne, at the time of the talking of the deposition:

"Will you read the question?"

The question was read.

Mr. Kleinfeld, at the time of the taking of the deposition:

"I say again that is not a question. You made
1028 a statement. It is Mr. Kingsley being interrogated."

Mr. Rhyne, at the time of the taking of the deposition:

"I think it is a question. I think he can understand it."

Mr. Kleinfeld at the time of the taking of the deposition:

"Do not answer that."

Mr. Rhyne at the time of the taking of the deposition:

"You instruct him not to answer it?"

Mr. Kleinfeld, at the time of the taking of the deposition:

"I instruct him not to answer it until it is a question."

Mr. Rhyne at the time of the taking of the deposition:

"We will have that for the Court."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"I will ask you this, Mr. Kingsley: Can you point out any part of Nutrilite's labeling which you consider to be misleading?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of the deposition:

"Same objection, on the ground that it is probing into the mental processes of the witness; in addition, the question is irrelevant."

1029 A. "I would answer that first of all by saying, in my judgment, the total effect of this particular pamphlet is misleading. Beyond that I think it is misleading on almost every page, as a matter of fact. I think it is perfectly possible to pick it up almost at random and to indicate sections which are misleading. My decision was based upon the total impression of the publication rather than upon a particular sentence or paragraph. It employs a standard propaganda technique, first of all, of rousing strong emotion, which in this case, is fear, it seems to me, and then following through with the various kinds of suggestions. The whole thing seems to me to be very carefully calcuated to produce a misleading impression."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"When Dr. Dunbar conferred with you, is the statement you just made in substance the analysis he gave you of this Exhibit A?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of the deposition:

"Same objection on the same ground."

A. "The statement I just made is in substance a summary of my own impression, on the basis of reading
1030 this pamphlet. As a matter of fact, I do not know that Dr. Dunbar was as struck as I was by the manner in which this reflects, as I say, one of the most standard of all propaganda techniques where you are attempting to mislead people. It is a very well done piece of work in that respect."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"You are referring to standard propaganda techniques. Are you an expert on that subject?" A. "I was at one time; yes, sir."

Q. "What is your understanding of that term—understanding of 'propaganda technique,'—when you use that as a condemnation of this pamphlet; what do you mean by that term?" A.

"Well, I am using the term 'propaganda' in a sense of a conscious attempt to manipulate opinion and behavior in a predetermined direction without regard to any sort of direct factual argument or rational argument."

Q. "You refer to rational argument. You say you are not a nutritionist?" A. "I have said that, yes."

Q. "By what facts do you gauge the statements made in this pamphlet?"

1031 Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of the deposition:

"Objection on the ground that it is attempting to probe into the mental processes of the witness and is unauthorized and irrelevant."

A. "Well, again, let me state that my judgment was formed on the basis of the total impression of this pamphlet.

"However, if you want concrete illustrations, as I say, I think I can pick it up almost at random and find——"

Mr. RHYNE: "I think you can pick it up——"

THE WITNESS: I beg your pardon.

A. (continuing) "—I think you can pick it up almost at random and find concrete illustrations of what I would interpret as clearly misleading statements."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"Don't you think that the picking of statements at random is an unfair way to attack any writing?" A. "Yes, I do. I think the total impression of the publication is relevant to this determination. I think the total impression is a product of a sub-
1032 stantial number of specifically misleading statements or impressions."

Q. "Well, is it a fair statement that your conclusion on that was based upon the facts and statement made to you by Dr. Dunbar and the information furnished to you by Dr. Butz?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of t deposition:

"Objection on the ground that that is attempting to probe into the mental processes of the witness, the Acting Administrator of the Federal Security Administration, and that such probing into the mind of an administrative official with respect to the exercise of his judgment and discretion is unauthorized."

A. "I accepted the medical testimony of Dr. Butz."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"Mr. Kingsley, you have been acting for Mr. Ewing for quite a while, have you not, acting administrator?" A. "Yes. It depends upon what you mean by 'quite a while.'"

Q. "Say since the middle of January?" A. "With the exception of a brief period. Mr. Ewing has been out twice. He
1033 was ill with pneumonia in January and was back for about, oh, I have forgotten how long—seven or eight days, and has been gone since the middle of February again."

Q. "The reason for my question, I was going to ask would letters addressed to Mr. Ewing come to your attention in his stead, during his absence, letters addressed to him as Federal Security Administrator, in his official capacity?" A. "Normally, I would say yes. Again, unless I know specifically what you have in mind, it is difficult for me to answer. We have somebody routing the mail. If it is, in her judgment, something that could be directly handled by the Food and Drug Administration, it will go directly there before I see it, even though it is addressed to Mr. Ewing or to me or anybody else."

Q. "Well, for example, I have in my hand a letter addressed to the Honorable Oscar R. Ewing from Clyde Doyle, Member of Congress from California, dated January 27, 1949. I could wait to ask you this when the records are produced, but I just wanted to ask you if a letter of that character would come to your attention?" A. "It might or it might not. In my judgment this never did. It probably went directly to Food
1034 and Drug. The reply to Congressman Doyle probably came back through here, through this office."

Q. "I assume that a letter which I addressed to Mr. Ewing would be handled in the same way?"

Mr. KLEINFELD: Mr. Kleinfeld, at the time of the taking of the deposition:

"Again I suggest that you do not answer unless a question is asked."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne:

"I ask you if letters written by me addressed to Mr. Ewing would be handled in the way that the letter from Congressman Doyle was handled?" A. "It is probable, yes, that it was."

Q. "I might say the main purpose of my question is to show or to find out whether requests for hearing addressed to Mr. Ewing or telephone call sent to him would come to your attention as Acting Administrator." A. "I believe yes, that that would come to my attention, without any question."

Mr. KLEINFELD: Mr. Rhyne, at the time of the taking of the deposition:

"Well, I believe, Mr. Kleinfeld, if you are not going to produce the records, those are all the questions I have."

1035 Mr. Kleinfeld: "Once the order is signed, of course we have no recourse but to produce whatever documents the court requires us.

"Are you through, Mr. Rhyne?"

Mr. Rhyne: "Yes."

Cross examination:

Mr. KLEINFELD: Now we come to examination of the witness by counsel for the defendants.

By Mr. Kleinfeld:

Q. "Mr. Kingsley, I think you testified that before you made the determination of 'probable cause that the labeling of this product, Nutrilite product, was misleading in a material respect to the injury or damage of the purchaser or consumer,' there was submitted to you a finding of fact by Dr. Robert C. Butz, medical officer of the Food and Drug Administration?" A. "Yes, that is right."

Q. "Did you read that finding of fact made by Dr. Butz?" A. "I did."

Q. "Did you have before you at that time the labeling or advertising material, 'How to get well and stay well'?" A. "I did."

Q. "Did you read that pamphlet?" A. "I did."

1036 Q. "Did you consider that pamphlet and the finding of facts made by Dr. Butz before making your determination of 'probable cause'?" A. "I did."

Q. "And after considering the pamphlet and reading it and after reading and considering Dr. Butz' finding of fact, did you then make the determination of 'probable cause' which is involved in this action?" A. "I did."

Mr. Kleinfeld:

"That is all."

Redirect examination:

Mr. KLEINFELD: Now we come to further examination by counsel for plaintiff.

Question by Mr. Rhyne:

Q. "Mr. Kingsley, I note that you signed three decisions. Why was that?" A. "I believe the primary basis for that was change in the character of the labeling, that originally we had a 57-page pamphlet, that after the first seizures were made and while the action was still in the court, a 36-page pamphlet was issued, or some other number, I have forgotten the number of pages, and more recently this 42-page one has been
1037 issued, which changed the facts to some extent, although not in my judgment in any material way."

Q: "Did you have all three of those before you at the time you signed this decision?" A. "I assume I did. I cannot say for a fact one way or the other. But I had some such pamphlet and I assumed that they were the right ones."

Mr. KLEINFELD: Mr. Rhyne, at the time of the taking of the deposition: "That is all."

* * * * * * *

1038 Now we come to further examination by counsel for defendants.

By Mr. Kleinfeld:

Q. "Did these findings of fact made by Dr. Butz and the ——"

JUDGE CLARK: The Court will take a recess until two o'clock.

(Whereupon at 12 Noon, the trial was recessed, to reconvene at 2 p.m. the same day.)

1039 AFTERNOON SESSION

(The trial was resumed at 2:00 p.m. upon the expiration of the recess.)

A. L. GOTTLIEB, the witness on the stand at the time of recess, having been previously sworn, resumed the stand, was further examined, and testified as follows:

Recross examination:

Mr. KLEINFELD: The last question I read, your Honors, was:

By Mr. Kleinfeld:

Q. By Mr. Kleinfeld at the time of the taking of the deposition:

"Did these findings of fact made by Dr. Butz and the pamphlet, "How to Get Well and Stay Well," which is marked Exhibit A, and the other pamphlets which you had before you —did they come to you in the ordinary course of the business of the Federal Security Agency?" A. "Yes, they did."

Q. "And in connection with each pamphlet, 'How to Get Well and Stay Well,' was each accompanied by a finding of fact made by Dr. Robert C. Butz, medical officer of the Food and Drug Administration?" A. "I believe it was, yes."

1040 Q. "And in each case you read and considered the finding of fact made by Dr. Butz and read and considered the pamphlet entitled, 'How to Get Well and Stay Well'?" A. "I did."

Q. "After reading and considering those documents you came to the conclusion, did you not, that you determined that you had 'probable cause' to believe that the labeling of the product Nutrilite, entitled 'How to Get Well and Stay Well,' was misleading in a material respect to the injury or damage of the purchaser or consumer?" A. "I did."

Mr. KLEINFELD: Mr. Rhyne, at the time of the taking of the deposition:

"I will have to object to that. The question is leading, of course, and very objectionable."

Mr. RHYNE: I certainly still think so.

JUDGE CLARK: Technically, Mr. Rhyne, it was not his witness he was leading, and when you turned him over for cross examination he had a right to lead in cross examination.

Mr. RHYNE: I think if you had been there you would have decided it was his witness.

1041 By Mr. Kleinfeld:

Q. By Mr. Kleinfeld at the time of the taking of the deposition:

"I will ask you in another fashion. In reaching your de-

terminations of 'probable cause' under Section 304(a) of the Federal Food, Drug and Cosmetic Act, to the effect that the labeling of Nutrilite, the label being entitled 'How to Get Well and Stay Well,' what did you do in reaching the determination of 'probable cause' that that label was misleading in a material respect?"

A. "I took into consideration the findings of Dr. Butz and the contents of the pamphlet 'How to Get Well and Stay Well.'"

Q. "And after considering those documents and after considering the matter, you then reached that determination of 'probable cause'?" A. "That is right."

Mr. KLEINFELD: Mr. Kleinfeld at the time of the taking of the deposition: "That is all."

Redirect examination:

Mr. KLEINFELD: Further examination by Mr. Rhyne at the time of the taking of the deposition:

Q. "Mr. Kingsley, at the time you signed these
1042 three decisions, did you know that Mytinger and Casselberry had requested that you grant them a hearing?"

Mr. KLEINFELD: Mr. Kleinfeld at the time of the taking of the deposition:

"Objection on the ground that it is entirely irrelevant and not germane to the issues here."

A. "I believe that I did, yes."

By Mr. Kleinfeld:

Q. Question by Mr. Rhyne at the time of the taking of the deposition:

"And I notice that in response to a question by Mr. Kleinfeld you said that these matters came before you in the course of the ordinary business of the Federal Security Administration.

"Isn't it a fact that these were the first such conclusions ever signed by the Administrator of the Federal Security Agency?"

A. "I cannot testify as to that. I can testify that they were the first ever signed by me as Acting Administrator."

Q. "And isn't it true that the reason you signed these was because Dr. Dunbar explained that the court had created this extraordinary situation requiring your signature?"
1043 A. "Yes, I think that is correct."

Q. "So it was not the ordinary course of business then, for you to make these decisions, was it?" A. "Well, I would say that it was in the ordinary course of business of the

Federal Security Agency, in the sense that given the position the court had taken, there was nothing else—I mean, it was something that had to be done by the Administrator. But in the sense it had not been done previously by me, it was unusual."

Q. "So it was not an ordinary thing for you to do, then?"

A. "No."

Mr. Kleinfeld: Mr. Rhyne, at the time of the taking of the deposition: "That is all."

1044 Mr. KLEINFELD: May I offer this in evidence, your Honor?

JUDGE CLARK: Any objection, Mr. Rhyne?

MR. RHYNE: It has already been read in. I object on the ground it is not complete.

JUDGE CLARK: I said he could offer anything he pleased.

Mr. RHYNE: If I can object, I will certainly object on the ground it is not complete, and I understood I was going back to complete my examination when the records were made available, and I never had an opportunity to do that because every time I tried to find Mr. Kingsley they said he was out of town or out of the country, so I never had a chance to finish it.

It left me in a rather peculiar position. The Court will recall we had a subpoena asking for certain records and they filed a motion to quash it.

JUDGE CLARK: Did you ever get the records?

Mr. RHYNE: Yes, I finally got them; but I never had a chance to examine Mr. Kingsley afterwards. So it left me in a rather peculiar position.

JUDGE CLARK: Mr. Kleinfeld, I didn't understand that this was only a portion of the deposition, only a partial deposition.

Mr. KLEINFELD: It isn't partial.

JUDGE CLARK: If it is only a partial deposition I don't

1045 think it is admissible.

Mr. KLEINFELD: It isn't partial. This is the deposition that Mr. Rhyne took. He never asked us to go any further. Mr. Kingsley was available that day up to the time he left the country.

JUDGE CLARK: He stated two or three times that you wouldn't produce the records until the order was signed.

Mr. KLEINFELD: Then he got the records.

JUDGE CLARK: He didn't get them that day, though, did he?

Mr. KLEINFELD: No, but he got them later.

JUDGE CLARK: His complaint is that he has never been able to catch up with Kingsley to complete the taking of his deposition.

Mr. KLEINFELD: That is what Mr. Rhyne says now. There isn't anything in the record of this case to indicate that that was a fact. It is not a fact. That is merely a statement by Mr. Rhyne. This is the deposition he took. We didn't take it; he took it.

JUDGE CLARK: It is my understanding that he does say he can't complete his deposition, and he says that in this deposition here.

Mr. RHYNE: I said it several times.

JUDGE CLARK: He can't complete his deposition until he
1046 gets those records. You said you can't give him the records until the order was signed.

Mr. KLEINFELD: Then the order was signed and he never asked for a further deposition.

JUDGE CLARK: He hasn't had an opportunity of further examination of Mr. Kingsley. Kingsley is always out of the country or out of Washington or out of some place.

Mr. KLEINFELD: Your Honor, that is what Mr. Rhyne says. I would like Mr. Rhyne to show to the Court any document or letter or anything he has addressed to us or to the Court or to anyone asking that Mr. Kingsley be called back for a further deposition. If he can show that, his objection is well taken; if he doesn't show that, his mere statement now at this late date that he thought he wanted to take a further deposition, I think is perfectly ridiculous.

Mr. RHYNE: I have nothing in writing of that kind. The only time it was ever discussed between counsel after that was when Mr. Kleinfeld, when this matter was originally scheduled for trial, asked that I waive the personal appearance of Mr. Kingsley and I didn't do it. Since then they advised me that he was in Geneva.

Mr. KLEINFELD: That is right.

Mr. RHYNE: And I believe that is all the information I have on it, and because of that visit, I haven't tried to complete the deposition.

Mr. GOODRICH: May I explain the dates involved on Mr.
1047 Kingsley's absence? I think that may have some bearing.

JUDGE CLARK: What is that, Mr. Goodrich?

Mr. GOODRICH: May I explain the dates of Mr. Kingsley's absence, when he left the country? He left sometime in August. This order that your Honor signed about the records was signed in April. The next day, or the next day after that, we made the records available. They have been available intermittently between then—the examination was interrupted I believe on April 19 or 20 when the Supreme Court proceedings were in progress.

Then when we were denied relief up there, we came back and we got in touch with Mr. Rhyne immediately and told him that we were ready to resume the depositions at any time. We instructed our Los Angeles counsel to get in touch with counsel out there to begin the depositions again.

All that was done over the summer when the case went over the summer. Then Mr. Kingsley was appointed to a position in Geneva and left while I was on my vacation.

Those are the dates involved. So several months intervened between the time the records were made available and Mr. Kingsley left the country.

Mr. KLEINFELD: Mr. Rhyne has never asked at any time to take a further deposition of Mr. Kingsley. If he had, we would very gladly have put Mr. Kingsley at his disposal.

JUDGE CLARK: The Court will admit the deposition. There
1048 is a dispute between counsel as to what happened, as to whether Mr. Rhyne had a sufficient interval to take the amended deposition after the Supreme Court had passed on your application for prohibition. Let it be admitted for what it is worth.

(The document referred to was received in evidence as Defendants' Exhibit No. 22.)

Mr. KLEINFELD: I now offer in evidence certified copies of the determinations of probable cause—three determinations of probable cause—made by J. Donald Kingsley, Acting Administrator, based on three findings of fact of Dr. Robert C. Butz. I offer these merely to prove that the determinations of probable cause and the findings of fact of Dr. Butz were in fact made.

JUDGE CLARK: Nobody disputed Butz' findings. They have been put in here six or eight times and apparently everything that happened in the whole proceeding is based on Butz, who is notably absent.

Mr. KLEINFELD: These conclusions are now the conclusions or determinations of Mr. Kingsley, the Acting Administrator. And the findings of Dr. Butz, although similar to those made by him in connection with the other determinations, are findings of medical fact upon which Mr. Kingsley, in his determinations of probable cause, says he relied.

1049 I offer them merely to show that Mr. Kingsley did make these determinations and that Dr. Butz did make these findings, not to prove whether they are true or false.

Mr. RHYNE: I object on the ground that the deposition which really shows my point that it is not complete, doesn't identify these findings in any way. They were not attached to it as exhibits, or shown to be a part of it. And, of course, I object on the ground I have always objected, that the findings of fact of Dr. Butz are hearsay and Dr. Butz is not here.

JUDGE CLARK: We have admitted those several times—not that I think they have any probative effect.

(The documents referred to were received in evidence as Defendants' Exhibit No. 23.)

Mr. KLEINFELD: May it please the Court, the defendants had subpoenaed Mr. Rehnborg, the inventor of Nutrilite. He was

anxious to get back home, I believe, and Mr. Rhyne and we entered into a stipulation with respect to certain facts.

Mr. RHYNE: Mr. Kleinfeld, I think you should state to the Court, of course, that your subpoena called for all the records relating to secret processes by which Nutrilite is formulated and the records of his business.

Mr. KLEINFELD: If you want to make the point, Mr. Rhyne, it is well taken. Mr. Rhyne, in order to let Mr. Rehnborg
1050 off the hook, asked us to sign a stipulation, and here is the stipulation.

It begins as follows:

"It is stipulated by the parties that the following are facts that may be taken as proved in the action only without formal proof:

"1. Records of University of South Carolina show that Rehnborg entered Liberal Arts College in September 1914 and stayed one semester. Studied, among other things, inorganic chemistry, grade 91, and qualitative analysis, no grade.

"2. The following information has been obtained from application filed by Rehnborg in the Richfield Oil Company of California in 1932:

"1915-1916: Accountant, Standard Oil Company, Tientsin, China.

"1916-1918: Accountant, China-America Trading Company, Tientsin.

"1918-1919: Comptroller, Lone Star Shipbuilding Corporation.

"1919-1923: Sales representative in China, American Milk Products Corporation of New York.

"1923-1929: Operated own business, Shanghai.

"1929-1932: Chief Clerk, American Potash and Chemical Corporation, Trona, California.

1051 "Education: Graduated High School, Shelton, Connecticut.

"3. Records of the Richfield Oil Company of California show that he entered their employ July 1932-January 1933, and was employed by them from July 1933 through August 1935 in a clerical capacity, Pay Roll Department, Richfield Oil Corporation of California.

"4. Plaintiff reserves the right to object to the introduction of any or all of the facts on the grounds or irrelevancy and immateriality."

This stipulation is signed by Mr. Rhyne and Mr. Kleinfeld.

JUDGE CLARK: Is there any dispute about this stipulation?

Mr. RHYNE: No, there is no dispute whatever, except that I just want to say that it was theirs, they dictated it over the phone and I agreed to it. I don't want you to get the idea that I wrote it.

1052 JUDGE CLARK: It is the first stipulation in this whole series that hasn't led to a dispute when the question came to determine what the stipulation was. Even stipulations that have been made in the present trial have been vigorously disputed.

Mr. KLEINFELD: I offer the stipulation in evidence.

Mr. RHYNE: You agree I didn't write it?

Mr. KLEINFELD: Oh yes. You didn't write it. You just agreed to it.

JUDGE CLARK: That may be admitted.

(Defendant's Exhibit No. 24 received in evidence.)

Mr. KLEINFELD: If your Honor will recall, during the cross examination which we tried to make of Doctor Casselberry the Court ruled that we couldn't pursue a certain line of attack and that we might make a written offer of proof. We have prepared an offer of proof with respect to the proposed cross examination of plaintiff's witness case which we would like to submit for the sake of the record.

Mr. RHYNE: At this point Mr. Kleinfeld, would you like to have the names and addresses of the people who signed these testimonials?

JUDGE CLARK: Let's see this offer of proof.

1053 Mr. RHYNE: I have the originals of the affidavits, Mr. Kleinfeld, and what I am giving you are the exact words that appear in the book, not the long testimonials, but we went back to each one of these people and wrote out exactly what was in the book and then said, "The above facts are true in my case," and then had them sign them all over again.

I am giving you those all notarized and everything. Here are the originals if you would like to compare them, because I am giving you a photostatic copy.

Mr. KLEINFELD: Thank you very much.

JUDGE GOLDSBOROUGH: I am not aware that the Court refused to allow Counsel or defendant to ask a great many of these questions. I don't know whether any of them have been asked or not.

Mr. RHYNE: It seems to me this is not a proper offer of proof. An offer of proof is something he might expect to prove by evidence. These are just a long list of questions that he could have asked Doctor Casselberry when he was testifying.

JUDGE CLARK: I don't think he can put anything in his offer of proof that wasn't ruled on by the Court. Most of these questions were not ruled on by the Court.

Mr. KLEINFELD: The situation was this, your Honor—we
1054 are trying to find it in the transcript—I asked several questions all in my opinion of the general type contained here. The Court ruled and I think quite strongly that the Court felt that those questions were not relevant or germane.

JUDGE CLARK: And you asked what the ruling of the Court would be as to a whole line of testimony and we told you that the questions had to be asked before the Court could rule on them. I am sure that is in the transcript.

Mr. KLEINFELD: I don't think so, your Honor. Your Honor yourself suggested a written offer of proof as I recall.

JUDGE CLARK: No. I said you could put anything in an offer of proof that you wanted, but I mean that had been ruled on by the Court. I have never known of an expedition of this sort in my whole experience as a lawyer. You just put in questions that were never asked and were never ruled on by the Court and say what you would have proved if you had thought of it or wanted to when the witness was on the stand.

Great liberality was given by the Court in the asking of the questions. You cross examined this witness for two halves of days and now you just come along and put in questions that you want ruled on as an offer of proof that you might have asked when the witness was on the stand, and you either didn't think of it or didn't wish to.

1055. JUDGE GOLDSBOROUGH: As far as this member of the Court is concerned, of course I went over them somewhat—

JUDGE CLARK: So did I.

JUDGE GOLDSBOROUGH: And I don't remember that any of those questions were ever asked by the defendant and passed upon by the Court.

Mr. KLEINFELD: Your Honor is correct. It was my understanding at the time that the Court didn't wish me to ask any further questions—

JUDGE CLARK: The Court specifically refused to state what its ruling would be on a whole line of questions that hadn't been asked. We told you we could only rule on a question that was asked and objection made.

Mr. KLEINFELD: Would your Honor give me about a minute to try to find a particular spot in the transcript?

JUDGE CLARK: Yes.

Mr. KLEINFELD: Thank you.

Mr. RHYNE: I have just finished going through these and if I could go back and take each one of their witnesses and make a list

of everything that I forgot at the time I was cross examining, I could write up 77 questions for each one.

JUDGE CLARK: I don't recall any of these questions being included in the questions that were ruled out.

1056 Mr. KLEINFELD: I would like to call attention to page 471 of the transcript—well, 470 and 471.

JUDGE TAMM: What about page 467?

Mr. KLEINFELD: 467 through 471, I think.

"Judge Clark: It is not part of your cross examination when he testifies positively that they are not false and misleading."

No, "Mr. Kleinfeld" at the top of page 467:

"And the doctor who testified for the plaintiff was permitted to give his opinion as to whether there was anything in the book that was false or misleading."

JUDGE GOLDSBOROUGH: Any what?

Mr. KLEINFELD: ". . . as to whether there was anything in the book that was false or misleading."

I am now addressing the Court. That is from page 467.

"We are trying to show, in order to help the Court make its final ultimate decision as to whether it was false or misleading by various statements. We think various parts of it are false and misleading and we want to ask him why they were put in the book. We think it is proper cross examination.

"Judge Clark: It is not part of your cross examination when he testifies positively that they are not false and misleading. As part of your case in chief, if you want to put on somebody to testify that they are false and misleading that is en-

1057 tirely your privilege, but you can't argue your case, though, in the plaintiff's case.

"Mr. Kleinfeld: For the sake of the record, may I state that we wish to ask numerous questions, going through the entire 58-page booklet, asking him with respect to the specific items which we think are false or misleading?

"Judge Clark: We can't pass on a question until it is asked."

JUDGE CLARK: That is the remark that I had reference to.

Mr. KLEINFELD: I think there are subsequent ones, sir, if I may go on.

JUDGE CLARK: Go ahead.

Mr. KLEINFELD: "Mr. Kleinfeld: Then I will ask my questions and if your Honor will say they are not proper I will stop asking them.

"By Mr. Kleinfeld:

"Question: In the same paragraph the statement is made, 'having trouble digesting their food or suffering with actual stomach pains.'

"I want to ask you: Does not that claim that people taking Nutrilite will not have trouble digesting their food or suffering with actual stomach pains?

"Mr. Rhyne: I object on the ground that this is
1058 in writing and speaks for itself.

"Judge Clark: Sustained.

"By Mr. Kleinfeld:

"Question: In the same paragraph, the words 'with decaying teeth'; I ask you whether that does not claim that people who take Nutrilite will not suffer with decaying teeth?

"Mr. Rhyne: I object on the same ground, and further, that this is an argument rather than cross examination.

"Judge Clark: Sustained."

Then I asked a number of questions and the Court sustains objections by Mr. Rhyne: We go to page 469, question by Mr. Kleinfeld:

"Question: I ask you to turn to page 2 of the 58-page booklet, the last paragraph. The second sentence reads:

'If your sense organs and your brain and nervous system have been supplied constantly with all essential materials for the growth, maintenance and operation, and your bodily chemistry is normal, then barring accidents you will be in full possession of your faculties.'

I ask you if that does not claim that your body chemistry is normal if you take Nutrilite and your sense organs and
1059 your brain and nervous system will be in good condition?

"Mr. Rhyne: I object on the same ground and on the further ground—

"Judge Clark: Mr. Kleinfeld, the objection Mr. Rhyne is about to make is sustained because I know what it is, and I again admonish that you cannot make your argument under the guise of cross examination.

"Anything to further your case in chief has to be put in in your case in chief. You can disprove anything the doctor has said, if you have competent witnesses to do it."

Now at that point, your Honor, you were admonishing me and I was getting perturbed. I thought if I kept on asking that type of question, your Honor would think I was being offensive. Your Honor was admonishing me.

JUDGE CLARK: I didn't think you were being offensive but you were repeating the same question over and over again—a question to the same effect—which the Court held was not proper cross examination, but none of those questions had anything to do with this offer of proof.

Mr. KLEINFELD: We wanted to go through the entire pamphlet and ask with respect to each statement there the purpose—

JUDGE CLARK: Mr. Rhyne's objection was perfectly good
1060 that the pamphlet was in writing, and that what the pamphlet held itself out as being was a matter for the Court.

Mr. KLEINFELD: We know your Honor sustained his objections. Your Honor said again on page 470:

"Judge Clark: Mr. Kleinfeld, I can tell you now, without taking the trouble to refer to all these pages, that objections to them will be sustained on several grounds.

"In the first place, it is a written document and speaks for itself. The witness has testified that he didn't put anything in the booklet that was misleading, or claiming cures for it. If you have got any witnesses you want to put on, you can put them on in chief to rebut the doctor's testimony, so the Court will exclude all such questions.

"Mr. Kleinfeld: We just want to ask these questions in order to ask the witness what these various statements about particular diseases and ailments—why they were put in these booklets.

"As I gather, the Court is objecting to all that kind of questions?

"Judge Clark: The Court will sustain objections to any such questions. You can embody them in an offer of proof if you want to."

Now we think that is what we have done.

1061 JUDGE GOLDSBOROUGH: The Court will do what?

Mr. KLEINFELD: "Judge Clark: The Court will sustain objections to any such questions. You can embody them in an offer of proof if you want to."

JUDGE GOLDSBOROUGH: That is a different proposition. There are not any such questions here. They are different questions.

Mr. RHYNE: They are not questions asking him to interpret the language of the book as the others were that I objected to.

Mr. KLEINFELD: Certainly many of them are. We say, for example—let's turn to page 2, question 3,

"Why, on page 3, do you include the statements about the brain, heart, glands and teeth?

"4. (a) What is the purpose of the fifth paragraph on page 3 which reads:" and we quote:

"(b) Do you claim that Nutrilite will prevent or cure any of the symptoms or conditions mentioned in this paragraph?"

That is the question we wanted to ask this witness going through the entire 58-page book.

JUDGE CLARK: I told you, Mr. Kleinfeld, the Court couldn't rule on a question until it was asked and when an objection was sustained that was the inference that when an objection was
1062 sustained you could put in an offer of proof if you wanted to. That is the normal procedure in every Court in the land that I am familiar with. You have to ask a question and have an objection sustained to it before you can even put in an offer of proof.

Mr. KLEINFELD: If we had asked each specific question, of course there would be no point in making an offer of proof.

JUDGE CLARK: That is the normal procedure for an offer of proof.

JUDGE GOLDSBOROUGH: There isn't any other possible procedure.

JUDGE CLARK: Never in my experience.

Mr. RHYNE: I would like to call specific attention to the fact that the questions that your Honor held objectionable both started, "Does not that claim" so and so. "Does not that claim" so and so. He was arguing about the specific written language, not the purpose or anything else—the thing he is trying to go into in these questions—

Mr. KLEINFELD: That is the type of question we wanted to ask the witness, whether or not the plaintiff did not by putting in certain statements in the booklet make certain therapeutic claims. That is the main type of question we wanted to pursue of the witness.

JUDGE CLARK: That is the type of question on which the
1063 Court sustained objection on the ground that it was a written document which was already in evidence. These questions you have got in this offer of proof have nothing to do with that for the most part.

Mr. KLEINFELD: The witness was permitted to testify that in his opinion, as were the other witnesses of the plaintiff, in their opinion there was nothing in the booklet that was false and misleading. We wanted to cross examine them on that opinion of theirs.

JUDGE CLARK: You did cross examine Doctor Casselberry for a whole day.

Mr. KLEINFELD: In our view, your Honor, we never got to the heart of what we wanted to cross examine him on.

JUDGE CLARK: In your view you wouldn't have gotten to the heart of it any time this year.

Mr. Goodrich cross examined Doctor Casselberry for all of one afternoon and all the next morning.

Mr. GOODRICH: I think that was Doctor Myers, your Honor—a different witness.

JUDGE CLARK: It may have been.

Mr. KLEINFELD: I think it was only I who examined or tried to examine Doctor Casselberry and I don't think I had him on very long at all, because I was just getting to the questions I wanted to ask on cross examination.

It was my understanding, I think, borne out by the record,
1064 that I just couldn't ask any more questions of that type.

JUDGE CLARK: The Court had no disposition to keep you from asking questions. You asked if the Court was going to sustain objections to questions subject to the same objection as the previous question you had asked and I stated that the Court would sustain objections to them, but I also stated that the Court couldn't rule on a question until the question was asked.

Nobody tried to stop you from asking any questions you pleased but the plaintiff hadn't waived his right to object to it and the Court hadn't waived the right to rule on it.

Mr. KLEINFELD: It was my understanding, your Honor—I may have been wrong—

JUDGE CLARK: Mr. Kleinfeld, I don't think there is an instance in jurisprudence in the United States where the Court has entertained a motion to offer to prove except to questions which have been asked and to which objection has been sustained by the Court.

It is at such time as that that the offer of proof is proper, and highly proper, because that is simply an effort to tell the Court what you expected to prove by the answer to that question if an objection hadn't been sustained.

Mr. KLEINFELD: May I read one more passage to your Honor?

JUDGE CLARK: Yes, certainly.

1065 Mr. KLEINFELD: On page 471:

> "Mr. Kleinfeld: May I go through the booklet and indicate which passages?"
>
> "Judge Clark: The Court is not going to waste time letting you go through the booklet. You can make your offer of proof in writing and the Court will consider it."

To me that meant that the Court, your Honor, was not permitting us to go through the booklet. I think the language is clear.

JUDGE CLARK: I don't put the same interpretation on it and I certainly knew that what you are trying to do was to go through the book and mark places on the basis of your offer of proof, and the Court distinctly told you that the Court couldn't rule on a question that hadn't been asked, and when you asked how the Court would rule on those questions the Court informed you that

objection to questions which were subject to the same objection as had been made to the questions you had asked would be sustained.

Mr. KLEINFELD: I think I would have been actually contumacious of the Court, after your Honor had told me that the Court is not going to waste time letting you go through the booklet, if I had asked further questions on the booklet.

1066 Mr. RHYNE: The record goes on for thirty pages. I think it bears out that you asked him:

"Why do you want to point out to the people of the country those facts you mentioned about general conditions"

and various other things about the booklet, so I think he is putting a rather strained interpretation on it.

JUDGE CLARK: The Court will reject this offer of proof.

Mr. KLEINFELD: May I then respectfully request that Dr. Casselberry be called back on the stand so I may ask the specific questions I wanted to ask on cross examination, and have your Honor or the Court rule on each particular question.

Mr. RHYNE: I will object to that because over here he has, from about 30 on, questions about distributors and things like that, things that he didn't even dream of when he was cross examining Dr. Casselberry.

He said he was through cross examining him and I don't think it is proper to try to call him back now and prolong this trial, when he cross examined him for more than four and a half hours.

Mr. KLEINFELD: May I point out, for instance, one question as an example, your Honor. For example in 30-A, here is the ques-

1067 tion we had proposed and would propose to ask of Dr. Casselberry on cross examination:

"In the middle of the fourth paragraph on page 35 of the 58-page booklet you make the statement: 'Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies.'

I wanted to asked him:

"What are the most painful common diseases you refer to?"

There has been dispute on that point.

JUDGE CLARK: You never asked that question.

Mr. KLEINFELD: No, that is a question I want to ask him.

JUDGE CLARK: We didn't pass on that question or even that type of question. I think at the close of the case, Mr. Kleinfeld, it is too

late for you to come back and think up another couple of days' questions and want to reopen the case for that purpose.

Mr. KLEINFELD: Again I want to state for the record that it was the understanding of counsel for the defendants that the Court
1068 was not permitting him to go through the 58-page booklet and ask the witness on cross examination what claims were being made by each of the statements contained in the booklet and why they were put in.

JUDGE CLARK: The Court ruled on a specific line of questions. The Court ruled on several specific lines of questions but all this controversy has to do with those questions which you asked to which objection was sustained.

You asked the Court if the Court was going to sustain objection to that whole line of questions and the Court said it couldn't rule on any question until the question was asked, but that when it was, the Court would rule on it and then you could make an offer of proof.

The Court assumed, of course, that you knew the rule about the offer of proof which, as far as I know, is universal in every court in the United States.

Mr. KLEINFELD: Your Honor told me that your Honor was not going to waste time letting me go through the booklet and I couldn't proceed at that point with asking any further questions.

JUDGE CLARK: The Court will rule at this time that you cannot recall Dr. Casselberry for further cross examination.

Mr. KLEINFELD: And will not accept the offer of proof?

1069 JUDGE CLARK: That has been rejected.

Mr. KLEINFELD: I offer in evidence vital statistics, special reports, national summaries, death and death rates for each cause, United States, 1945 to 1947, put out by Federal Security Agency, Public Health Service, National Office of Vital Statistics, Volume 31, No. 3, dated 9 May, 1949.

JUDGE CLARK: I see no objection to admitting that, Mr. Kleinfeld, but I want the record to show that the Court didn't pay any attention to your statement, as grounds of admissibility, that it happens to be a Government publication.

The Government has put out a great many publications that are not worth the paper they are written on: "Love Life of the Bumblebee" and "The Agricultural Bulletin" that was put out in 1943 in which they undertook to show by logarithms how many pigs a sow would have in a litter five years in the future, which bears the Government imprint.

I see no objection to this thing because it has no probative effect one way or the other.

Mr. RHYNE: Could I make the objection that it is absolutely irrelevant and immaterial to any issue before the Court?

1070 JUDGE CLARK: The Court will overrule that objection.
(Defendants' Exhibit 25 received in evidence.)

Mr. KLEINFELD: The very last exhibit we have is another booklet, Volume 31, No. 11, September 19, 1949, vital statistics, special reports, national summaries, death and death rates for selected causes by age, race and sex, United States, 1947, put out by the Federal Security Agency, Public Health Service, National Office of Vital Statistics.

(The booklet referred to was marked Defendants' Exhibit 26 for identification.)

Mr. RHYNE: Same objection.

JUDGE GOLDSBOROUGH: In this particular exhibit, I think that what the defendant ought to do if they have any testimony is to put the testimony on the witness stand subject to oath and subject to cross examination, and not undertake to offer its own conclusions, which these documents are, as evidence.

I don't think it is evidence as far as I am concerned. In fact I don't think anything about it. I know it.

JUDGE CLARK: I don't think it is evidence either. As far as I am concerned I voted to admit that other thing simply because I didn't think it made any difference one way or the other whether it was admitted and I voted to admit it in the interests of saving time, unless there is the further objection that that is a self-
1071 serving declaration put out in this case. At least I assume it is. I have never read it.

JUDGE GOLDSBOROUGH: That is what he says it is. It is their own opinion about the controversy in this case

Mr. RHYNE: I would like to include that in my objection, too, your Honor, that it is self-serving.

Mr. KLEINFELD: I think the same reasons advanced for getting in evidence the records of the Selective Service Board are equally applicable here. This is an official booklet put out by a government department, containing literally thousands of items obviously based on an examination of thousands of cases.

It would be impossible, of course, to bring before the Court every person whose record is contained here. I may say to the Court that I think the Court has been somewhat liberal in admitting in evidence various publications, offered both by the plaintiff and by the defendants, for example, the various excerpts from medical or alleged medical literature were put in evidence.

JUDGE GOLDSBOROUGH: It has never been admitted by this Court. Witnesses were asked whether they agreed with certain statements in the publications but the publications have not been admitted in any case.

1072 Mr. KLEINFELD: It is my understanding that excerpts were put in evidence.

JUDGE GOLDSBOROUGH: I don't know which ones they would be.

MR. RHYNE: Not to prove the truth of them at all.

1073 JUDGE CLARK: It was whether the witness agreed with a statement that you read from one of these things on cross-examination.

MR. KLEINFELD: I believe on direct these excerpts were put in evidence by the plaintiff's counsel, and I think the records here of the clerk will show that.

MR. RHYNE: I was wondering what Mr. Kleinfeld was arguing about. I understood the Court admitted his exhibit.

JUDGE CLARK: He is now offering a report from the Federal Security Administration.

MR. RHYNE: I had objected, but I understood the Court had overruled me.

JUDGE CLARK: The Court hasn't overruled you on this one. That is sustained on the rounds that it is a self-serving declaration.

MR. RHYNE: Could I move to strike the other one—it is put out by the Federal Security Agency also—on the same ground?

JUDGE CLARK: We admitted one put out by the Selective Service System. That is the only one we did admit.

MR. KLEINFELD: That bore, of course, on an entirely different thing. It has been our position that the booklets which are in issue before the Court claim that the product is good for common diseases and that common diseases are the diseases which cause death,

1074 particularly in the 40s and 50s; and we believe that the booklet so claimed. We are trying to show what the common diseases which kill people, particularly in the 40s and 50s, are, by the best sources we can think of.

We think that bears definitely on the claims which are involved in this booklet. They say that it would cure all common diseases. In our opinion, we claim that common diseases which kill people, particularly in the 40s and 50s, are not nutritional diseases, but are the diseases specified here, like cardiovascular diseases, tuberculosis, and diabetes.

We think that definitely bears on the question before the Court.

MR. RHYNE: They had three doctors on the stand and could have asked them. This is all cumulative.

JUDGE CLARK: The objection will be sustained.

MR. RHYNE: Mr. Kleinfeld, before you close your case: You asked me about the New York Times clipping, the full text of it. Here it is, as it appeared in the Los Angeles Times, copyrighted by the New York Times. I believe that is the last thing you asked me for. It does show the exact language that appears in the book.

MR. KLEINFELD: The last item we have: I would like to read into the record written interrogatories—

JUDGE CLARK: Court will take a recess for five minutes.

1075 (Whereupon a short recess was taken.)

Mr. KLEINFELD: The Government wishes to read into the record written interrogatories asked of the plaintiff and the answers thereto. I will be very glad to have them incorporated by the stenographer in order to save the Court's time, if Court is desirous of that.

JUDGE CLARK: That is very satisfactory to the Court.

Mr. KLEINFELD: Is that all right, Mr. Rhyne?

Mr. RHYNE: Yes.

Mr. KLEINFELD: Here are the interrogatories and the answers to the interrogatories:

(The documents are as follows:)

WRITTEN INTERROGATORIES

The defendants herein, by their attorneys, submit the following written interrogatories under Rule 33 of the Rules of Civil Procedure for the United States District Courts:

1. In what ways is it claimed by you that these defendants or any of them have abused their power in violation of the due process clause of the Fifth Amendment?

2. What is the nature of the arbitrary action of the defendants on which you rely to prove a violation of the due process clause?

1076 3. What is the nature of the unlawful action of the defendants on which you rely to prove a violation of the due process clause?

4. What is the nature of the oppressive action of the defendants on which you rely to prove a violation of the due process clause?

5. What is the nature of the unreasonable action of the defendants on which you rely to prove a violation of the due process clause?

6. Specify the manner in which you claim the defendants have exceeded their powers under the Federal Food, Drug and Cosmetic Act in connection with the recommendation of seizure actions against the product Nutrilite Food Supplement?

7. Specify in detail the facts on which you base your claim that the action which these defendants have taken with respect to recommending seizures of the product Nutrilite Food Supplement was taken for the purpose of harassing the plaintiff and was deliberately calculated by defendants to be oppressive.

8. Explain what steps the plaintiff herein has taken to effect consolidation of the pending seizure actions for removal for trial in a single jurisdiction.

9. Give the dates of the occurrences which you specified in answer to Interrogatories 1-8.

1077 10. State the names and addresses of the witnesses you intend to produce at the trial of the above case.

11. Give the dollar volume of interstate business in the sale of Nutrilite Food Supplement for each of the years 1939-1948.

* * * * *

ANSWERS TO WRITTEN INTERROGATORIES

The plaintiff herein submits the following answers to the written interrogatories served upon it by defendants:

1. The following:

(1) The rendering of three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading;

(2) The carefully concealed fact from plaintiff that such secret decisions had been unlawfully made by the defendants, such fact being first revealed to plaintiff on January 17, 1949;

(3) The inflicting of irreparable injury on plaintiff by such decisions;

(4) The deliberate increase in plaintiff's irreparable losses by the unreasonable failure to procure the dismissal of all but the first libel for condemnation or seizure action after all but the first thereof had been judicially declared void and illegal;

1078 (5) The denial by the Acting Administrator of the Federal Security Agency of plaintiff's requests for opportunities to be heard upon the question of whether the labeling of plaintiff's product is misleading in a material respect, to the injury or damage of purchasers or consumers;

(6) The further rendering ex parte by the Acting Administrator of the Federal Security Agency of unlawful decisions that the labeling of plaintiff's product is misleading, to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact, the case;

(7) The rendering of such ex parte decisions by the Acting Administrator of the Federal Security Agency that the labeling of plaintiff's product was misleading, with full knowledge of the total and ruinous consequences to plaintiff of such decisions;

(8) The deliberate and arbitrary refusal of defendants to stipulate to the removal of the pending libel for condemnation or seizure actions to the district in which plaintiff does business;

(9) The unreasonable interrogation by defendants, or their agents and employees, of many of plaintiff's distributors and customers with the resulting damage to plaintiff's business and good

will thereof and interference with and retardation of the efficiency and morale of plaintiff's sales and distribution organization.

(10) The placing, or causing to be placed, of embargoes upon plaintiff's product in widely scattered jurisdictions of the United States so deliberately planned and calculated as to injure plaintiff;

(11) The giving of untrue information to secure said embargoes;

(12) The carefully designed geographic pattern of the libel seizure actions so as to unnecessarily punish plaintiff;

(13) The deliberate and unnecessary punishment of plaintiff by inflicting unnecessary expense through the institution of numerous libel for condemnation or seizure actions in widely separated and far-flung jurisdictions in the United States;

(14) The oppressive and unreasonable threats by defendants to institute still further libel seizure actions in other widely separated and far-flung jurisdictions in the United States;

(15) The deliberate violation of defendants' agreement not to make multiple seizures of plaintiff's product, upon the ground that such agreement only applied to seizures of plaintiff's product in Los Angeles;

(16) The issuance of instructions to allow the Buffalo seizure to be removed no further than the midwest;

(17) The rendering of opinions and the provision of unfavorable and injurious information by the defendants to private individuals and organizations with respect to the labeling of plaintiff's product, without either prior or subsequent notification to plaintiff;

(18) The unreasonable volunteering to magazines and newspapers of information in a way which would most injuriously damage plaintiff;

(19) The repeated violation of implied agreements to advise plaintiff of instances in which defendants deemed the labeling used by plaintiff to be in violation of the Federal Food, Drug and Cosmetic Act and the regulations issued thereunder;

(20) The deliberate efforts of defendants to seize only "large" amounts of shipments of plaintiff's product, so as to make plaintiff's losses as large as possible;

(21) The deliberate punishment of plaintiff by requiring the employment of attorneys and the provision of cost bonds in those farflung jurisdictions in which seizures were made of plaintiff's product, knowing full well that plaintiff could consolidate all of such actions and the only accomplishment of said numerous actions would be the loss of such monies so expended by plaintiff;

(22) The secret infiltration of plaintiff's organization by defendants' agents and employees in entrapment attempts in order that

information respecting plaintiff's operations might be constantly and instantly furnished defendants;

(23) The threat to incarcerate plaintiff's Seattle, Washington, distributor over the 1948-1949 New Year holiday if certain goods were not immediately produced by said distributor.

(24) The calculated action of defendants in refraining from instituting libel proceedings in the Southern District of California of products known to defendants to be in the possession of the Post Office Department and other common carriers for interstate shipment through which plaintiff was prevented from exercising its absolute right to remove the multiple seizure actions to such Southern District of California;

(25) The refusal and failure of defendants to indicate to plaintiff wherein the labeling of Nutrilite was claimed to be misleading, or to provide an opportunity to revise such labeling, all of which led plaintiff to the belief that the labeling was, in fact, acceptable to the Food and Drug Administration.

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2. See 1.

3. See 1.

4. See 1.

5. See 1.

6. See 1.

7. See 1.

8. A motion to consolidate and remove all pending libel actions was filed by plaintiff in Belleville, New Jersey, on April 5, 1949.

9. (1) September 30, 1948; December 2, 1948; December 9, 1948.

(2) From the dates listed in (1) to January 17, 1949.

(3) From September 30, 1948; December 2, 1948; and December 9, 1948, to date.

(4) From January 25, 1949, to date.

(5) February 11, 1949; March 2, 1949.

(6) January 28, 1949.

(7) January 28, 1949.

(8) From November 12, 1948, to date.

(9) From the fall of 1947 to date.

(10) September 23, 1948, New York City; October 11, 1948, Miami, Florida; November 23, 1948, Minden, Nebraska; December 7, 1948, Belleville, New Jersey; December 8, 1948, Seattle, Washington; December 15, 1948, St. Petersburg, Florida; December 14, 1948, Belleville, New Jersey.

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(11) See (10).

(12) From September 30, 1948, to January 3, 1949.

(13) See (12).

(14) See (12).

(15) From October 27, 1948, to January 3, 1949.

(16) September 21, 1948; November 8, 1948; and November 10, 1948.

(17) November 8, 1948; November 10, 1948; December 1, 1948; January 10, 1949; May 13, 1949.

(18) From September 30, 1948, to date.

(19) December 5, 1946; July 15, 1947; February 18, 1948; September 30, 1948.

(20) From September 30, 1948, to date.

(21) From September 30, 1948, to January 3, 1949.

(22) February 24, 1947, and August 17, 1948.

(23) December 30, 1948.

(24) From September 30, 1948, to date.

(25) From the fall of 1946, to date.

10. William S. Casselberry, Long Beach, California; Lee S. Mytinger, Long Beach, California; Lester L. Lev, Los Angeles, California; Lee J. Myers, El Monte, California; Gordon J. McCurdy, Coral Gables, Florida; John A. Meyer, Baltimore, Maryland; Paul E. Travis, Huntington Park, California; H. H. Robinson, Spokane, Washington; Roger W. Truesdail, Los Angeles, California; Philip H. Rue, Long Beach, California; Mrs. Philip H. Rue, Long Beach, California; Vernon W. Vore, Los Angeles, California; Mrs. E. W. Bridgeford, Long Beach, California; Fred Thomas Alexander, Los Angeles, California; Mrs. Christine Brown, San Gabriel, California; Lewis Sechrist, Compton, California; Mrs. Irene Sechrist, Compton, California; Mrs. George Thompson, Inglewood, California.

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11. Upon information available from records covering the period 1939 to September 1945, not kept by plaintiff, it is believed that the approximate interstate sales were: 1939, $328.50; 1940, $962.50; 1941, $1,616.00; 1942, $1,306.00; 1943, $745.60; 1944, 2,584.60; up to September 1, 1945, $2,020.40.

From September 1945 to April 30, 1949, the records of the plaintiff show interstate sales as follows: September 1, 1945, to December 31, 1945, $884.00; 1946, $23,656.00; 1947, $344,120.50; 1948, $2,189,201.60; 1949, through April 30, $1,053,648.75.

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* * * * *

Mr. KLEINFELD: That completes the defendants' case.

Mr. RHYNE: Are you not going to offer the Los Angeles Times article?

Mr. KLEINFELD: Pardon me, just one moment.

JUDGE CLARK: Surely.

Mr. GOODRICH: I would like to request at this time that the Court take judicial notice that the Kordel case, which has been mentioned here in connection with alleged stipulation or violation of

implied agreement in California, was decided on November 22, 1948. That is readily obtainable from the United States Supreme Court, 335 U. S. 345.

Mr. RHYNE: I concede that.

Mr. GOODRICH: The significance of that is this: Your Honors will recall that Mr. Rhyne injected the issue of an alleged violation of an agreement not to make further seizures. That agreement is said to have been made on or about 18 October 1948.

There was at that time pending in the Southern District of California the criminal indictment and the defendants, Mytinger and Casselberry, a partnership, there had made a motion to dismiss on the ground that the labeling involved had not accompanied
1086 the article, and, therefore, was not a proper subject of the suit.

That motion was first advanced on 18 October. At that time Mr. Dickerman—you will recall that it was in Lawyer Myers' deposition that 24 came in—then wired to Washington as to whether the Food and Drug Administration would be willing to stipulate to make no further seizures pending—

Mr. RHYNE: Aren't you really arguing your case? I agree to the date.

JUDGE CLARK: I suggest that you are arguing.

Mr. GOODRICH: There are a few simple facts here.

JUDGE CLARK: If it was reported in the United States Supreme Court, the District Court can take judicial notice of the Supreme Court.

Mr. GOODRICH: I was trying to bring out a few facts which would save the Court's time from having to go through the deposition of Myers, the plaintiff's amended complaint, the defendants' answer, the Kordel case, and so forth, to get the relationship of these dates.

Briefly, after this motion to dismiss was made and the agreement allegedly made, one seizure was made October 28. On November 28 the Kordel case was decided and the remainder of the seizures all remained after the Kordel case was decided. So if there is a violation of an implied agreement, of course, we deny that.
1087 There was one seizure made during that period. It is the seizure mentioned in paragraph 11 of plaintiff's amended complaint, the third seizure.

JUDGE CLARK: Have you any rebuttal?

MR. RHYNE: The only thing that I offer, since they didn't offer it, is the Los Angeles Times of Saturday morning, June 30, containing this article from the New York Times dated June 29 containing the full text of the item contained in our book that they asked about.

Mr. KLEINFELD: May I see that?

Mr. RHYNE: That is the one I just gave you. Will you mark this as our Exhibit 22?

(The document referred to was marked for identification as Plaintiff's Exhibit No. 22.)

Mr. KLEINFELD: We object to it on the ground that it is hearsay.

JUDGE CLARK: You asked for it yourself, Mr. Kleinfeld.

Mr. KLEINFELD: We asked to look at it.

JUDGE CLARK: You asked for it. You said you were not satisfied with the tear sheet and you wanted the whole article.

Mr. KLEINFELD: If the Court wants it, we have no objection.

Mr. GOODRICH: This is not the same thing as the article yesterday or the tear sheet.

1088 JUDGE CLARK: I remember the whole controversy, Mr. Goodrich. The tear sheet was part of this article, I take it.

Mr. GOODRICH: This is a different situation altogether.

Mr. RHYNE: It is a different article, your Honor, but they asked for it, they asked if I had the complete article and I gave it to them.

Mr. KLEINFELD: We will object on the ground it is hearsay.

JUDGE GOLDSBOROUGH: What is it?

Mr. RHYNE: It is simply the text of this article that appeared in our book. When the witness was on the stand, you will remember they offered—

JUDGE CLARK: It is the authority on which you relied in the statement in "How to Get Well and Stay Well."

Mr. RHYNE: That is right. They offered a page themselves from the New York Times of the 29th or 30th, which didn't contain the complete article.

JUDGE CLARK: I think it is admissible on the question of good faith.

Mr. KLEINFELD: Of course, there is no indication that this does contain the entire article. This is an article from the Los Angeles Times, quoting something from the New York Times.

JUDGE CLARK: It is copyrighted from the New York Times,
1089 isn't it?

Mr. KLEINFELD: A portion of the copyrighted article might have been quoted. There is no indication that this is the complete article.

Mr. RHYNE: I offer it to show our good faith.

JUDGE CLARK: The objection is overruled.

Mr. KLEINFELD: That completes the defendants' case.

Mr. RHYNE: It completes our case.

JUDGE CLARK: How much time do you gentlemen want for argument? The Court wants to accommodate you, but it doesn't wish any more time consumed than is absolutely necessary.

Mr. RHYNE: I will say to the Court that I am willing to submit our two trial memoranda—the Government has already submitted theirs—and waive argument.

Mr. KLEINFELD: We would like to address the Court.

JUDGE CLARK: For how long do you want to address the Court?

Mr. KLEINFELD: About 20 minutes.

JUDGE CLARK: You can have 20 minutes. I just wished to put a limitation on the time before you start the argument. The Court has no desire to limit you to 20 minutes. If necessary, we can come back tomorrow and give you time for argument, but the Court would like to have it agreed on what amount of time you
1090 need. Would an hour be agreeable to you?

Mr. KLEINFELD: That is quite agreeable to us, sir.

JUDGE CLARK: When the time is agreed on the Court wishes to warn you in advance that the Court will strictly enforce that rule. Sometimes in our Court, and sometimes in this Court, I know fellows agree on time, then they get up and want to take some more. Judge Goldsborough suggests that the plaintiff ought not to put his main argument in the last speech. He ought to confine himself to, say, 40 or 45 minutes in his opening and then the rest of the time at the close of the speech. Will you govern yourself accordingly, Mr. Rhyne?

Mr. RHYNE: Yes. In view of this, would it be better, so as not to divide the argument, if we would come back tomorrow morning at 10 o'clock? I would like to submit our briefs at this time to the Court, but anything the Court suggests is all right with me.

JUDGE CLARK: I think that is a reasonable request. As far as I am concerned, I am in favor of making it 10:30 instead of 10 o'clock because I have to stop at the doctor's on the way down here.

Mr. RHYNE: That is very agreeable to me, your Honor.

JUDGE CLARK: Is that agreeable to you, Mr. Kleinfeld?

Mr. KLEINFELD: That is quite agreeable, sir.

Mr. RHYNE: May I submit at this time our trial briefs,
1091 your Honor?

JUDGE CLARK: Do you have anything more to submit, Mr. Kleinfeld? We have already got your trial brief.

Mr. KLEINFELD: No. If your Honor will permit us, we would like to submit a reply brief within a few days.

JUDGE CLARK: Very well.

The Court will take a recess until 10:30 tomorrow morning.

(Whereupon, at 3:15 p.m., the Court was recessed, to reconvene at 10:30 a.m., October 27, 1949.)

1091a Reporter's certificate to foregoing transcript omitted in printing.

1092 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Washington, D. C.

Thursday, October 27, 1949

The trial of this case was resumed before a Three-Judge Statutory Court consisting of the Honorable Bennett C. Clark, of the United States Court of Appeals for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough and the Honorable Edward A. Tamm, of the United States District Court for the District of Columbia, at 10:30 a.m.

APPEARANCES:

On behalf of the plaintiff: Mr. Charles S. Rhyne and Mr. Lester L. Lev.

1093 On behalf of the defendants: Mr. Vincent A. Kleinfeld, Attorney, Department of Justice, and Mr. William W. Goodrich, Attorney, Federal Security Agency.

1094-1095 PROCEEDINGS

JUDGE CLARK: All right, Mr. Rhyne.

Mr. RHYNE: If the Court please, I would like to ask permission to divide my opening statement time with my co-counsel, Mr. Bradley. He will argue the constitutional issue and I will argue the oppressive conduct issue.

JUDGE CLARK: All right. You may divide it any way you want to, except that you can't reserve more than 15 minutes.

Mr. RHYNE: Thank you very much.

OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF, BY MR. RHYNE.

Mr. RHYNE: If the Court please, I think this case has been rather thoroughly explored and there isn't too much that I can recall to the Court's attention about the evidence and some of the contentions about it, but I would like to first of all start and call your attention to a few of the admissions in the complaint which I think are especially important, which haven't been emphasized too much up to now.

First of all, in paragraph 4, the defendants admit "the product Nutrilite Food Supplement contains no substance or material, or combination of substances or materials, harmful or deleterious in any manner whatsoever to human users thereof."

The Court will also recall their direct admissions that the vitamins and minerals contained in Nutrilite are beneficial for vitamin and mineral diseases, so I contend that they have
1096 admitted that it is not harmful, but it is admitted that they are directly beneficial.

I call the Court's attention also to paragraph 6 of the complaint where they admit that on 5 December 1946 they received copies of this pamphlet, "How to Get Well and Stay Well," which was involved in the criminal case out in California. They received those on 5 December 1946, but it was not until 15 September 1948, 22 months later, that they indicted us—had us indicted—a long time, indicating no emergency existed whatever.

I also call the attention of the Court to their direct admission that following this hearing which preceded the criminal indictment in July 1947 that we went to the chief of their Los Angeles station—this is paragraph 9—and told him that we knew he was interrogating our distributors and consumers and asked him about it, and they admitted that we went there and asked him about it. And our proof showed that the investigation was routine, but the important thing is this, and they admit this:

> "Plaintiff stated to said chief that should any question arise at any time in the future concerning the alleged misbranding of any product distributed by plaintiff or in connection with any phase of plaintiff's business or operations, that said Food
> 1097 and Drug Administration should notify plaintiff thereof immediately and that upon such notification plaintiff would do its utmost to comply with the views of the Food and Drug Administration."

This certainly shows our good faith all the way along.

Then in paragraph 11 they admit the filing of the 10 libel seizure actions, admit that they are going to file more, admit that they involve the same issue or the identical issues, that no separate issues required a filing of more actions.

They admit in paragraph 13 that they have caused embargoes to be placed on plaintiff's products in New York, New Jersey, Washington, Florida, and various other localities in the United States.

They admit in paragraph 16 that there is no provision of law under which the plaintiff can be reimbursed for the losses incurred through these libel actions, because we can't get our damages back for our damage to good will or anything else in any way.

Finally, in paragraph 18(a) they admitted that twice prior to the decision by the Administrator we asked him to give us a hearing and told him if he did give us a hearing, we would show that the Food and Drug people had absolutely no grounds whatever to

say that our labeling was misleading in any respect. We told him that.

He was further advised that the consequences of an
1098 erroneous decision would be that plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by defendants prior to any possible opportunity plaintiff might have to defend itself against said erroneous decision.

We also allege, and they admit, that he twice denied our request for hearing.

There are other admissions, but I think those are the most important ones in the complaint. I would like to say just a word before I get into my main argument on the oppressive conduct issue by the witnesses. You saw plaintiff's witnesses. We offered two. They will probably say that we had a long list of them in our reply to interrogatories. That whole long list was sitting in the court house, and I think the Court will not infer that our failure to call them was because they would have testified against us.

The Court knows we shortened our case because we did not feel it was necessary to call this multitude of witnesses whom we had here.

Dr. Casselberry: I submit that Dr. Casselberry was an honest, straight-forward witness who told the truth, and at least, beyond any question, demonstrated how hard the plaintiff worked to make this pamphlet truthful in every possible respect. And he also said that any time they found anything out that anybody had
1099 any doubt about something, or as they learned more, they tried to change statements, they tried to be absolutely truthful and honest at all times.

And he also described in detail how when they questioned pages 37 through 58 they took them out and their attorney wrote them a letter and said, "If you have got any questions about us, at any time, let us know and we will try to correct it." But did they do it?

Oh, no, they turned right around and condemned those 36 pages.

Dr. Myers, from Baltimore: I will have to call him the Baltimore Myers because they went and got themselves a Myers from Washington. Dr. John Myers was a specialist in this field. He lives it, works it, all his life since he got out of medical school he specialized. He talks about actual patients he treats and about the developments in this field. There can be no doubt but what Dr. Myers was honest, sincere, trying to tell this Court the exact truth about a subject which he literally lives and knows.

Lee J. Myers, the attorney who testified here—

JUDGE CLARK: There are three Myerses in this case?

Mr. RHYNE: Yes, your Honor.

(continuing)—by deposition: By their own admission which they thought we would never see, Lee Myers is one of the outstanding food and drug specialists in the United States. They say he
1100 is an astute attorney, a specialist in Food and Drug cases. He described how carefully this pamphlet was prepared. So I say that on the testimony of Dr. Myers and Lee Myers and Dr. Casselberry, our honesty, sincerety, and good faith are proved beyond any possible shadow of doubt.

Then we get off on the deposition of Dr. Truesdail, who runs a laboratory, whose business it is to analyze vitamins and minerals, and whose business it is to know whether or not they deteriorate at all. He tells about the advice he gives to the people he represents, that after a period of time they do deteriorate.

And, of course, you noticed that Dr. Nelson picked out a few and said they wouldn't deteriorate, but he didn't cover them all, not at all. All we say is that this product would deteriorate below the representations made on this label and we couldn't sell it. It would become unsalable. We don't say it is completely destroyed.

Then the great silent witness for the plaintiff was this Clarkfield, Minnesota, file prepared by their own inspectors, the only investigation that has been made by the Government of the U. S. to find out what users and consumers thought about our pamphlet, and what did they all say? They said it had never been represented as a cure. They never thought it would cure anything.

Then, the defendants' witnesses: they offered nine witnesses
1101 as compared to our four. Seven of them testified here.

Dr. Dunbar's testimony was typical of the arbitrary conduct that preceded the decisions in this case. He said he only read part of it, that it came to him through a Mr. Murray who was planning a multiple seizure program. And Mr. Murray is the author of that famous pressure memorandum which Mr. Larrick very reluctantly admitted is still true, after trying to say that it was never sent out. But the facts are in the record that he admitted—

JUDGE CLARK: He said he didn't think it had been sent out. He couldn't positively of his own knowledge say if it had, and he said Mr. Murray was sitting here in the court room.

Mr. RHYNE: Yes, sir; and they didn't put Mr. Murray on the stand.

And Mr. Crawford: Mr. Crawford was the scanner par excellence. He said, "I scanned the first 36 pages." And two or three times he almost slipped and said he read them. Every time he almost slipped he suddenly remembered that Mr. Larrick came along and condemned those and if he said he read them, he knew the position Mr. Larrick would be in.

The Court itself asked him a question: "You read these?" He said, "Yes—oh, no, I scanned it." He did the same thing when I took his deposition.

Mr. Larrick: How in the world could Mr. Larrick have
1102 answered my question about their threat to put our Seattle distributor in jail over the New Year's holiday if he didn't check the Seattle, Washington, file? And he said he had never seen the report of their inspector on that seizure. The only report from which he could get the information to respond to our interrogatory was this inspector's report.

Mr. Larrick put on a demonstration of trying to shake every word and every syllable and everything that he could in those first 36 pages to show that the great scanner, Mr. Crawford, just didn't read them. He put all his 26 years of denunciation of labeling into his attempt, and I submit that it was absolutely futile, and that after his other testimony and his wiggling about why they said this about Dr. Dunbar not having seen the complaints, that it was an afterthought, more than anything else. And, of course, he talked about complaints, but not one iota of evidence was ever offered on this witness stand that they ever received one—even one—complaint from anyone, not even one.

Then we come to Dr. Jeghers: Dr. Jeghers lost his usefulness to them when he agreed that Dr. Wilder of the Mayo Clinic—

JUDGE GOLDSBOROUGH: He did what?

Mr. RHYNE: He agreed with Dr. Wilder of the Mayo Clinic on many of the things in this chart, where Dr. Wilder was talking about vitamins and minerals.

1103 So they needed someone else, because also he didn't agree with Dr. Butz on all the things he said in his famous finding of fact of September 30. So they sent to Cincinnati for Dr. Blenkenhorn. It is not much further to Cincinnati than it is to San Antonio, Texas; and I submit that this was a great blunder for the defendants, because after they put this man on the stand, he said he couldn't understand what Dr. Butz had written. So they took him off in great consternation, to say the least.

Then we come to Dr. Walter K. Myers. The thing that struck me is Dr. Myers sat up there and thought this was awfully funny, all this that Mr. Goodrich had told him. It was obvious he was testifying about what Mr. Goodrich had told him, rather than the evidence in this case. This Dr. Myers wasn't a board member. You remember they made such a point about our Dr. Myers not being a board member. Their Dr. Myers wasn't a board member, either.

So it seems to fall kind of flat. And I say that if he was a board member—they certainly would have asked him.

And he was going to show how funny this was, so he took iron as an illustration. And he went a little too far, he exaggerated a little too much, because he didn't then try to—to cover himself up he had to admit something that I didn't think any doctor on earth would admit: that he didn't know the USP dose of iron.

1104 This Dr. Myers obviously had never used vitamins and minerals in his practice. He never said that he had used them on any patient. I don't know how they got him here. They got him here in a hurry, but at least they talked to him. They didn't get a chance to talk to Blenkenhorn. They got him here in a hurry from Cincinnati; but, brother, they talked to Dr. Myers. He was willing to go right through Dr. Butz' thing and say Dr. Butz was right on this and right on that. And when I asked him about a few of them, he hedged and he hawed. And to me it was obvious enough that it would be useless to go any farther with him because the fellow wouldn't be intellectually honest with me.

Then we come to Dr. Elmer Nelson, the man who filed an affidavit in this case in support of their motion to dis iss—under oath—saying that vitamin K had no value in human nutrition. And you saw him squirm and twist on the stand after I first asked him: "Does it have?" And he said: "Yes, it is the most irrefutable fact in the whole field of vitamins and minerals." And I think from that point on that anything that Dr. Elmer Nelson said—he was their great man—he was their clean-up hitter, he was the one who was going to slap down everything that our witnesses had said that these MDs wouldn't say.

I think that the same rule ought to be applied to him that is applied to a witness when you are instructing a jury
1105 that, if he has lied about a material point, his entire testimony is to be disregarded. And I think his should be disregarded, because he talks about soils and minerals. And what about the great Dr. Albrecht out in Missouri? He said, "Oh, I disagree with him"—the world's foremost authority.

He talked about soils. They didn't qualify him on soils at all, but I think that is a good indication as to Dr. Nelson.

I think another thing that was most significant about Dr. Nelson was that none of the defendants in this case ever relied upon him, because none of them ever called him. They didn't think anything of him either.

Then we have Mr. Kingsley's deposition, Mr. Kingsley, the expert on propaganda, whose answer was most frequently: "I don't know; I am not sure." He wasn't sure what he read, which of the pamphlets he read. The only thing he was positive of was that he had no complaints, that he had no facts showing injury, and that he knew we requested a hearing. He didn't know anything else.

I submit his testimony is absolutely worthless, and I think the inference you can draw from his deposition is that if he could have appeared on this stand in person, and the Court could have gotten one good look at him, they would have realized how arbitrary
1106 and capricious he was, as his own deposition actually shows.

Then the great Dr. Butz:

JUDGE CLARK: The great who?

Mr. RHYNE: The great Dr. Robert C. Butz, whom they were afraid to call here. I say, if you will read Dr. Butz' deposition you will see why they were afraid, you will see why we went to the Supreme Court of the U. S. on a writ of prohibition in this case, because after I took Dr. Butz' deposition and they saw he had broken down completely on them, they decided they had to take desperate action to try to avoid a trial in that case.

They knew they could never go to trial with that man, and I knew when I left there that day you could see from his deposition they were going to fire him, because it is obvious from his deposition. I sat there with a list of things that were in our book and in the medical books, and he had been boned up on this thing. And every time he would miss one I would check on him. And finally he said, "You read them over and I will say Yes or No."

Then Mr. Goodrich got awfully excited and objected entirely. He said, "I will object to this whole line of interrogation on the ground that it is irrelevant to the case before the Court and is an effort to interrogate an expert employed by the Government on general medicine." He tried to stop the whole thing.

1107 Then another very significant thing is he named a bunch of doctors over in the Food and Drug Administration—Dr. Campbell, Dr. Weinstein, Dr. Granger, Dr. E. E. Nelson—that he talked to. Did any of them testify? If they had, anybody who knew anything about vitamins and minerals in the entire Food and Drug Administration—don't think they wouldn't have put them on the stand here after their other three doctors broke down so completely.

So I think this: As you can see from the thing that we have attached, the analysis to our brief, that Dr. Butz—he would—was trying so hard to remember what he had just read in the books, and he would go along with, and then he would suddenly realize he had to get back.

Then Mr. Kleinfeld took him on a lot of long, leading questions and tried to bring him back to his thing. And I took him again, and he went back the other way. I mean it was the most amazing performance, as you can see from his deposition. They just couldn't possibly call that fellow and use him, and that is the reason he wasn't here.

Then what does Dr. Dunbar say? "Sure, I knew he specialized in psychiatry." They knew that Dr. Butz wasn't qualified in this field, and I think it is a fair inference from the evidence that they not only knew that he wasn't qualified, but they knew that if they

wanted to really get somebody to agree to all this erroneous
1108 information that he was a great guy to do it because he didn't know anything about the subject. And they know him better than anybody else.

Now, I am not going to say much more about the witnesses and their testimony. I would like to just say a word now about this testimony as applied to the case. As I have said, I think our good faith has been demonstrated beyond question and that the pamphlet is not and never has been misleading, to the injury or damage of any purchaser or consumer—and they had no information on that subject whatever—and that it was carefully prepared with scientific and legal aid.

We have shown that between the time they filed their first seizure action and December, when we filed this action, our sales—not our profits—dropped $100,000 a month. And, of course, when we secured the restraining order, they went up a little bit—but not too much.

They said that their sole objection is to our pamphlet, but you have two of them who didn't read all of it, you have one of them who is not sure what he read. You have the fact that they had no complaints or facts on injury whatever. They all admitted that.

And I submit if they had one complaint—just one complaint in their file—they would have produced it here; sure they would
1109 have. And then they ignored their own investigation and their own inspector who told the truth about it. And their failure to look at their files is arbitrary action in itself.

When they turned on our first 36 pages after we had discontinued 37 through 58, that reveals more than anything on earth just what they had in mind for us: they wanted to smash us, to put us out of business completely and forever.

Another very significant thing is that not a single witness for the defendants, not a single one of the defendants—Dr. Butz, none of them—made any analysis of the base of Nutrilite. The base of Nutrilite is the great thing in it. It is the thing that distinguishes it from all vitamin and mineral products. This is concentrated down to 6 pounds from 1,000, and that is the secret of Nutrilite. But did they make an analysis of it? No. They condemned it without trying to make an analysis.

Dr. Myers, their witness, admitted that there was a lot of information about trace minerals and vitamins. Our Dr. Myers told about the $500,000 that Dr. McCollom has spent to study and isolate those. But did the defendants even attempt to find out what was in that base before they made their decisions, or after, at any time? No, they didn't, and they admitted it.

I think that without trying to follow any detailed logical
1110 analysis of each little point on what they did before their decisions that pretty well touches the highlights. We have covered it thoroughly in our brief, and I won't take up too much time on that.

Then we come to the action after they made their decision. You have the 10 actions involving the same libel. I don't think I need to go into that. It is so obvious.

JUDGE CLARK: You have consumed 25 minutes, Mr. Rhyne. I don't know how you are going to divide up your time. You may divide it any way you please, up to an hour.

Mr. RHYNE: I am going to finish in about five minutes. I appreciate your telling me.

They concealed the fact that the first three decisions were absolutely unlawful; and the very language of the act itself, until January 17, 1949, when they had to reveal it in this action. And Judge Pine very promptly held that all those decisions were unlawful. And it i very significant that each one of them wanted to take their swing at us over there.

It started out with Mr. Crawford. Then they took Mr. Larrick, and then Dr. Dunbar. It seems to me that ordinarily the thing would have gone back to the first man who considered it, rather than let each one of them take a crack at us.

Then the thing that impresses you about the seizure actions
1111 is how coldly they calculated the filing of them so as to do the most damage from the viewpoint of publicity, court costs, counsel costs, and all the other costs in defending.

They go way out to the Pacific Coast, up in New York, Florida, out in the Mid West, coldly calculated to hurt us most and cost us the most. And Mr. Larrick admitted they were going to keep right on making seizures, that all the inspectors throughout the country knew it.

And then there is the famous pressure memorandum, which he admits is true and which to me proves beyond any shadow of doubt the arbitrary and capricious nature of what the defendants did and what they had in mind for us.

Now, on the law on arbitrary and capricious conduct, we have the National Remedy case in our own Court of Appeals, which is the only case in the United States involving multiple seizures of a drug or food product. And there in that decision, which we have cited in our brief, and which is in 5 Federal Second 1066, decided June 1, 1931, our own Court of Appeals had this to say:

"Appellant does not seek to restrain appellees from obtaining by the due and proper method provided by law, a decision upon the disputed questions of law and fact involved, but

merely wants to prevent irreparable injury to itself arising out of the multiplicity of such libels in widely separated jurisdictions.

1112 "Appellant has no plain, adequate and complete remedy at law, and its property, business, and good will will be ruined and destroyed, unless relief is granted herein."

In another part of the case:

"In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect, deprive appellant of its property through the destruction of its business before the issues involved would be determined by the Court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due processes of law."

We have cited a lot of other cases in our brief on the fact that the courts will always grant injunctive relief against a multiplicity of action.

Thank you.

1113 ARGUMENT OF E. J. BRADLEY

Mr. BRADLEY: My constitutional argument will be brief and I will only cover the salient points. I should like to state those points to the Court first so they can best follow my argument:

First, that the due process clause of the Fifth Amendment requires that in the absence of any emergency or of a situation of compelling public interest requiring immediate action, no person shall be deprived of his property by governmental action without first being afforded an opportunity to be heard:

Second, that in this particular case the evidence clearly shows that no emergency situation existed which justifies the defendant's summary action:

Third, that the particular provision of the statute under which the defendants have acted, Section 304(a), does not restrict the powers granted to it to cases of emergency or situations of compelling public interest requiring immediate action, and because it does not so restrict those powers, it is unconstitutional as applied to the facts of this case:

Fourth, that the administrative officials who made the decisions which injured us, gave no indication at any time that they even felt that an emergency situation existed:

1114 Fifth, that the trial of a libel action affords us no remedy to recoup our losses, so that the initial action of the defendants in seizing our product was an irremediable loss.

As to the first point, the Fifth Amendment to the Constitution commands that in the absence of an emergency no person shall be deprived of his property by governmental action without a hearing except in cases of emergency. That is, by governmental action. I think the principle is so axiomatic that it would be useless to cite the authorities in support of it, but I would like to state a summary of the law which appears in Dodd's "Cases on Constitutional Law."

Mr. Dodd says as follows: "Where immediate action is necessary in the public interest, it is obvious that the parties cannot be heard before action is taken. Where immediate action is not necessary, a hearing before action should clearly not be necessary for the action itself leads to no irreparable injury but leaves a later remedy which adequately protects all the rights of the party. Where the initial action will itself lead to an irreparable injury, there should be an opportunity to be heard in advance of action except where a great public interest requires immediate action. Otherwise the remedy is not unlike that of a new trial in a capital case after the execution of the accused."

Now as to the emergency, we urge that the record in this
1115 case clearly shows that no emergency existed to justify their summary action. Each of the four administrators who made his decision of probable cause has admitted that he had no facts whatsoever before him to indicate that any of the public was being injured by the use of Nutrilite. In addition, the very conduct of the defendants in this case shows that they felt that no emergency existed. The plaintiff's product is sold all over the country. In the period from October 1948, the first seizure, until they were enjoined in this action, the product was seized in only seven states. Any alleged danger to the health of the public went completely unabated by their own choice in the rest of the country. I think that is a complete indication that even the defendants felt that no emergency existed.

Even in the areas where the product was seized, subsequent shipments were allowed to continue and reach the purchasers for their consumption. I think Justice Jackson in the Supreme Court, when the defendants sought to obtain a writ of prohibition against this Court, adequately pointed out to the defendants the absence of any emergency. He asked:

> "What harm can that do? It is perfectly harmless stuff except it costs somebody some money. There have been nine years and nobody has done anything about it. . . ."

1116 And finally to show the absence of an emergency, counsel for the defendants have several times admitted to this Court that the question of emergency is completely irrelevant under the statute. That, in itself, I am sure, is a direct admission that no emergency exists.

The provision of the statute under which defendants acted does not restrict the powers granted to it—multiple seizures—to cases of emergency, and we urge that for that reason it is unconstitutional. The particular provision of Section 304(a) under which they acted is as follows—they may make and did make multiple seizures—

> "When the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer."

We urge that there is nothing in those words misleading to the injury or damage of the purchaser or consumer to indicate that they apply only to an emergency situation. That they do apply to emergency is highly questionable in view of the fact that in the preceding part of the section, Congress has already provided for multiple seizures in cases where the product is dangerous to health. Clearly there a person would not have the right to have a hearing before such seizures. In the case of a product which is
1117 dangerous to the public health, there is a clear case of emergency and in our case, of course, the product is admittedly harmless and beneficial.

But assuming it does, assuming those words do include emergency situations, we urge they also include non-emergency situations, because Congress used the words "injury or damage to the purchaser." Damage to the purchaser obviously means financial loss as opposed to physical injury. It can have no other meaning.

But we urge that the alleged financial loss of a few dollars to a purchaser has never constituted an emergency situation under the doctrine of due process.

In the case of the Sentell Company—Sentell vs. New Orleans and Carrolton Railroad at 166 U. S. 698, the Supreme Court had this to say about emergency under the due process clause:

> "The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of the action and process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such, as to render judicial inquiry and consideration impracticable."

Now the Court knows the long line of decisions of the Supreme Court and other courts which indicate what that type
1118 of emergency means. The historic examples are a spreading conflagration, endangering a town or group of buildings; an actually adulterated or dangerous product which can be summarily destroyed before it reaches the public; an example of diseased cattle

which can be destroyed before they spread disease to the population. Those situations are clearly emergency situations within that definition laid down by the Supreme Court and obviously in every emergency situation before the courts there has been a reason for denying a hearing. Immediate action was necessary. There was no time for judicial process.

Under this statute the defendants can exercise their powers of multiple seizures where no immediate action is necessary and they did so in this case. They have admitted that there were no facts showing any injury to the public. I think the case of Jenks vs. Stump at 41 Colorado 281 is directly in point with our case. That case involved a state statute which allowed any officer of a humane society to seize any abandoned or cruelly treated animal and to hold them until the expenses were paid. The statute didn't provide for a hearing.

The plaintiff brought an action to recover his cows, which had been seized under the statute, and the court said as follows:

1119 "The distinction in all such cases seems to be whether public necessity demands summary action and, when it does not, notice must be given to the owner of the property and an opportunity be given to determine the truth of the allegations in each case, before the same is taken . . . It does not appear from the record that any public necessity existed, nor that the public safety was in any manner conserved by taking these animals from the range or that any exigency existed which required them to be taken without notice to the owner and a hearing to determine whether or not they were abandoned or neglected, nor does the statute purport to restrict the powers granted to cases of emergency.

"At the trial there was a verdict for the plaintiff .... based upon the ruling that the statute is unconstitutional. We think the judgment is correct and it is affirmed."

We urged that that case falls squarely within the facts of this case. That the particular provision of Section 304, under which we allege the defendants injured us, does not restrict the power to emergency situations and yet it denies a hearing. In that it allows the defendants to act in non-emergency situations we urge it is unconstitutional.

The Supreme Court made a similar decision in a case in-
1120 volving an emergency situation and failed to distinguish between procedures which are, shall we say, blessed by due process and those which are not. In Missouri Pacific Railroad Company vs. The State of Nebraska at 217 U. S. 196, there was a statute which allowed or required railroad companies to build spurs

or side tracks into grain companies located adjacent to the tracks upon the mere demand of the grain companies. The Supreme Court stated:

> "This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act . . . We are of the opinion that this statute is unconstitutional in its application to the present case."

The question has been raised: Assuming that the particular provision of Section 304(a) allows the denial of a hearing in both emergency and non-emergency situations, suppose the defendants in this case acted in what they thought was an emergency situation. First let's look at what the defendants actually did. Let's look at their findings:

> "Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated there-
> 1121 under, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer."

They did not even specify whether the consumer was being injured or whether he was suffering financial damage. Since they did not specify what was the basis of their action this Court must look to the record to see if an emergency actually existed. If the Court finds no emergency in the record, then they should find the statute unconstitutional under the facts in this case.

The defendants have often urged that the trial of libel actions will give us adequate hearing. We submit that it does not, because even if we are proved correct in the libel actions, there is no way on earth where we can recoup the losses suffered in the form of the approximatly $6,000 worth of product that has been seized and in the form of the up to $100,000 a month worth of business which we have lost. The statute doesn't provide for our recouping that loss if we win in the libels and there is no principle of law which allows us to recover. It is gone. So we have no recovery whatsoever.

> 1122 It has been often pointed out in this case that the words "without hearing"—

JUDGE CLARK: There is nothing to hinder them from going ahead and, as soon as this injunction, which is in effect now, passes out of effect, there is nothing to hinder them, even if they lose those libel actions, from going ahead and starting 40 more.

Mr. BRADLEY: Any number they wish, your Honor. In conclusion, I would like to say that it has been pointed out several times in this case that the words "without hearing" were slipped into this statute by the conference committee without the knowledge of the Congress at large.

The question remains: What is the effect of having those words put in there? We urge that the effect of it is this: that if the words were not in the statute, then this Court could, as other courts have done in the past, read into the statute the requirement of a hearing whereunder the facts of this case no emergency is shown to exist.

Since this Court cannot do that because the statute specifically denies a hearing, then we urge the statute must be held to be unconstitutional as applied to this case where no emergency is shown to exist.

Finally, again I say on the question of whether or not this statute restricts itself to emergency situations, the defendants have
1123 already admitted that the question of emergency is completely immaterial under the statute. There could be no clearer admission of the fact that the statute doesn't restrict itself to emergency situations.

JUDGE CLARK: The Court will take a recess for five minutes.

(Whereupon a short recess was taken.)

1124 JUDGE CLARK: Mr. Kleinfeld, you have an hour. You can divide it in any way you please. It will be necessary for the Court to take a recess a twelve o'clock. We would ordinarily be glad to permit the argument to continue when it is concluded, but one of the members of the Court is under the necessity of taking a recess at twelve o'clock.

ARGUMENT ON BEHALF OF THE DEFENDANTS

Mr. KLEINFELD: May it please the Court, I think it may help in deciding what is really at issue in this case to take a brief look at the format of the statute.

Now Section 502(a) of the act says, "a drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular."

Under Section 302(a) the government may seek to enjoin the illegal distribution of misbranded drugs in interstate commerce and in the recent past the government has instituted an injunction suit

in the Southern District of California attempting to enjoin the plaintiff here from distributing in interstate commerce Nutrilite with false and misleading therapeutic claims.

Now when that suit comes to trial, as eventually it must, the burden will then be on the government to prove by a preponderance of evidence to that court that the labeling of Nutrilite does in fact contain false or misleading claims. The administrative de-
1125 terminations made here will have absolutely no effect in that case. They will be neither relevant nor material. The government will have to prove its case by a preponderance of evidence, that this labeling, these booklets, do in fact contain false or misleading claims.

There is one other court before which the fundamental issue may be tried, the fundamental issue being whether, in fact, this labeling is true or is not true, whether, in fact, it makes false or misleading claims or whether it does not. When and if these seizure actions are finally at long last consolidated and tried, either in one of those districts where one of the actions was started or in a district of reasonable proximity to the plaintiff's home district, again there the government will have the burden in that seizure case—in those consolidated seizure cases—of proving by a preponderance of evidence that the labeling of Nutrilite does, in fact, contain false or misleading claims.

There, too, the administrative determinations made by the Administrator here will have no relevancy and no materiality. There, as in any other lawsuit, the government will have to prove its case—it has the burden of proving—by a preponderance of the evidence that these claims are, in fact, false or misleading. So the fundamental issue, which will not be settled by this case, no matter who wins or who loses, will ultimately be settled either by the
1126 injunction court in California or by a court before which a seizure action is tried.

When the government tries either one of those cases and loses, by the principle of estoppel by judgment or res judicata, the government will have lost and may make no further seizures, but in those actions the administrative determination has no relevancy.

Now we turn to Section 304 of the act and see what it says with respect to multiple seizures. First, the Section 304(a) provides that an article or drug that is adulterated or misbranded may be seized and condemned. Subsequently it says this: It provides that more than one seizure action may be instituted:

> "when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of

the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Now this is a preliminary administrative determination. This settles only one thing and that is whether more than one seizure action may be instituted. It does not decide, of course, the merits of the controversy. Congress has merely said that if the Administrator believes he has the probable cause specified here, in that case the Executive Departments of the government may institute libel actions. They may not themselves seize the product. They may go to courts, file complaints, the courts may then direct the various marshals to seize the products, take them into custody, and ultimately have a trial to decide whether the government is right or whether the government is wrong. So to finish this one point: It is quite clear, of course—I think no one disputes it—that as far as this present trial is concerned, it does not bear at all on the fundamental issue which must ultimately be decided by a court or a court and jury, as to whether this labeling does or does not make false or misleading claims.

1127

That the government must prove some day, and we believe they will. So the issue here involved, present in this case, other than the constitutional issue, is not whether the labeling, is not whether these pamphlets are false or misleading, but whether the defendants here, in making that preliminary administrative determination acted arbitrarily or illegally in making such determinaton.

This Court realizes, of course, much better than we, that that does not mean whether this Court believes that the defendants were right or wrong. It does not mean whether this Court would, if it were the Administrator, have reached such a determination. It means, of course, what the courts have settled for many, many years. It means whether the Administrator acted really illegally, so whimsically, so arbitrarily, so capriciously, that no rational person could have arrived at that determination.

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That is the fundamental issue before this Court, aside from the constitutional question. The Court, it seems to me, must sit down and decide: "You made this administrative determination. The statute says you may do so. The statute doesn't say you may act other than as a reasonable governmental official."

The Court must then decide whether these defendants apparently proceeding according to what Congress has said they may do, whether these defendants acted so arbitrarily, so capriciously, so whimsically, that a rational person just couldn't have reached that conclusion. That is the issue in this case.

Now, of course, this Court can read the label as well as anyone—probably much better. But again, I respectfully suggest that even

though the Court may think, from a reading of the label, that it—
the Court—would probably not have reached the same con-
1129 clusion as the Administrator or the other defendants, that is
a far cry from saying that the Administrator in performing his functions, acted irrationally, acted illegally, acted arbitrarily, and acted capriciously. It is a quite different proposition.

Now on the constitutional question: that was argued at some length before your Honors in connection with the defendants' motion to dismiss the amended complaint. We submitted a lengthy brief on that but I just want to speak about three or four minutes on that, because that is so much a question of law that I believe your Honors will probably decide it on the briefs.

There are only a few things I want to point out in connection with that issue. It is very important, it seems to me, to comprehend that the multiple seizure provisions of this act do not add to the power of the executive branch of the government.

Let us assume that this act was absolutely silent with respect to multiple seizures as was the predecessor 1906 act. What would the situation be?

The law would then say, as it said in the 1906 statute: "If a drug is misbranded or adulterated and it is shipped in interstate commerce, it may be seized and condemned."

Now, every shipment of such a product would be, at least in the
opinion of the enforcement officials of the government, an
1130 illegal, a contraband shipment. It would be no different from
the situation where John Doe committed a crime in District A, B, through Z. If John Doe commits such a crime, he may be prosecuted in every district where he committed that crime. The situation would then be, if this act did not have multiple seizure provisions, that if a drug distributor transmitted in interstate commerce ten different shipments, which were believed to be in violation of the law, that all those ten shipments, or any shipments deemed to be illicit and contraband, all those shipments should be seized and condemned.

Now, when the 1938 act was passed, Congress said:

> "We want to put limitations on that power. We don't have to but we do. Now the limitation we want to put is this: We at least want the Federal Security Administrator to sit down and determine whether he has probable cause to believe, from facts found by him or subordinate officials, that the labeling involved in a misbranding action—not an adulteration action—is misleading in a material respect to the injury or damage of the purchaser or consumer. At least we want to make the officials charged with the administration of this statute sit down, think about it, and determine whether there is such

probable cause in their opinion, before we will permit more than one action to be started."

That is a restriction, not a conferring of power. Other-
1131 wise, as I have said, every single shipment would be an illicit shipment—and it has been held, of course, that any product which violates the act is contraband, then any such shipment, whether there were a thousand of them, could be seized.

So Congress has delimited the powers of the executive branch of the government, but still every single shipment, if it violates the law, if the executive branch of the government in charge of the administration of the statute feels has violated the law, every such shipment may be proceeded against.

Now in connection with the constitutional question, also, there is no limitation in the statute with respect to adulteration. There is no provision at all limiting the right to make muliple seizures where the charge is adulteration. The statute is silent on that. Now adulteration doesn't necessarily mean danger. It doesn't even necessarily mean filth. It means danger, it means filth, it means decomposition. It may even mean economic adulteration where a product is made to appear better than it is.

In all those situations Congress has made no limitation on making more than one seizure. So if this provision is unconstitutional because Congress delimits the power of the executive branch
1132 of the government with respect to misbranding, then necessarily it follows, I suppose, that it is unconstitutional with respect to adulterated products.

JUDGE CLARK: That doesn't follow at all, Mr. Kleinfeld. There is a specific provision in that statute that the Court can declare one section of the statute unconstitutional without invalidating any other in a designated paragraph.

Mr. KLEINFELD: I only mean, your Honor, that if it is unconstitutional to seize a product more than once, even though it may not kill anybody, I suppose it is equally unconstitutional to seize a product which contains some decomposition but which likewise wouldn't kill anybody.

JUDGE CLARK: That question troubled me—whether, if the Court held part of the Statute to be unconstitutional, it would have to declare the whole statute unconstitutional, but after reading that paragraph again, we discovered there was a saving clause.

Mr. KLEINFELD: I only wanted to point out that adulteration, in a statute which has its own glossary, doesn't mean danger or even filth. We urge therefore that the beginning of lawsuits such as is involved in the making of multiple seizures, since there must be a trial on the merits eventually, where the government must prove its case in such preliminary determinations, such preliminary actions, involve no substantial constitutional issue.

Counsel for plaintiff has discussed a number of cases.
1133 What those cases involve are so-called executive seizures, where a state passes a law saying that if a local state inspector believes that an animal is diseased he may forthwith destroy it, then later perhaps litigate it. That, of course, is not the situation here.

We go to court, we file a complaint, a libel; the Court then directs the marshal to seize the product, and a trial on the merits is had. So all these cases involving so-called executive seizures are not in point because our Act just doesn't provide or permit executive seizures.

National Remedy Company against Hyde, mentioned by plaintiff, was decided under the 1906 act and not under this statute. In that case the government had started an action against a drug product whose labeling it thought was misbranded. The government lost. Six years passed and then the government started multiple seizures. The Court of Appeals held that it needed to go no further than use the principle of estoppel by judgment. The Court said, "You lose on this issue. You can't start any more suits." And the Court was right, if the issue is the same, of course.

If we sue Mytinger and Casselberry, Inc. and Nutrilite and lose in one of these libel courts or one of these injunction suit courts, we are through. We can't start any more libel suits; we can't start any more injunction suits. So in this case here, we haven't
1134 started a suit against the plaintiff which we have lost. We are trying to start suits. We are trying to get them to trial. There has been no trial. So on that issue alone, on that point alone, your Honors, I point out that National Remedy Company against Hyde is not pertinent to this issue.

We come then to the second issue of whether the defendants here acted arbitrarily, whether in reaching that preliminary determination they acted so arbitrarily, so capriciously, so whimsically, that the Court will say that a rational person just couldn't have arrived at that conclusion.

Let's discuss the evidence here. What was the evidence of the plaintiff? Essentially the plaintiff put on three witnesses: two witnesses, that is, and a deposition. We had Dr. Myers for the plaintiff: a medical doctor who uses vitamins exhaustively, who stated that in his opinion there was nothing in the booklets which was false or misleading. That was Dr. Myers' opinion. We are entitled to our opinions.

Then they had lawyer Myers who testified for the plaintiff, or whose deposition was put in, and lawyer Myers testified that in his opinion, there is nothing in the booklets that was false or misleading. That, too, is Mr. Myers' opinion.

Then we had Dr. Casselberry, the president of the plaintiff.

Dr. Casselberry is a Ph.D., the degree being not connected
1135 with any aspect of nutrition, and what did Dr. Casselberry say? Dr. Casselberry is the author of these pamphlets. What did he do in preparing these pamphlets? He is their fundamental witness. He says he looked through medical literature, he took excerpts from them. What else did he do? He was asked on direct examination on page 74 of the transcript, Mr. Rhyne asked him, "Doctor, what other assistance did you have other than legal, in writing this 58-page book? Answer: I derived much assistance from Mr. Rehnborg, who is the manufacturer of our product and, of course, from other experts like doctors and chemists, other people in the field."

Counsel for plaintiff was very careful not to ask who those doctors and chemists were. That is plural: doctors and chemists. "Of course," he said, "from other experts like doctors and chemists." No mention of who those doctors and chemists were. I might say this to digress for a moment.

Here is a man who is writing a book, discussing medical subjects, discussing diseases. He is putting out a product which is to be used by people suffering from various ailments whether they are minor ailments or whether they are serious ailments.

The plaintiff is putting out a drug product and is putting out labeling addressed to people who are suffering from disease. It seems to us, if the Court please, that a manufacturer of drug
1136 products, a manufacturer who puts out a piece of literature, at the very least naming various diseases, has some duty to the public other than to glance through medical books, glance through newspapers, and put out literature advocating the sale of that product.

So he said he got the assistance from experts like doctors and chemists, and he explained that is what he did: He went through the literature and he got this advice from experts like doctors and chemists. He later said, "The experts checked it for the facts in their field, friends and neighbors for the readability, and various assistants in the office for technical errors, spelling and such things."

That is the kind of advice he got.

Now in cross examination I asked him—I tried as best I could to get him to tell the Court—"What kind of medical, scientific or chemical advice did you get? Who are these people who advised you? You testified on the record that you did go to doctors and chemists. What are their names?"

I wanted to find out from him: before he put out a pamphlet like this, even discussing diseases, where did he go for advice. The question of good faith was brought into the case over our objection. Is it good faith for a man to put out a drug product, to put out literature describing the efficacy of a drug product, whether serious

or minor, to do all that without consulting some experts,
1137 without going to at least some authoritative sources, without going to newspapers, so I asked him again, "Did you get any medical or scientific advice?" and he squirmed: "Do you mean advice in writing or did I check with doctors?" and I kept on asking him: "From whom did you get advice?" He finally said that all the advice he got other than looking through the literature and talking to Mr. Rehnborg, whose qualifications he said he never checked—he feels it was all right to just take for granted what Mr. Rehnborg told him—all he did, in one instance, was have his secretary call a doctor on the phone and ask for one little piece of technical advice. Those are the doctors and the chemists whom Dr. Casselberry relied on.

Now, what is the scheme they have used? I think they themselves have shown the scheme they used in writing this literature. They go to whatever source they think will help them. They pick up an excerpt here and there. That, to them, is good faith. That apparently, to them, is showing that the Administrator acted arbitrarily when the Administrator thinks otherwise.

Let's go to The New York Times' article. Yesterday they said we had asked for what The New York Times said about WAC applicants failing to pass the physical test. They waived it triumphantly. They didn't give us The New York Times: They gave us the Los Angeles Times, which, in turn, was quoting from The New York Times.

1138 JUDGE CLARK: It is a copyrighted article from the New York Times.

Mr. KLEINFELD: Only part of it is contained here, your Honor.

I say, even if they had gone to the New York Times, should a man putting out a piece of scientific literature go to a newspaper and rely on that newspaper without going to the fundamental source?

I say that isn't good faith, and I say it doesn't bear on any alleged arbitrary conduct on the part of the defendants for them to say, "We went to the New York Times," let's say, "and the New York Times said this." Are newspapers infallible? I again say these people owe some duty to the public to tell the truth, and telling the truth isn't merely saying, "somebody told me that," or "I read it somewhere." That is not good faith, and that isn't the truth, certainly not in a field like this, designed to protect the public. So the Los Angeles Times, which quotes in part from the New York Times, makes certain statements which they think will help them.

Now, this statement in the Los Angeles Times is dated June 29. The first paragraph is identical with the New York Times we have here, which was put in evidence, of June 30, byline June 29. But

here are two paragraphs in the New York Times article, this
1139 copyrighted article, which wasn't in the Los Angeles article.

Look what it says:

"The next principal cause of women's rejections was gynecological and urinary disorders, accounting for 17.9 percent of rejections. Other cause in their order ran as follows: cardiovascular, 8.2 percent; eye condition, 7.9; overweight, 6.6; ear, nose and throat conditions, 5 percent; underweight, 4.7 percent" and so on.

This indicates that the rejections were not caused by these alleged vitamin deficiencies. That is in the New York Times publication. If they had even gone to the trouble to check the New York Times they would have seen that. They didn't. They take what the Los Angeles Times said about the New York Times.

I say they have a duty to do more than just collate little pieces of information from newspapers or even from obsolete medical literature and assume that they can safely rely on that and sell drugs to the public. That is not good faith of any character. They rely on this tear sheet from Dr. Royal S. Lee Foundation, with respect to a survey made by Pennsylvania State College.

Now, Dr. Royal S. Lee Foundation is not a foundation, and Dr. Royal S. Lee is not a doctor. As a matter of fact, he sells
1140 misbranded drugs in interstate commerce. He has been the subject of various litigation with the Government—I might say, most unsuccessfully.

JUDGE CLARK: That is outside the record and may be stricken.

Mr. KLEINFELD: But if you compare that tear sheet which they relied on with the actual booklet put out to show the results of that survey, which they should have done if they were acting in good faith to the public, it will be seen that they relied on something which isn't true.

Now, the fact that Dr. Royal S. Lee said it and they took it from Dr. Royal S. Lee doesn't indicate that it is true. It doesn't indicate that the plaintiff here acted in good faith. It certainly doesn't indicate that the defendants acted arbitrarily. Quite the contrary: it indicates that these booklets by the plaintiff were written, as the defendants claim they were written, haphazardly, searching through various obsolete medical literature, searching through newspapers, searching for various people who made statements, putting them all together, the result being, in the defendants' opinion, the making of definitely false and misleading claims.

If they wanted to rely on this Dr. Royal S. Lee, why didn't they bring him here? If they relied on really good medical literature

why didn't they bring the people here who wrote that litera-
1141 ture so we could cross examine them. If they relied on doc-
tors and chemists, as they said on cross examination, why didn't they bring them here? That would be evidence of good faith, that the defendants acted arbitrarily—not a tear sheet, not a news sheet from Dr. Royal S. Lee, not some excerpt pulled out of its context from an old and obsolete medical publication, if we can dignify it by that term. None of that was put in here.

We have those witnesses—a Dr. Myers, a Lawyer Myers, Dr. Casselberry. Does that testimony show that these defendants here acted arbitrarily? Does it tend to show that they acted capriciously, that they did anything other than what the statute permits them to do?

I urge that it certainly does not. It proves only one thing: that these three people believed, in their opinion, that the labeling is not false and misleading. That is a far cry, indeed, from showing that these Government officials acted outside the scope of their authority, but acted within their authority like reasonable human beings.

What about the defendants' testimony? We put on Dr. Dunbar, Commissioner of Food and Drugs. He has been with the Food and Drug Administration for 40 years. He testified that when he made his determination of probable cause he read parts of the pamphlet, he read Dr. Butz' medical findings. Subsequently, he read the entire
pamphlet. He pointed out in some detail his opinion as to
1142 portions of that booklet that were false or misleading.

Now, what in that indicates that Dr. Dunbar acted arbitrarily or illegally?

We put on Mr. Crawford, who testified that he had scanned through the first 36 pages, had read carefully the last pages of the testimonials on the 58-page booklet. He had considered it. He had read the entire pamphlet subsequently, he had relied for medical aspects on what Dr. Butz told him. He had considered all these, and he came to his administrative determination. What about that was arbitrary? He performed his function as he has always performed his function.

We put on Mr. Larrick, who, too, had been with the Food and Drug Administration for many, many years, had had tremendous experience in labeling. He had read the entire booklet in the medical aspects, he had relied on Dr. Butz. He had considered all those elements, he had determined that various parts, which he pointed out to the Court, were false and misleading. What was arbitrary about that?

Now, in arriving at this administrative determination, of course, there are always two aspects: the non-doctor, the Administrator, and the Commissioner, and the other defendants. They must look through the booklet and decide in their opinion what claims are made.

"In my opinion, does this booklet say that the product will
1143 help arthritis?" If they so determine that, since they are not medical doctors, they then go to their medical doctor and they say, "Doctor, will a product with these ingredients cure or treat or help arthritis?" If the doctor says, "The consensus of medical opinion is that it will not," on the basis of that, on the basis of their reading the pamphlet, on the basis of their experience in Food and Drug work, they then reach this determination of probable cause.

If they have done that, how can it be said that they acted arbitrarily, that they acted whimsically, that they acted irrationally, that no reasonable person could have arrived at that result? And that is the test in this case.

We believe that the defendants could have rested on that, because the statute permits that. We went further: We put on three medical doctors, connected in no way with the Food and Drug Administration, connected in no way with the Government. They certainly testified that various statements, various medical statements, contained in these booklets are untrue, are false or misleading, as did Dr. Nelson the Food and Drug vitamin expert.

Certainly, if Dr. Butz' medical finding needed any buttressing to show that they were not absolutely irrational, we had four witnesses who so testified.

And again I say: How can it be said, on the basis of the
1144 testimony by the administrative officials, on the basis of the testimony by the doctors whom we put on the stand, who are not connected with the Food and Drug Administration—how can it be said that these defendants acted either outside of the authority conferred upon them by law or acted as no reasonable person could have acted? It just cannot be said that anything in the record points to such a conclusion.

JUDGE CLARK: The Court will have to take a recess at this time, Mr. Kleinfeld. You have 26 minutes left, and Mr. Rhyne has 15.

MR. KLEINFELD: Thank you, sir.

(Whereupon at 12 noon the Court was recessed, to reconvene at 2:00 p.m.)

1145 AFTERNOON SESSION—(2:00 p.m.)

JUDGE CLARK: All right. Mr. Kleinfeld, you have 26 minutes left.

ARGUMENT ON BEHALF OF THE DEFENDANTS

(Resumed)

MR. KLEINFELD: May it please the Court, I just want to take about two more minutes before Mr. Goodrich goes on; also, at the peril, I admit, of being somewhat repetitious. I want ot make the

point again that the fundamental issue involved in the labeling of Nutrilite—and that is whether the claims made in the labeling are or are not false or misleading—will ultimately be settled and decided by either the Court in the injunction suit which we have instituted in this other District of California or will be decided by a court and a jury in the libel actions when they are brought on for trial. No matter what this Court decides, whether it is for the plaintiff or the defendant, and no matter if an appeal is taken to the Supreme Court, no matter what the Supreme Court decides, all that will ultimately be decided in the present litigation will be whether the defendants acted arbitrarily in making their determination of probable cause, upon the basis of which——

JUDGE CLARK: Suppose this Court and the Supreme Court would declare the act unconstitutional?

1146 Mr. KLEINFELD: If the multiple seizures proceedings are declared unconstitutional then we would be left with the first seizure action to try.

JUDGE GOLDSBOROUGH: How is that?

Mr. KLEINFELD: If this Court or the Supreme Court holds that the multiple seizure proceedings of the act are unconstitutional then the government will be left with the first seizure action to try—the very first action which we have instituted.

JUDGE GOLDSBOROUGH: You say if the Supreme Court finds that a hearing was necessary in a case of this character, and that therefore the act is unconstitutional, the matter wouldn't be finally disposed of?

Mr. KLEINFELD: The matter of whether we will make multiple seizures will be ultimately disposed of.

JUDGE GOLDSBOROUGH: That is not the only consideration. The consideration of whether you should have made the first seizure is involved.

Mr. KLEINFELD: I never for a moment believed—and I don't believe now—that that is an issue in this case. I don't believe this Court ever decided that before making any one seizure we had to have some sort of a hearing. I have been under the impression, as I believe the pleadings show, that what the plaintiff is asking this Court to do is:

1. Prevent the government from making more seizures; and

2. Perhaps to prevent the government from proceeding with
1147 the trial of anything other than the first seizure action, and the temporary injunction which this Court has granted against the defendant so provides.

So I say again, no matter what this Court decides, no matter what the Supreme Court decides, if an appeal is taken, the only result will be to enjoin or not to enjoin these defendants from mak-

ing more seizure actions and perhaps to prevent the defendants from continuing with the trial of any action other than the first seizure action.

That will have to be decided ultimately by a Court which has jurisdiction of the injunction suit which the government has started in the Southern District of California or by a court and a jury, if either side demands it, in the seizure suits if they are brought to trial.

JUDGE GOLDSBOROUGH: I think it is proper for me to say at this time that I don't take that view. I don't know how my brothers feel about it; but that is not my view.

JUDGE CLARK: It is not mine either.

Mr. KLEINFELD: All right. Now, I want to point out also that the issue as to arbitrariness involves—in any case that I have read where that issue is involved—means not whether the administrative officials acted erroneously. It means in no case that I have read whether the Court would, if it were the administrative official, have decided differently. It means only one thing: whether the
1148 administrative official acted illegally, acted capriciously, acted whimsically, acted as no rational person would act. If he didn't, he should not be enjoined and I know of no court which has enjoined them.

My last suggestion to the Court is this: that the burden of proof in this case is not on the defendants: It is on the plaintiff. It is on the plaintiff to prove and I urge it has not proved it by this record—the burden is on the plaintiff to prove that these defendants——

JUDGE GOLDSBOROUGH: To prove by a preponderance of the evidence.

Mr. KLEINFELD: To prove by a preponderance of the evidence. The burden is upon the plaintiff to prove, not to the defendant to disprove.

JUDGE GOLDSBOROUGH: I still say: to prove by a preponderance of the evidence.

Mr. KLEINFELD: It is up to the plaintiff to prove that the defendants acted beyond their authority in law, or in exercising their authority acted arbitrarily, capriciously, whimsically, acted as no rational personal would act.

JUDGE CLARK: The Court calls your attention to the fact that your time is limited. The rule about the burden of proof is that the burden of proof is sustained by a prima facie case. The burden of proof shifts. The burden of proof only means the responsi-
1149 bility for going forward with the evidence. The burden of proof shifts with the adverse party. The burden of proof sometimes shifts four of five times in a lawsuit.

Mr. KLEINFELD: Mr. Goodrich.

1150 ADDITIONAL ARGUMENT ON BEHALF OF THE DEFENDANTS

Mr. GOODRICH: I should first like to devote myself in the argument to the booklet, "How To Get Well and Stay Well," plaintiff's Exhibit No. 1, and plaintiff's Exhibit No. 3, plaintiff's Exhibit No. 1 being the 58-page booklet, plaintiff's Exhibit No. 3 being the 42-page booklet. The Court on several occasions has told counsel they have considered these booklets and that they have arrived at the conclusion that the booklets offer nothing in the way of cure, that the booklets only tell the purchaser that if he takes this product, he will be less likely to get disease.

We respectfully disagree with that view. The Administrator of the Federal Security Agency, the Commissioner of Food and Drugs, both concluded, as did the associate commissioner of Food and Drugs, and as did the assistant commissioner of Food and Drugs, concluded that this booklet offered much more and we respectfully urge your Honors to reexamine the booklet in the light of the testimony that has been given from this witness stand.

Let's turn first to the 58-page booklet—more specifically to pages 40 and following. On page 40 is a masterpiece of double talk. Nutrilite doesn't cure anything. Nutrilite simply puts back into
1151 the body those things of which the body is deficient, those things which cause disease, and the body returns to normal. The person is well again, he got well because he took Nutrilite, but Nutrilite doesn't cure anything.

That is ridiculous. Mytinger and Casselberry, Inc. are not selling $6,000,000 worth of vitamin preparations in a year's time curing nothing. Their own witness, Myers, said people don't take this for simple things: They take it for serious diseases. No one is going to pay $19.50 for one bottle of pills if it doesn't cure anything.

JUDGE GOLDSBOROUGH: Is there anything in the record about the $19.50?

Mr. GOODRICH: Yes, sir. The record is ample on that. $19.50 for one package.

JUDGE GOLDSBOROUGH: It must be in the pleadings then. I don't remember it being in the evidence.

Mr. GOODRICH: Dr. Dunbar has testified that the pills were sold at $200 per year, $19.50 per month. It may be denied by counsel, if he wishes, in his reply, but as I interpret the record——

JUDGE CLARK: $19.50 wasn't mentioned in the testimony while I was in the room and I think I have been here constantly since the start of the trial.

Mr. GOODRICH: I certainly agree that Your Honor has been here throughout the trial and if I am in error in my evaluation of
1152 the record, I am certain that counsel on the other side will point that out to the Court, but I believe that I am not. The

witness Myers certainly testified that no person would buy an expensive product of this kind unless for a serious condition. I will refer, your Honors, to page——

JUDGE GOLDSBOROUGH: I was talking about the $19.50. I don't remember any testimony about $19.50.

JUDGE CLARK: I well recall Dr. Myers' testimony, as to just what he said about it.

Mr. GOODRICH: The next point is: What is the meaning of these testimonials? The Court again has given us the benefit of its view that these testimonials are simply the story of what happened to one man. Dr. Casselberry testified that this entire book was written to advance the sales of Nutrilite, and had no other purpose, testifying, of course, to the obvious.

The use of testimonials in the merchandising of drugs is an old and time-honored practice. The medicine man had his people on the stand to get up and tell of their own experiences. Why? To make a more persuasive appeal, not for any other purpose. People logically would believe the experiences of a man who had been through it rather than—or more so—than the story of a clearly interested party, the merchandisers of Nutrilite.

What did the merchandisers of Nutrilite do about these tes-
1153 timonials? First, Dr. Casselberry tried his hand on a book.

He wrote one, "How To Get Well and Stay Well," he mentioned specifically the diseases. He got into trouble. He went to lawyer Myers. What was lawyer Myers' advice: "Take out the names of the diseases. Take them out. Talk about the symptoms. Talk about the symptoms." Why? To do just what they are trying to do in this case: pull the wool over the Court's eyes.

"We are not selling it for anything." Not much they are not! $6,000,000 worth a year! Now they talk of common ailments—the common and current illnesses. "Almost everybody is sick. Look around you. Read the newspaper. Look at the people who have died."

I ask your Honors to think of that. Think of your friends who have died within the last two years. If you can think of one who died from dietary deficiency disease then perhaps you should decide this case for the plaintiff. You can't do it. They don't die from that.

I asked Dr. Myers, if he, in the last year—this great expert on nutrition, had ever filled out a death certificate in which he stated what he believed the true facts: that scurvy was the cause of deaths from pneumonia. Of course not. His excuse was that they don't leave a space for that. That is ridiculous.

We attempted to show by the vital statistics that that was
1154 so, and it was ruled out. I don't wish to argue that point any further. But that is ridiculous. People do not die—I ask you to call upon your own experience and you will find in your own

experience that people die from cancer, from heart disease, from the other diseases which I mentioned, and that those are the common, the current illnesses that Mytinger and Casselberry, Inc. are talking about when they offer this product to the public. That is what the Federal Security Administrator found. The evidence is clear that the product won't do any good for those conditions. Myers admits it. All of the doctors say so.

Now let's turn to Dr. Butz—this man who has been sneered at by the plaintiff and his findings taken for nothing. What did he find? He found that this product would not be good for these specified conditions. It won't. All the testimony shows that it won't, including Dr. Myers'.

Dr. Myers reluctantly admitted that these symptoms are common symptoms running throughout the course of disease. These symptoms are not symptoms that occur generally or in any great degree in vitamin deficiency conditions. These symptoms mean serious things in some instances. A headache, gastric distress, upset, nervousness, may mean brain tumor. Persistent indigestion is one of the principal—one of the very principal—danger signals of cancer,

1155 and while this product may not be per se dangerous, if you take this product for persistent indigestion and you have a cancer of the stomach, you will be just as dead six months from now as if a man had sold you arsenic. Just as dead. What is the harm of waiting a few months? What is the harm of doing these things while they appeal to the credulity of suffering people? "Nothing. It doesn't hurt anything." Steal their money under false pretenses. Feed them something that will do them no good for a serious condition. That is the danger that the Federal Security Administrator saw in this product.

He still sees it in this product. He arrived at his conclusion honestly and fairly. There is no arbitrariness in this case.

Now let's turn to a few of the references from the 42-page book. The 58 was so clear that: "Yes, we will take it out. We don't want to fight about that—the symptoms."

They knew they couldn't sustain that. Lawyer Myers knew what the law was. He is an expert in his field. He knew that where a person uses testimonials he stands behind the facts—not behind the fact that a man had reported that experience.

We have covered that. We have given the case in our trial brief. I won't belabor the point at any greater length.

Let's turn to the 42-page booklet and see just exactly what

1156 they are doing. They start off first with a disclaimer and they end up with a disclaimer—lawyers' talk and nothing more. Lawyers' talk. It wasn't in the editions written by Dr. Casselberry: It was put there at the advice of a shrewd lawyer, put there to confuse the issue, put there to avoid becoming entangled in the toils of the law.

But what do they start to do then? On page 1, the very first page "We are honest people. We only want to tell the truth" and then start off to tell you that you are sick, your children are sick, your families are sick. "If you are not sick, you are going to get sick. If you get sick you are going to feel bad. If you get sick and feel bad you are not going to have any money. You are going to be in hospitals. Take Nutrilite."

"If you are already sick, it will help you get well. If you are not sick, you are going to get sick, so take it and keep from getting sick."

That is the siren call of this publication. If they are selling preventive medicine, as they tell your Honors today, why in the world would they want to convince people that almost everybody is sick? That is preposterous. They would be telling you not about yourself —"don't look at yourself: you are well. Look at the people who are dead. They didn't take Nutrilite. Don't think about your own body chemistry. Think about somebody else's."

These people are out to appeal to the entire popula-
1157 tion in the sale of vitamin preparations. They are appealing on a basis of cure and treatment of serious conditions, also prevention, it is true, but if they are simply selling preventive medicine there is no reason, no sense, in talking about "get well": simply how to stay well. This book doesn't talk about how to stay well. It talks about the serious condition that you are in, that your wife is in, your children are in. Of course, this pill is the answer to that.

Now Mr. Rhyne has suggested here that they are talking about subclinical dietary deficiencies. Just what in the world is subclinical dietary deficiency?

First, they are not talking about that, because they are talking about obvious symptoms, and all of the testimony from this stand has shown that the symptoms of subclinical dietary deficiency are obscure: They are not even well-known to physicians—physicians have difficulty interpreting them—but Mytinger and Casselberry, Inc. ask the gullible public to think of all these pains.

"They are certainly due to nutritional deficiency." They are not. That is the clear fact in this case. They may be in rare instances. Our people have stated honestly that they may be in rare instances. There is, of course, much superficial appeal to the statement that a well-fed body, a well-nourished body, is a healthy body, a healthy body is better able to resist disease.

1158 The reasoning then follows that a vitamin pill of this kind contributes a nutrient to the diet. Of course it does, contributes a nutrient to the diet; but that doesn't mean by any stretch of the imagination that a person is well fed because he took these things.

Let's turn to the slums within a block of this court house that

have been called to our attention by the Bench. Those people are not suffering from vitamin and mineral deficiencies alone: they are suffering from starvation. They have no $200 a year to put out on a vitamin preparation of this kind. If they did, it would be the height of folly. They would get only a part of that which they need. That is not the type of person this appeals to. This appeals to the people who are able to spend $200 a year—perhaps with difficulty, as I would have—but to appeal to a sick man who says: "Another $200: I will scratch it out some way." That sick man, in most cases, needs nothing that these people contribute. Any excess over the body's requirement does no good.

It is just like throwing a drop of water in the Potomac River. It doesn't do any good. It provides no assurance. There is no underlying nutritional deficiency as the cause of heart disease, cancer, tuberculosis, these other things. All of that has been explained here.

I have about four more minutes and I would like to turn
1159 to that great Gentleman, Dr. Myers of Baltimore.

JUDGE CLARK: You have two minutes, Mr. Goodrich.

Mr. GOODRICH: Two minutes.

Dr. Myers of Baltimore? There are two things I would like to mention about this man: First, the great thing about Nutrilite is that secret ingredient. He knows nothing about it, but he knows it is specific, he knows it is required. That is astounding. He knows it is specific, he knows it is required, but he doesn't know what it is and he doesn't know how it is obtained. What a scientist! No scientist worthy of the name would come here with such a proposition: to say that you know that something unknown is specific and is required.

This is the same story that was told by the brewers of old time nostrums. It has that secret component in it that will cure everything.

Dr. Myers' other experience with scurvy: he got scurvy eight times; he couldn't remember the symptoms, so he got it eight times on a diet of bananas—absolutely impossible.

Thank you, your Honor.

REBUTTAL ARGUMENT OF BEHALF OF THE PLAINTIFF

Mr. RHYNE: I will take just a minute, your Honor. First of all I would like to reply to Mr. Kleinfeld's argument as to what went
on before the Supreme Court. We went before the Supreme
1160 Court to settle that and their Mr. Bastian stated:

"Therefore, it is the position of the Court below that a substantial constitutional question having arisen and jurisdiction

thereby obtained, the Three-Judge Court may determine every question involved, similar to the old rule which a court of equity once having obtained jurisdiction retained jurisdiction for all purposes. This is consistent with the provisions of the Federal Rules of Civil Procedure which require all matters of the defense being taken up at the same time.

"Therefore, as said by this Court in the Sterling case, as to the validity of provisions of the State constitution and other statutes, they could not be deemed to authorize the acts of the Government that were challenged, and that a constitutional issue being involved, it enables the Court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case."

In that brief, case after case was cited which said that this was a Court of Equity—having acquired jurisdiction it can decide everything—and I say to this Court, if this Court states that in its opinion—and the Supreme Court of the United States upholds—
or finds that our three pamphlets are not misleading in any
1161 particular, that will end all litigation between us, except the litigation in the criminal case.

There seems to be no doubt about it. There is no limit on the jurisdiction of this Court. They took a long time arguing about the statutory scheme up there in the Supreme Court.

JUDGE GOLDSBOROUGH: Is there any sense in your talking about something that the Court agrees with you on?

Mr. RHYNE: All right, your Honor.

I would like to say that on the adulteration issue—I never heard it construed as being economic before. I would also like to call the Court's attention to the fact that this item from the Los Angeles Times quoting the New York Times story does have the full text of the item in our book, contrary to what Mr. Kleinfeld stated.

I would also like to call your attention to the fact that there is nothing in this particular clipping here (indicating) that refers to this Lee Foundation. It says the article is by Howard W. Blakeslee, Worldwide Science Editor, and this authorized scientific release was published in the New York Times, Minneapolis Star-Journal, and other leading newspapers throughout the nation.

As to what Mr. Kleinfeld said about the substantiality of the constitutional issue, that was all argued out in the Supreme
1162 Court. They thought it was substantial, and I don't believe I need to go into that in any more detail here.

One very significant thing about their whole argument is they didn't even attempt to point out any fact showing that any emergency existed, so I think on the constitutional issue their whole argument falls rather flat. I am kind of surprised to see Mr. Good-

rich at last go and try to rely upon our great gentleman Dr. Butz, because when I asked him what he meant by "common diseases," he said: "If you refer to 'common diseases' "—this is on page 55 of the deposition—"you would refer to such things as you have in your family every day, such as—not every day—but cold virus infections, bacterial infections, common childhood diseases. You would include such things as measles, scarlet fever and *diptheria*."

They never did give any of their doctors Dr. Butz' deposition and ask them whether they agreed with it, so I say if they had brought a thousand doctors here to prove that Dr. Butz was correct, since none of them knew what was contained in our base—and Dr. Myers said he knew it did contain the trace minerals—since none of their people knew what was in our base, they were really condemning our product and our pamphlet without knowing what they were talking about.

And they certainly have the most thorough facilities in all
1163 the world to determine just what is contained in a product. And I asked Mr. Nelson this:

"Is it possible that this base of alfalfa, parsley, and watercress, which Nutrilite has and which is not contained in the other two products listed in your affidavit, would mean that Nutrilite is more valuable in human nutrition than those other two products?

The witness:

"I don't know. It may be a possibility."

That is quite a concession from Mr. Nelson.

Thank you.

JUDGE CLARK: The Court is prepared to decide this case now, but it has been called to my attention that some time ago——

JUDGE GOLDSBOROUGH: Yesterday.

JUDGE CLARK: Yesterday Mr Kleinfeld sought and obtained time from the Court to file a further memorandum.

Mr. KLEINFELD: We are quite willing to waive that, your Honor.

JUDGE GOLDSBOROUGH: Sir?

Mr. KLEINFELD: We are quite willing to waive that right.

1164 FINDINGS OF COURT

JUDGE CLARK: Mytinger and Casselberry, Inc. vs. Ewing, et al. Predicating its findings upon the two issues set forth in the pretrial order dated June 14, 1949, the Court finds, first, that the following provisions of Section 334, Title 21, USCA, is unconstitu-

tional under the due process clause of the Fifth Amendment to the Constitution:

> ". . . such limitations shall not apply . . . when the Administrator has probable cause to believe from the facts found, without hearing by him or any officer or employee of the agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Upon the second issue to be determined by the Court in accord with the pretrial order, the Court finds that the defendants, in initiating multiple libel proceedings against the plaintiffs, without first affording to them a hearing upon the issue of whether the labeling upon the plaintiffs' product was misleading, acted arbitrarily, oppressively and capriciously.

The Court makes no finding upon plaintiff's proposal to add a third issue to the pretrial order and denies plaintiff's motion to augment the pretrial order by the addition of plaintiff's suggested third issue to be determined.

1165 The Court will be adjourned.

Mr. KLEINFELD: May I make a request of the Court? May I request if the Court will make findings?

JUDGE CLARK: Yes. Mr. Rhyne, you can prepare the findings of fact and conclusions of law.

Mr. RHYNE: Is there any time limit on that? You are not fixing any time limit?

JUDGE CLARK: How soon can you do it?

MR. RHYNE: I would like to have about 15 days, if I might.

JUDGE CLARK: That is all right.

(Whereupon, at 2:35 p.m., the Court was adjourned.)

1166-1167 Reporter's Certificate to foregoing transcript omitted in printing.

1168 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

[Title omitted]

REPORTER'S TRANSCRIPT OF HEARING ON DEFENDANTS' MOTION TO DISMISS—Filed January 28, 1949

Washington, D. C.
Monday, January 24, 1949.

The above-entitled cause came on for hearing of motions before the Honorable David A. Pine at 1:30 p.m.

APPEARANCES:

Charles S. Rhyne, Esq., Eugene J. Bradley, Esq., and Lester L. Lev, Esq., on behalf of the plaintiff.

Alexander M. Campbell, Assistant Attorney General, George Morris Fay, U. S. Attorney, Vincent A. Kleinfeld, Attorney, Department of Justice, for the defendants.

1169 PROCEEDINGS

THE CLERK: Mytinger & Casselberry versus Clark, et al.

Mr. RHYNE: If the Court please, may I first of all move the admission of Mr. Lester L. Lev, a member of the bar of the Supreme Court of California?

THE COURT: You move his admission for the purposes of this case?

Mr. RHYNE: For the purposes of this case; yes, Your Honor.

THE COURT: Motion granted.

Mr. RHYNE: As Your Honor can see, there are three motions involved. I filed a complaint and asked for temporary restraining order and temporary injunction, and the Government filed its motion to dismiss and for summary judgment, which I have answered ahead of time through agreement with Mr. Kleinfeld.

I think first of all, Your Honor, we would like to know which motion you wanted to hear first.

THE COURT: Logically, I should hear the motion to dismiss and for summary judgment, because if it is granted, the others become moot.

Mr. KLEINFELD: May it please Your Honor, under the Federal Food, Drug and Cosmetic Act, the Government has instituted seizure actions against shipments of a product called Nu-
1170 trilite. Nutrilite consists of parsley, alfalfa, and water cress, fortified by minerals and vitamins. It is sold in interstate

commerce to the tune of about half a million dollars worth a month, and the people who buy this product on the representations which the Government contends are grossly false and misleading, pay for this product to the tune of about $200 a year, payable in installments.

The product is accompanied by labeling literature entitled "How to get well and stay well." It is very cleverly conceived. Every few pages you will find a statement to the effect, "Don't forget we do not claim this to be a cure-all."

THE COURT: Does the advertisement go along with the commodity?

Mr. KLEINFELD: Not physically, but it has been held by the Supreme Court within the past few weeks that this accompanying literature is within the definition of labeling as contained in the Act.

THE COURT: Is the problem which the Supreme Court had a few weeks ago in this case?

Mr. KLEINFELD: No, Your Honor. This literature accompanying the product, in our view, conveys to the ordinary person, although not perhaps to the health expert, judge or attorney, the impression, definitely, that the product, since the ordinary person suffers from vitamin deficiencies, when taken will retard and ward off all of the common diseases, and therefore if you have the common
1171 diseases you can get rid of them by eating this magic Nutrilite.

The history goes back a number of years. As the labeling of this product was criticized as being in violation of the Federal Food, Drug and Cosmetic Act, attempts were made from time to time to clean it up, each time staying a little bit ahead of legal proceedings. The latest attempt to clean it up was made while the series of actions under controversy here were instituted. But if the literature is looked at, it is obvious that the impression it conveys to the ordinary person is that common diseases, almost all of them, are caused by vitamin deficiencies and if the ordinary person consumes this magical product at a cost of $200 a year, he will not get these common diseases, and if does have them, he will get rid of them.

THE COURT: Where is this product manufactured?

Mr. KLEINFELD: In California, Your Honor.

THE COURT: And it is shipped in interstate commerce to various States of the Union and the District of Columbia?

Mr. KLEINFELD: Yes, Your Honor. For example, the title page of the publication upon which our actions are predicated says:

> "If your health problem is the result of dietary deficiencies, and if you want to get well and stay well, be sure to read this book."

Then the following language is used:

1172 "Think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food, having stomach pains, decayed teeth, trouble with the heart, leg pains and discomfort in various parts of their bodies; think of those who should be having physical health who have died in the last year prematurely."

Such statements convey to the ordinary person that if he eats this magical cure, he will not get these diseases, and if he gets them, he will get rid of them.

From time to time it talks about the brain, heart, glands and teeth. On page 5 is a display saying "22,000,000 children need corrective treatment," and it mentions almost every type of disease one can think of.

As a matter of fact, although the Government is not claiming this product will injure anyone, there is some advice given in this pamphlet which, indirectly, is as deadly as a bullet through the heart. At pages 20 and 21 we find the following statement:

"Actually, then, when a person has an ache or pain, a weakness, wasting, unsatisfactory feeling, a lesion, a symptom, or loss of physical capacity—in short, when he is ill, there are three courses of action open to him:

"(1) He can reason that since his body needs
1173 all necessary building and regulating materials anyway, whether ill or well, he must be sure his body is getting all these essential items for proper rebuilding and regulating, and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs."

Then it continues:

"This procedure should be acceptable to all concerned. First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ailment has likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse."

In other words, if you have a chronic cancer, keep away from the doctor a few more months. We say that is deadly. Under the Federal Food, Drug and Cosmetic Act, Congress specifically provides that the Government may start separate actions against a

product in separate courts throughout the country under three specific contingencies; (1) if the Government has already won a case against the product, which is not the situation here; (2) if an administrative finding is made to the effect that the product is
dangerous; we are not proceeding under that; and (3) the
1174 statute specifically says multiple seizures may be made
when a finding has been made that the labeling of the product is misleading in a material respect to the injury of the consumer or purchaser.

Such a finding, pursuant to a specific Congressional mandate, has been made in this case. Plaintiff relies almost entirely on the case of National Remedy Company v. Hyde, which was decided under the Food and Drug Act of 1906. Here we are under the 1938 Act. But the cases are distinguishable in three fundamental respects.

In the National Remedy Company case the Government had instituted a seizure action against the product. The company took the matter to court and the Government had lost. Then, six years intervened and suddenly the Government swooped down and made multiple seizures of the product. The Court of Appeals held that conduct was arbitrary and illegal. We have not had any litigation in the present situation and have not lost a lawsuit. In addition, a specific administrative finding has been made that the labeling of the product is misleading in a material respect to the consumer or purchaser.

The second point of difference between the National Remedy case and our present situation is that under the Food and Drug Act of 1906 the United States Attorneys to whom cases were referred for prosecution by the Department of Agriculture, the
predecessor of the Food and Drug Administration, were
1175 under the legal duty to start suit, and the Court of Appeals
pointed that out. That is not present in this instant situation. Under the Act of 1938—and this also has been pointed out by the Court of Appeals—litigation is entirely in the hands of the Department of Justice and the recommendation of any administrative agency or department, including that of the Food and Drug Administration, is merely a recommendation; there is no implicit or explicit duty on the part of the Department of Justice to start litigation because of the recommendation or suggestion of the Food and Drug Administration.

The third fundamental distinction is this: The Food and Drug Act of 1906 made no mention of multiple seizure suits. The Act was silent on that. There was no direction to institute multiple seizure actions under any circumstances; there was no warning against it. When the Federal Food, Drug and Cosmetic Act of 1938 was in process of enactment, it was deliberated upon for five

years, and one of the points most thrashed out in the debates and hearings of Congress was the question of making multiple seizures. As I say, that Act was under consideration for five years. It was the position of the Government there should be no restriction; that when a product was deemed to be dangerous, fraudulent, or misleading, multiple seizures could be made. Finally, Congress specifically decided to permit multiple seizures under specific
1176 stated circumstances, and in 334 said specifically that more than one libel for condemnation based upon the same alleged misbranding shall be made—in other words, do not start more than one action—except "that such limitation shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal; injunction or libel for condemnation proceeding under this Act, or (2) when the administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Such a finding has been made by the Commissioner of Food and Drugs. So I say, what is the Government doing that is illegal or arbitrary? The Government is doing what Congress told it to do. The proper officials of the Food and Drug Administration have made such a finding. Dr. Dunbar's affidavit points out the many respects in which this literature is false and misleading to the material injury of the purchaser or consumer.

Now, if Your Honor please, a big point is made by the plaintiff to the effect that the finding here was not made by the Federal Security Administrator but by the Commissioner and Acting Commissioner of Food and Drugs. There may have been
1177 some doubt legally about delegations prior to the last few years, but I think it is well settled, for several reasons, that such delegations are proper. First when by reorganization plan No. 4 the Food and Drug Administration was transferred from the Department of Agriculture to the Federal Security Agency, its functions were transferred, not to the Federal Security Administration but to the Federal Security Agency, to be exercised under the direction and supervision of the Administrator.

In the second place, the Act, Section 301 (a), provides specifically that the Administrator may issue necessary regulations to carry out the Act, and that has been held by a number of cases to include the right to delegate.

Third, the right to delegate must be there or the Act could not be administered.

Among the functions of the Federal Security Administrator under this Act are thirty functions which relate to and discuss the Administrator. If the Administrator had to exercise every one of those 30 functions besides his function as head of the Social Security Board, the Act could not be administered. Of necessity, though made under his direction and supervision, must be delegated to the proper subordinate officials.

Now, who made the findings? The Commissioner and the Assistant Commissioner. They run the over-all agency.

1178 Now, as I said, I find it hard to conceive what the plaintiff claims here.

His complaint has attached to it an affidavit from a doctor that the product is not dangerous. I am not claiming it is.

THE COURT: Let me ask you this: Was he accorded a hearing before you made your finding under your provision No. 4 that you rely on?

Mr. KLEINFELD: No, Your Honor; there was no hearing. The statute says findings can be made without hearing.

THE COURT: Does that not strike you as unfair? Let us assume for argument that you are in error about the therapeutic value of the product. By a decision of the Commissioner, these people would be put out of business. Why could you not afford them a hearing and have an open mind? What is wrong with that?

Mr. KLEINFELD: There is nothing wrong with it, Your Honor, except that this is not a sudden decision; it has been going on for ten years.

THE COURT: But why not get their point of view yourself?

Mr. KLEINFELD: There have been conferences, Your Honor.

THE COURT: Would that not make it almost arbitrary?

Mr. KLEINFELD: You must compare that with the fact, Your Honor, that there are a number of other specific acts

1179 under this Act that Congress requires not only that there be a hearing, but findings, and provides for statutory review. In other words, if the Federal Security Administrator establishes standards for it——

THE COURT: What kind of due process is it when the other side is not given a chance to state his position?

Mr. KLEINFELD: We are not litigating, Your Honor. They have their right to come to court.

THE COURT: But you could put them out of business by these multiple seizures.

MR. KLEINFELD: I do not think that would happen, Your Honor. First of all, they have the right to have these actions consolidated and tried in one district and have it brought up for trial, but they have not attempted to do what the statute permits. They have a perfect right to go to any court and say, "We want to consolidate

these actions," and have them all consolidated in one suit in one district. If they did that, then they could say, "This is very harsh on us and we would like to have it tried," but they have not done that. They are not coming into court with clean hands.

I say if it is harsh, there are two answers. The procedure laid down by Congress is pretty direct. There is nothing illegal or unconstitutional about it. They have said such multiple seizures may be made and suit litigated thereafter. I can't see the harm
1180 that may be done to the plaintiff, what is being done to the poor deluded public who are playing to the tune of $200 a year each.

THE COURT: It seems to me you could take two or three weeks in giving them a hearing. You said you had this under consideration for five years, and yet you have never accorded them the right to attempt to convince you their product is worthwhile.

Mr. KLEINFELD: They have talked to the Department of Justice and the Food and Drug Administration, and each time the labeling is changed a little bit just to get ahead of the lawsuits. There must come a time when conferences must cease and they must obey the provisions of the law. A finding has been made by people who for forty years have been administering the Food and Drug Act. As I say, this matter of multiple seizure was fought out for five years and finally it was decided it should be done. After a history of violations and hot pursuit and subsequent change of labels, and after they had built up a business of half a million dollars a year from people who could ill afford to pay it and when they indirectly advised people to keep away from the medical doctors, I don't see how it can be contended anything arbitrary or anything the law does not specifically authorize them to do or compel them to do.

THE COURT: Your advice was not sought before they were denied a hearing?

1181 Mr. KLEINFELD: No, we are not consulted prior to litigation.

THE COURT: You take the cases as you find them?

Mr. KLEINFELD: Yes. Maybe Your Honor would give them a hearing or maybe I would, but I think we have to take the law as it reads, and it provides it may be done without a hearing.

I would like to mention one case which was decided on January 3rd by the Court of Appeals of the District of Columbia, the case of Berzoff v. Donaldson, which was a suit to enjoin the Postmaster General—

THE COURT: I read that yesterday.

Mr. KLEINFELD: Let me read part of it. It says: "Questions of fraud may be determined in the light of the effect advertisements would most probably produce in the ordinary mind"—

THE COURT: That was in the Post Office Department, which is thought to be rather arbitrary. The statute did not require it.

Mr. KLEINFELD: They got an informal hearing.

THE COURT: No, it is more than an informal hearing; they take testimony. I admit you possibly do not have much chance there, but you do go through some forms.

Mr. KLEINFELD: These people have been in a number of times; they have talked to us and with the Food and Drug, and also
1182 with the local officials in Los Angeles as well as the officials here. This has been going on for a number of years, and each time they say, "We want to be good boys. We are only making half a million a year and we will change anything you tell us to." Then something is changed but the balance is still grossly false and misleading.

THE COURT: Would you say your client has been diligent when it permits any such procedure?

Mr. KLEINFELD: Maybe so. It may be the Government was not sufficiently aggressive. The point remains, however, that they were originally only small interstate shipments and gradually grew to this great volume. We have given them the citation and they have had their hearing on the very same issue and they are indicted in the Southern District Court of California for not only shipping this product in interstate commerce but fraudulent-, knowingly and wilfully misrepresenting it. So they have had for all practical purposes more of a hearing than the statute contemplates. I do not see how the case differs from a number of cases that have been before this Court and the Court of Appeals. For instance, there was the case of Proctor and Gamble v. Coe, where an attempt was made to enjoin the Commissioner of Patents from cancelling a trademark. The Court of Appeals pointed out that all the administrative official was doing what was he was authorized to do by law, and the Government here is doing nothing more than permitted by law.

1183 I say, Your Honor, when it is considered these people are asking for a temporary injunction, every day the product is sold, the money paid for it is irreparably lost. While there is a public policy against people being sued more than once, Congress has permitted it, but there is also a public policy to protect people from grossly fraudulent and misleading representations, and that is what the Government is trying to do in this court. If this booklet is read entirely, the impression is given to the ordinary person that every common disease is caused by dietary and vitamin deficiency and if you eat this magical product you will not get them, and that is grossly false and misleading and we say under such a state of affairs the Food and Drug Administration was well justified in making this finding, which was a preliminary administrative find-

ing, upon the basis of which the United States Attorney instituted litigation.

Mr. RHYNE: If Your Honor please, on this motion for summary judgment, I would like to point out that the motion is in this status: He alleged and I denied all of the testimony he has been giving here about everything being false, misleading or fraudulent. On the contrary, Your Honor, everything has been turned over to these people, and I will go into that later. He says they have never had a conviction and I say they never will have a conviction on the facts in this case.

1184 All of this stuff about what is in that book, the statements he has made here about what the book contains—the book does not say that at all. Of course, it would have been brought out if we had been given a hearing, but on his motion, let me point out the Court of Appeals here has held repeatedly that where there is an issue of fact—

THE COURT: I assume there is no joinder of issue.

Mr. RHYNE: He argues it is false, fraudulent and misleading, and we deny it; so there is an issue of fact. He says in his brief the defendants have submitted affidavits from medical officers. Of course, we had affidavits of medical officers, too; we had the affidavits of two doctors saying that this product is not harmful in any way; we have one of the outstanding nutrition experts saying it is not. Then we had an affidavit by a man who has devoted ten years to this field, and on what is proper advertising he disputes everything they have to say.

THE COURT: You can raise all of those questions in defense in connection with the multiple seizures. He simply says Congress has given the Food and Drug Administration the right to conduct multiple seizures when there is a certain finding made in a certain case. There is no dispute, apparently, the finding has been made. I would assume your position to be the finding was made under circumstances which would make it arbitrary and capricious?

1185 I would [*]

Mr. RHYNE: That is one of our contentions, Your Honor, and in addition, in the case he refers to in the Court of Appeals, they say the number of seizures is so oppressive. That is another place where the Court of Appeals held Congress could not have intended to let them grab things all over the United States. They have seized our product in Seattle, St. Petersburg, Clarkfield, Minnesota; Oak Park, Illinois; Spokane, Washington; Buffalo; Belleville, New Jersey; Hastings, Nebraska, and New York City. They are trying to go all over the country and seize this product before we can get a possible chance on the merits in the libel action.

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* Illegible is transcript.

We have alleged a set of facts showing how they have demoralized our business and that we will not be in business unless we can get a trial on these libel actions.

I would also like to call Your Honor's attention to this: He says that when the Administrator has probable cause to believe from facts found without hearing by him or any officer or employee of his agency—I wonder—we did not know anything about any finding; they would not tell us anything before they answered here. These affidavits give us their findings for the first time. They are made by medical officers and then the Associate Commissioner of the Food and Drug Administration found he had probable cause on the basis of those findings. But, if Your Honor please, the statute says "When the Administrator has cause to believe"; it is the
1186 Administrator, and only the Administrator, who can have probable cause.

THE COURT: Can he not delegate that to a subordinate?

Mr. RHYNE: It says that any officer or employee of the agency can find the facts, but only the Administrator under this Act can have probable cause to believe—

THE COURT (interposing): If that is the only point you have, I am not impressed.

Mr. RHYNE: Now, he says that this multiple seizure was a matter that was discussed more than any other matter before Congress. When this legislation was passed, the Secretary of Agriculture was the man responsible, rather than the Administrator; he was to administer the Act. When they started out, the first bill let minor employees have reasonable cause to believe and find the facts, too. Senator Clark, who is now one of our Court of Appeals justices, and Senator Bailey, attacked this whole thing. They thought the thing was so important that these minor employees having this power, which meant they could delegate to almost anybody, they could put anybody out of business in violation of what the Court of Appeals said in the National Remedy case.

I have all of that in my brief and that is one reason why it is a little long, because I have set forth the legislative history. I have put in the Supreme Court decision which points it all up
1187 because it shows through that legislative history that while it started out with letting minor employees make decisions as to probable cause, they decided the matter was so important it was changed so that finally it was the Secretary who should have probable cause, although the minor employees could find the facts; they thought multiple seizure was such a drastic remedy it should stem up to the Secretary himself. So they accommodated the language to show the Congressional intent.

The Supreme Court case I am talking about is the case of Cudahy Packing Company, where the Supreme Court took up all

of these things about what the Administrator of Wages and Hours had to do—and we have argument about the necessity or implied necessity to issue a subpena duces tecum. The Supreme Court said—they finally vested it in the Administrator himself—and that indicated no one else could do it.

That is the exact situation we have here. This particular point has not been litigated at all, and where they talk about finding these facts without a hearing, they do not say he can make this decision on probable cause without hearing.

As Your Honor can see from the record, we do not know who made the finding of facts or who made the decision as to probable cause; we did not know it until they came in here with these affidavits; they did not tell us anything and would not. They were made by these associate commissioners and assistant
1188 commissioners, and they took the statements by their doctors which said on the facts they *though* our advertising was misleading. The findings of fact as to whether it is misleading are two different decisions. Right in the same language they refer to the Administrator and to officers or employees of the agency who can make this finding and they refer to the answer showing they distinguish between the three. I was wondering, Your Honor, when I got the Government's brief, why they devoted four and a half pages to showing many decisions on this particular point, but when I got to their affidavits and saw it was not the Administrator who made the decision as to probable cause, I could see exactly what had happened. He claims he has delegated this authority to the Assistant Commissioner, but the whole history of the situation shows—and he is certainly no more important than the Secretary of Agriculture, and only the Secretary could make the decision as to probable cause. Surely his underlings could find the facts, but there is nothing that requires the Administrator to make this decision on probable cause without a hearing. They can find the facts without a hearing but not make a decision as to probable cause.

Now, Your Honor, because the time is limited, I am not going to read the language of these bills, but as I say, when they started out they were going to let these minor people do it, and it finally stemmed up to the Secretary of Agriculture, and referring to
1189 Mr. Kleinfeld's reference to the Administrator, the Secretary of Agriculture certainly has more than 30 functions to perform.

In the Supreme Court case, where they were arguing that same thing about the Administrator having a lot to do, they say if the Government's position was sustained there, he could *delgate* this to minor employees. So, they first put it in and then took it out.

As I say, I wondered why they had devoted so much space to this particular point, and then as I studied the Act and saw the distinction, it is certainly clear that only the Administraor can make the decision and the legislative history shows they thought the seizure power was so drastic that it should not be exercised on the action of any minor official.

Now, counsel referred to this indictment. It is true they were indicted last September, and by agreement with the District Attorney of Los Angeles they allowed the case to go off the calendar until a case was decided in the Supreme Court of the United States, which case was decided recently. At the time they let the case go off the calendar they had an understanding there would be no more seizures. Then, of course, they started on this nation-wide seizure. When we called it to the attention of the District Attorney, he said he could not do anything about it because it was all handled in Washington.

1190 Coming back for just a moment, if I may, to this literature, I would like to say this about the literature: It was submitted to the Food and Drug Administration in 1946. In January, 1947, one of the inspectors of Food and Drug told them that as far as he knew it was all right. The next thing they really knew was when this indictment came in September, 1948. It is true they had never talked with Mr. Kleinfeld until November of last year; that is the only time they saw him. They talked to Mr. Dunbar, the Commissioner of Food and Drugs, and all he told them was that they were going to seize their product wherever they could find it; they did not discuss this advertising or anything that was in it; they just took the flat position that under the law they could carry out these seizures and they were going to do it.

Then, when I filed this action, we went before Judge Schweinhaut for a temporary restraining order, and I would like to explain what happened there. Judge Schweinhaut read the National Remedy case, in which our Court of Appeals said it was inconceivable to them that Congress could have ever intended that these Food and Drug people could put someone out of business before they could get a decision on their advertising, and he said the matter of a bond bothered him.

First of all, Judge Schweinhaut said he had an agreement with the District Attorney's office he would not issue a restraining
1191 order unless they were represented. He said the matter of a bond bothered him and he said he was going to ask Mr. Sachs to tell the Department of Justice to instruct the Food and Drug people to make no more seizures until there was a hearing on the temporary injunction. There was considerable argument about whether he could cite them for contempt, and he said he would not rule on that, but if I needed any more orders I could come back.

In the meantime, someone went to Judge Schweinhaut with a motion for denial of the temporary restraining order and he tore up their suggested order.

That was the status of the case before we came here.

Now, Your Honor, the facts in this National Remedy case are almost identical with ours. There were 12 seizures in that instance and we have had 10. We also have the same threat that they are going to grab our product all over the United States. As a matter of fact, in the last few seizures they have taken certain excerpts from our advertising in mimeographed form; so I think that certainly indicates they are going to do it on a widespread scale.

My opponent says we can consolidate these seizure cases into one. If we consolidated the 10 cases filed now, there may be 10 more tomorrow, and it may be 14 months then before we can get a trial here. If we have it moved to San Francisco, it would be seven months, and in the other jurisdictions it is going to be some time before we can get to trial.

1192 We take the firm position, from what I have seen of the affidavit of this expert, Mr. Myers, who has had years of experience in this type of thing—I am convinced they do not have a chance to prove this labeling is misleading in any way. They say only a very intelligent person can understand that, and an ordinary person cannot—

THE COURT (interposing): You are getting into the merits, are you not?

Mr. RHYNE: He argued that and I was afraid he had prejudiced my case by it.

THE COURT: Let me make this statement, and if I am wrong, please correct me.

There is only one proposition before me and that is whether there is a genuine issue of a material fact as to your right to enjoin the administrative officers from bringing these multiple suits and that you allege they have acted arbitrarily, capriciously and oppressively, and set forth as one of your grounds that they accorded no hearing before they made their finding and also that the findings have not been made by a person authorized under the statute to make them, and also there is a distinction between a rule to show cause and an actual finding.

That is all there is in the case, to me, notwithstanding these briefs. Is that not correct?

Mr. RHYNE: Yes, Your Honor.

1193 THE COURT: So, whether or not your advertising is false and misleading is not before me; there is only before me the question of whether or not the administrative officers have exceeded their power in determining to bring multiple suits and whether they should be enjoined from so doing.

Mr. RHYNE: That is true.

I might say one further word about the National Remedy case. The people who write legislation for the Congress and also an attorney for the Food and Drug Administration have said that that case was codified into the law. It is true that before the 1906 Act, there was no limit on multiple seizures, and this language was intended to codify the National Remedy case and to keep them from using the seizure power in an oppressive manner.

There is another point I would like to make, Your Honor, that I think is important. Mr. Kleinfeld referred to other things they could do under the Act. The Act gave them the right to get an injunction if it was necessary to stop something completely. They can go out to Los Angeles and get an injunction stopping these people from doing business at all, according to his statement. I would like to call Your Honor's attention to just one thing that the committee said in its report about that, because I think it points all of this up. The House report, H. R. 2139, 75th Congress, third session, at pages 3 and 4, states as follows:

1194 This remedy should reduce litigation. In some cases it should avoid the hardship and expense to litigate in seizure cases. In many instances, seizure is a harsh remedy and should be discouraged and confined to those cases where the public protection requires such action. In many cases, it is believed injunctions can be used with equal effectiveness and with less hardship. A seizure case finally decided in favor of a defendant leaves him without recourse for his losses, including court costs, storage and other charges.

Of course we have set out in detail in our complaint the irreparable injury we have already suffered through these seizures, all of which, we contend, are illegal except the first one, and the undoubted injury we will suffer from these threats of future seizures, and we have shown the type and extent of this business and how it is done and allege we are doing it in full compliance with the law and, as I say, I do not think there will ever be a time when they will get a conviction because these people are honest business men who are trying their best to comply with all laws.

You cannot get a ruling in advance about anything except your labels from the Food and Drug Administration. They have talked with them on several occasions. This argument counsel makes about keeping one jump ahead of a lawsuit, there is no basis in the record for that statement, none whatever.

I think under all of the facts here what they are really
1195 doing is using their seizure power in an oppressive way, the very way the Court of Appeals said it was inconceivable to think Congress should have intended, although in that case there was no limit whatever. But this case has been codified in the present law.

So, Your Honor, I firmly believe that on the merits—and I could go into much greater detail, but it is all in the brief—the motion for summary judgment should be denied because there is, as you say, a conflict on the facts and because they admit they have not given us the hearing the Administrative Procedure Act requires, and for the further reason, as I say, by going through the legislative history, it will be seen Congress did not intend for one second to let them do the very thing they are doing here, and it appears very explicitly in the hearings and in the report that they never intended this but on the contrary they intended to hedge it around with as much protection as they possibly could.

Mr. KLEINFELD: I just want to spend a minute discussing the legislative history.

THE COURT: Take all of the time you feel necessary.

Mr. KLEINFELD: I think I have made as complete a study of the legislative history as anyone in the country, and I think Mr. Rhyne is under an honest confusion about it. Mr. Rhyne said I
1196 devoted several pages in showing how Congress debated as to whether the Secretary of Agriculture would have to make the finding. That is not so. What he is referring to is this: There was an entirely different situation proposed to Congress. The Food and Drug Administration proposed that when any elements of danger were present, local officials in the field could actually, themselves, make seizures before even the courts authorized it. The Food and Drug proposed if Mr. John Doe, a local drug official in the field, had a drug he believed to be dangerous, he could seize it and then go to Court.

THE COURT: The condition was there that it was dangerous, but you do not contend this is dangerous; you do contend that the purchaser is defrauded out of his money and also he may be lulled into a false sense of security by not going to a doctor when he has some disease that might be aided by a physician.

Mr. KLEINFELD: That is quite right, Your Honor. But this legislative history is devoted to the question whether one seizure could be made without court action; they were not discussing multiple seizures at all.

Furthermore, throughout the legislative history there was not an iota of suggestion that the Secretary of Agriculture would have to make these findings himself. They are talking entirely about ex parte administrative seizures without court sanction, which
1197 Congress did not permit and which never was in the Act. So I think the legislative history is entirely beside that point.

There is another point I would like to mention and that is the so-called codification of the National Remedy case. I cannot understand that statement, because *Congres* specifically provided multiple

seizures could be made without hearing under four specific sets of fact, one being the set of facts we have here.

So, what Congress was doing was clearly getting around the National Remedy situation by saying they were going to whittle down any administrative decision to make multiple seizures, but we will permit them when one, two, three or four is present, and in this case we have one constitutional finding which Congress authorized.

THE COURT: What is the statute?

Mr. KLEINFELD: Section 304 (a).

THE COURT: You depend on subsection (2)?

Mr. KLEINFELD: Yes, Your Honor.

THE COURT: Where in the record is there a showing that he has complied with subsection (2)?

Mr. KLEINFELD: We have submitted certified copies of the findings, attached to our points and authorities, Your Honor.

THE COURT: I see in your index "Findings and Conclusions in Collier v. McNutt, Civil No. 26004."

1198 Mr. KLEINFELD: That was a case involving the identical issue which was argued before Judge McGuire and he granted our motion to dismiss and for summary judgment.

THE COURT: And exactly the same opposition was made?

Mr. KLEINFELD: Yes, Your Honor.

THE COURT: Where is the finding?

Mr. KLEINFELD: That is under Index 7 and following.

THE COURT: Where does the Administrator or someone acting for him in this record say that he has probable cause to believe from facts found without hearing, or any officer or employee of the agency, that the misbranded article is fraudulent or would be in a material respect misleading to the injury or damage of the purchaser or consumer; that is what you depend on?

Mr. KLEINFELD: That is what we depend on, yes, sir.

THE COURT: Where is that statement of probable cause?

Mr. KLEINFELD: Mr. Crawford, the Associate Commissioner, says:

> "Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act, and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this
> 1199 article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer."

A similar finding is made by Mr. Larrick, another associate commissioner.

THE COURT: All right, go ahead.

Mr. KLEINFELD: I want to close by saying the legislative history is referring to an entirely different thing, namely, ex parte procedure by subordinate officials without going through a court of law.

The only issue is whether the Government or any official of the Government is transgressing the authority vested in him by law. I say there is no showing whatsoever that either Mr. Clark, the Attorney General, Mr. Ewing, the Federal Security Administrator, or any official of the Food and Drug Administration is doing anything other than what Congress has specifically provided by law. What this plaintiff is asking is that the Congress repeal what Congress has specifically authorized. Congress has said multiple seizures may be made under certain circumstances. The plaintiff says they are going to ask the Court to say you can only do so when the Court, after review, feels it should be done. That is not what Congress has done. The Administrator and Commissioner of Food and Drugs, pursuant to specific statutory authorization that the labeling of the article is misleading to the injury or damage
1200 of the purchaser or consumer. He has done nothing more than Congress has authorized and directed him to do; he has done nothing more than that.

Mr. RHYNE: Your Honor, he made the statement it was absurd to say the National Remedy case was codified into the 1938 law. Mr. Michael F. Markel, who was formerly senior attorney of the general counsel's staff of the Food and Drug Division of the Federal Security Agency, made the following conclusion when he was speaking at a clinic conducted by the New York University School of Law in 1947, with respect to the effect of the multiple seizure provisions of the present Act;

> "The purpose of this provision is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 Act did not contain a comparable provision. However, in at least one instance (citing the National Remedy case) the court enjoined the institution of more than one seizure because it appeared to the court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. This section is virtually a codification of the principle of that case."

THE COURT: How can you get around this language, which, while it provides more than one libel for condemnation based
1201 upon the same alleged misbranding may not be instituted under this Act: "Such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction or libel for condemna-

tion proceedings under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing"—that is shocking, but there it is—"by him or any officer or employee of the agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Shocking as it may seem to you and me, Congress has certainly given him the right to do just this without a hearing.

Mr. RHYNE: Your Honor, we did not break down the finding as to probable cause just as they have.

THE COURT: The assistant commissioner has made the finding of probable cause and the facts have been found by Dr. Butz. The statute permits a finding by either the Administrator or someone else.

Mr. RHYNE: But the decision as to probable cause is in the Administrator himself. The other people can find the facts, but we say, Your Honor, that the Administrator under the legislative history of this Act does not have the authority to delegate
1202 that decision of probable cause, because it was too important a function, and in the first instance they placed it in the Secretary of Agriculture, and certainly the Administrator is no more important than the Secretary of Agriculture. This is supposed to be an unusual case when such a decision is made. I have shown in my brief they may let an underling find the facts, but the top man must make the decision on probable cause.

THE COURT: This is the associate commissioner?

Mr. RHYNE: Yes, but he could just as well have delegated it to a minor employee, just as in the Cudahy Packing Co. case, he could delegate it to clerks.

THE COURT: How far down in the hierarchy is the associate commissioner?

Mr. KLEINFELD: He is second man in the hierarchy.

Mr. RHYNE: Of course, he is not under the Administrator of the Federal Security Agency; he has quite a number of assistants. When the point was first made by them, they cited all of these cases, and I wondered what they were talking about. We had never seen the findings, but when I studied these cases and studied the question and saw how it is broken down and that only the Administrator could have it, then I looked at the legislative history and saw what they were driving at. They are trying to do the same thing they sought to do in the Cudahy case. There the Administrator had authority to delegate duties—

1203 THE COURT (interposing): Does not the Security Administrator have numerous assistants, and under them is the Com-

missioner of Food and Drugs and under him an associate commissioner?

Mr. RHYNE: Yes, Your Honor, the very same thing that existed in the wage and hour case. As the legislative history shows, this was the most important thing they discussed. They fought and fought and fought and finally they hedged it around with all the pains they possibly could to prevent arbitrary action and to prevent the very thing the Court of Appeals said they would not stand for in the National Remedy case, where they had made 12 seizures and they stopped them. We have had 10 seizures in our case. The Court of Appeals has said:

> "We may assume, therefore, that the adulteration was not of such character as to injure the public,"

and they cite other cases showing that this Congress could not have intended to allow them to put people out of business by seizure in advance of a trial on the merits.

Now, the only time we have had any expression from Food and Drug they have said it was all right except when they came here and talked to Mr. Dunbar, when he made these threats to make these seizures, and even then they did not point out what was wrong with the advertising. I think it is most significant when they
1204 have the chief of their vitamin section make a long affidavit about the content, and all he complains about is the price. They have never been able to show that anyone has ever complained and the product has been sold since 1933. I think it is most significant if no one has been hurt up to now and we ought to be allowed to stay in business until we can get a decision on the merits of our advertising, and that is what we are asking for here. We ask the nine seizures other than the first be declared void and we want protection against future seizures, and in so far as our temporary injunction is concerned we want to be protected until we can have a decision on the merits.

Mr. LEV: Your Honor, I wonder if I may be heard on something that has not been covered.

THE COURT: Yes.

Mr. LEV: Inasmuch as this is an equity case, I want to answer Mr. Kleinfeld's assertion we are not here with clean hands. I have represented Mr. Mytinger since 1939. I was present at all of these conferences. The first time I ever heard of any trouble with Food and Drug was in 1947 when we received a citation to appear before the Los Angeles office staff. At that time the complaint was we were 40 percent short of vitamin B-1 in one of the products. We obtained
a number of samples and submitted them for testing elsewhere
1205 and they said there was only a 5 percent shortage. We never heard anything further—

THE COURT: I am not interested in that.

Mr. LEV: Very well. I merely wanted to say we have come in with clean hands.

THE COURT: I am not trying the merits here. I am asked to enjoin. I think this is all irrelevant.

I am of the view that when Congress gives the authority contained in the Federal Food, Drug and Cosmetic Act which permits him to make multiple seizures when the Administrator has probable cause to believe from facts found with or without a hearing, by him or any officer or employee of the agency, that the misbranded article would be in a material respect misleading to the injury and damage of the purchaser or consumer, that the provisions of the statute should be strictly followed. They have not been strictly followed here because the Administrator, as Administrator, has not stated he had probable cause to believe these things from the facts found by someone else, and under those circumstances I deny the motion for summary judgment, without prejudice to a renewal of it when the statute has been followed literally and strictly. I cannot grant the relief sought by the Administrator at this time because I feel there has not been a strict and literal compliance with the statute and that there should be one when such a drastic and harsh provision of the law permits the acts contemplated.

1206 So far as the injunction is concerned, I will issue that until there is another motion for summary judgment, if it is necessary. Do you believe it is necessary?

Mr. KLEINFELD: I think it will cast quite an administrative burden on the Administrator, but we will go ahead.

THE COURT: Congress said so. I notice Congress was careful to permit employees to find facts, but placed the burden upon him to state whether he had probable cause or not, and I think Congress wanted to place that responsibility at the door of the head of the office so there would not be any mistake as to who was exercising the authority. It may be a burden, but there it is.

Mr. KLEINFELD: I tried to distinguish in my brief, but Your Honor has made up his mind.

THE COURT: I feel it must be strictly construed. I will deny the motion without prejudice.

Mr. RHYNE: In the meantime, there will be no more seizures?

THE COURT: I understand an injunction will not be necessary, from what Mr. Kleinfeld said.

Mr. KLEINFELD: There will be no more seizures until we get a finding from the Federal Security Administrator.

Mr. RHYNE: There will be no seizure until the Court has a chance to pass upon it; is that so?

Mr. KLEINFELD: That is right.

1207 Mr. RHYNE: Then the motion can be argued more fully.

THE COURT: The motion is hereby denied without prejudice.

(Whereupon, the hearing in the above-entitled matter was concluded.)

1208-1209 Reporter's Certificate to foregoing transcript omitted in printing.

1210 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

REPORTER'S TRANSCRIPT OF HEARING ON RENEWAL OF MOTION TO DISMISS—(Filed March 9, 1949)

Washington, D. C., Thursday, March 3, 1949.

The above-entitled matter came on for hearing on motion to dismiss before the Honorable David A. Pine, District Court Judge, at 11:45 o'clock a.m.

1211 APPEARANCES:

On behalf of the Plaintiff: CHARLES S. RHYNE, EUGENE J. BRADLEY and LESTER V. LEV.

On behalf of the Defendants: ALEXANDER M. CAMPBELL, Assistant Attorney General, GEORGE MORRIS FAY, U. S. Attorney, VINCENT A. KLEINFELD, Attorney, Department of Justice.

1212 PROCEEDINGS

THE CLERK: Mytinger and Casselberry vs. Ewing, et al.

MR. KLEINFELD: If the Court please, this is a renewal of the motion which we made before Your Honor a few weeks ago and which was argued at great length before Your Honor at that time, so I shall give Your Honor now only a general outline of the situation, as I feel Your Honor would not care to hear an extended discussion.

THE COURT: I remember pretty well the points involved. My recollection is—and if I am wrong, please correct me—I refused to grant the motion to dismiss and for summary judgment at that

time because the record showed that certain findings which the statute required be made by the Federal Security Administrator had not actually been made by him; and if the statute was literally read, it required him to do those things himself.

Mr. KLEINFELD: That is right, Your Honor; you denied our motion because the determination of probable cause had not been made by the Federal Security Administrator himself, but by a subordinant official, and Your Honor denied our motion without prejudice. We have, therefore, renewed our motion and have filed with the Court a determination of probable cause made by the Acting Administrator of the Federal Security Agency in the absence of the Administrator. That determination of probable cause
1213 has been filed with the court. As I say, Your Honor, this determination of probable cause has been made by the Acting Administrator of the Federal Security Agency, and since Your Honor denied our motion to dismiss and for summary judgment solely on that ground, namely, that the determination of probable cause had not been made by the Administrator, we now respectfully request that our motion be granted.

THE COURT: Before, it was made by an Assistant Director of the Food and Drug Administration, was it not?

Mr. KLEINFELD: It was made by the Associate Commissioner of the Food and Drug Administration, Your Honor.

THE COURT: Yes.

Mr. KLEINFELD: We have now filed with the court the requisite determination and findings made by the head man; that is on file with Your Honor.

I do not want to go into it again because we have spent a couple of hours on it heretofore, and therefore I do not think Your Honor wants to hear it.

Mr. RHYNE: I think Your Honor will also recall there was the matter of our having a hearing before any such determination of probable cause or findings were made, and Your Honor, when you denied their motion, told them to comply with the statute. Your Honor will recall that in our view, in complying with the statute, when the Administrator was required to make this determina-
1214 tion of probable cause, I argued he was also required to give us a hearing before he made that determination. Immediately after this order was signed, I made a formal written request to the Administrator, asking him to give us a hearing and pointing out that if he did give us a hearing we could prove beyond doubt that their charge that our advertising was misleading was absolutely groundless. I pointed out to him there were four grounds on which they could make multiple seizures; (1) when there was a prior judgment in favor of the Government in a criminal case, or in a libel case, or in an injunction case; (2) if the product was danger-

ous to health; (3) if the labeling was fraudulent; and (4) if it was misleading. Of course, they have proceeded against us on the fourth ground which, I believe, is a lesser ground than any of the others and, as I pointed out to Your Honor before, we think they are afraid to try these cases. They have stalled with criminal indictment cases in California, and I pointed out in my letter to the Administrator that if the Food and Drug people would come before him in an ex parte way and contend our advertising was misleading, if we were given the opportunity of a hearing we could prove absolutely it was not. Also, if Your Honor please, Senator Downey of California and two Congressmen asked him to give us such a hearing, but he wrote to me and denied us that hearing. I wrote back and pointed out certain other things and renewed my request for a hearing. Again, in a letter delivered to me specially yes-
1215 terday afternoon, he denied us a hearing. I admit, if the Court please, that the statute itself does not require him to give us a hearing. I start with that assumption, and since I say that, Your Honor will remember when we were here before they said I should attack the constitutionality of the Act. When I began to study the cases before the Post Office Department, in the Circuit Court of Appeals and in the Supreme Court, they say they will read it in. I say, if Your Honor please, if I were to go before a three-judge court, they will say the Administration is bad, and not the Act. They will say, "We will read into this the requirement of a hearing, even though it is not there in language; we will read it in by implication," and therefore I would be out before the three-judge court.

I would like to point out, first of all, in the case of Walker v. Popenoe, a case similar to this, where the Postmaster General refused to carry a certain pamphlet in the mail, and he did it without a hearing because the statute did not require it, when it came before Judge Letts, he granted an injunction on the ground of due process requiring him to grant a hearing whether it was required in the statute or not. The Government appealed the case to our Court of Appeals—

THE COURT: A Post Office case is different from this case in that that is the only opportunity afforded, whereas in this case
1216 you have an opportunity at the trial. All you are seeking a remedy against now is the multiple seizure.

Mr. RHYNE: Pending trial, yes, sir.

THE COURT: You said in effect that if they were continued, it would put you out of business. You will have your due process on the trial of this case when the seizures are made. But in the Post Office Department there was only one hearing, and that was before the Post Office Department. Do you not think, factually, it is different?

Mr. RHYNE: I think, factually, Your Honor, there is that distinction. However, although I think there is that distinction, under the due process clause, as I read these cases, and I have other cases under other statutes where there was no provision for a hearing also that I can go to; but as I read the cases, and particularly these FCC cases, where you did have an opportunity for a hearing before the Federal Communications Commission, our Court of Appeals has said that where personal property can be destroyed, in effect, by the action of an administrative agency, or an administrative officer—and that, of course, is what we allege, that our property will be destroyed you are entitled to a hearing even though the statute does not say it. So I argue, if the Court please, that on the principle established in these Postmaster General cases, even though you can make the distinction that Your Honor makes, that the principle is still there, and we have a statute which does not,
1217 by its terms, require this Administrator to give us a hearing.

I admit that. But I say where the effect of his decision—and in our case these multiple seizures have the effect of putting us out of business before we can get a hearing in these libel actions—that we are entitled to a hearing under the due process clause before *he*, because of the effect of his decision, which is an immediate injury to us, an irreparable injury, and especially as in this case where he has had a request to give us a hearing, and has not done so but on the contrary has held a little star chamber ex parte hearing where the Food and Drug people presented their side and we did not get a chance to say anything. I think they are afraid to let us appear before the Administrator and point out that they have such a flimsy case, practically no case at all, because, Your Honor, if you take the overall advertising, we are sure it is not misleading in a material respect as required by the statute.

They pick out a sentence here and there. There is a lot of this advertising, which is in a rather thick booklet, but they only pick out parts here and there.

Your Honor, I think our Court of Appeals in this WJR case, where it said:

> "The due process guarantee of hearing in our system of law has always been recognized as a right in persons, not a privilege to be extended to persons according to the ex parte
> 1218 judgment of tribunals as to whether or not there should be a hearing. It is a personal right of access to the courts or to administrative tribunals, a right at the minimum to present one's claim of injury or threatened injury and to be heard to argue in support of the proposition that the allegations thereof, assuming their truth, are legally cognizable, i. e., state a 'cause of action.' This right of hearing accorded by the

due process clause is one of the few rights guaranteed by our Constitution which are substantially absolute."

The right is subject to no limitation, if Your Honor please——

THE COURT: May I interrupt?

MR. RHYNE: Yes, Your Honor.

THE COURT: As I see it, you are not seeking relief from denial of a hearing since you have your right to a hearing before an open court and a jury in every one of these cases; what you are seeking to avoid is the bringing of a number of cases against you at one time.

MR. RHYNE: That is right, Your Honor, to put us out of business.

THE COURT: Supposing a man is indicted in a half dozen jurisdictions by direction of the Attorney General, which might put
1219 him out of business and even into jail; you would not expect the Attorney General to necessarily accord him a hearing before he decided not to prosecute him?

MR. RHYNE: No, Your Honor, but I believe this case is a little different from that case.

THE COURT: The difference would be in your case property is involved and in the other it might be a man's liberty.

MR. RHYNE: I would agree, Your Honor, a man's liberty is of greater importance than property, but in this case we have an unusual statute.

THE COURT: As I recall your argument, the Court of Appeals condemned multiple seizures and said they were illegal, and Congress, in the face of that opinion, passed this statute which permits multiple seizures upon a certain finding by the Administrator. Is that not correct?

MR. RHYNE: In part, Your Honor.

THE COURT: I beg pardon?

MR. RHYNE: In part. I say the statute, if I may explain——

THE COURT: You assume the finding must be made after a hearing; you assume that must be written in?

MR. RHYNE: I assume that case is still the law.

THE COURT: Notwithstanding the Act of Congress?

MR. RHYNE: Yes, Your Honor.

THE COURT: I will hear you on that.

1220 MR. RHYNE: Your Honor, I know Mr. Kleinfeld argued before that the National Remedy case, upon which I relied, is no longer the law because of this statute, but Your Honor will also recall I called attention to the fact—I realize Mr. Kleinfeld is arguing the case here and would like to win it, but as I called to Your Honor's attention before, I do not think his argument is to be considered with as much weight as a statement made by a senior

attorney of the Food and Drug Administration when he was making a speech at New York University on the Federal Administrative Procedure Act, in which he said that this case had been codified into the law and so, therefore, it is still the law.

So, Your Honor, where these seizures are unnecessarily oppressive, as they were condemned in that case, you can still stop them under this statute, and he said the purpose of this provision is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1966 Act did not contain a comparable provision. Then he says:

> "However, in at least one instance the court enjoined the institution of more than one seizure because it appeared to the court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. This section is virtually a codification of the principle of that case."

1221 So I say, Your Honor, that principle is the law today, and on the facts of our case as we have alleged and by their motion to dismiss they admit, they have deliberately made seizures in New York, Buffalo, Hastings, Nebraska, Seattle, Washington, St. Petersberg, Florida, Chicago, Philadelphia, Clarksfield, Minnesota, Belleville, New Jersey, and all over the country, and we allege they have done that with the deliberate intent of putting us out of business before we can get a hearing on these libel actions. We also allege that they have exceeded their authority by denying us a hearing, and, as we point out in our legal memorandum, if they wanted to stop us—and in this way there would be no question of injury to anybody—they have a right to get an injunction in our action in Los Angeles.

So we say, Your Honor, the only purpose is to oppress us and harrass us and hurt us before we can get a hearing. All we now ask is that the Court require them to wait until we get a hearing on the merits, which is something the Administrator has not given us but on the contrary has commenced his proceeding on the weakest of these four possible grounds. As I read the statute and these other cases, it seems to me, Your Honor, that the courts have said that rather than declare an Act unconstitutional because it does not provide for a hearing, where the property of a person is affected they will
1222 read in that requirement. We have a case in the Court of Appeals involving cancellation of air mail contracts. That is the case of Boeing Air Transport v. Bradley, where the court said——

THE COURT: I argued that case.

Mr. RHYNE: —that a provision for notice and hearing is read into the statute or otherwise it is unconstitutional.

I am coming back to my original point in part, Your Honor, but I think it is an important point, and I think the National Remedy case involves some of the same ideas, and in the National Remedy case, the Department of Agriculture, which then administered the Act, even though they were not required to do so, gave a hearing. It says in the report of the case they gave a hearing and they presented their contentions. We say if this National Remedy case is the law, and in reading the statements by Mr. Markel and by others who have been writing on this thing, they all seem to think the National Remedy case is still the law—in that case the Court said they could see no necessity whatever to put these people out of business before they could get a hearing. If we are to get our hearing in one of the libel actions rather than before the Administrator, it seems that the very least they could do, since the public health is not involved and nobody is being hurt in this case at all—the very least they could do is wait until we have a hearing on the merits. I am willing to take the hearing before the Administrator and I feel very confident, Your Honor, the Administrator of the Federal Security Agency, who has been a little apart from the Food and Drug Administration, and I guess this is the first time he has ever had to pass upon one of these cases——

1223

THE COURT: If I may interrupt, Mr. Rhyne, I have felt inasmuch as this appeared to be an R statute, Congress intended it should be followed literally and that responsibility should be placed on the man indicated in the statute and not some subordinate. He has now assumed that responsibility, has he not?

Mr. RHYNE: Could I say a word on that, Your Honor?

THE COURT: Has he?

Mr. RHYNE: The Acting Administrator has acted.

THE COURT: In the absence of the Administrator, he is the Administrator, is he not?

Mr. RHYNE: Well, his findings were undated and all he did was to sign his name where the Food and Drug people had signed before; everything is identical except the date is four days later. I do not know whether he heard any evidence or did anything, because it was an ex parte thing and we were not allowed to participate.

THE COURT: But he has assumed responsibility personally, has he not?

Mr. RHYNE: Yes, Your Honor, he has, and he has denied us the hearing I requested. Going further, Your Honor, first of all we believe the due process clause entitles us to a hearing. Your Honor went through the Boeing and other cases and I will not go through all of that, but it seems to me any time an administrative officer does something to hurt you, you are en-

1224

titled to a hearing. That is the way I read those cases. Otherwise, the court says the Act is unconstitutional, and therefore under this finding by the Administrator they cannot make these seizures. He sets the whole thing in operation. That particular type of case has not been passed upon by any court. There is no case where anyone has asked for this type of hearing.

On the National Remedy case, that case is so clearly fair and reasonable I do not see how anybody could contend other than it is the law and that a court of equity will always protect you against unnecessary injury, and of course we have alleged and they have admitted it is all unnecessary.

THE COURT: Do you not think it would be rather empty for you to go before the Administrator, feeling as you do?

Mr. RHYNE: No, Your Honor. As I say, he has been separate and apart from the Food and Drug Administration.

THE COURT: But you say he acted arbitrarily.

Mr. RHYNE: He has had the overall responsibility.

THE COURT: And he has failed to give you an opportunity to be heard?

Mr. RHYNE: We say he has decided in an ex parte way.

1225 I called attention to that fact once before; I called his attention to that specifically. I said, "If you will let us appear before you we can convince you there is nothing misleading in our advertising." Although he has not allowed us to appear before him and explain, I do not think I could assume, Your Honor, he would act that way at a hearing. I assume all men are fair and I think just as our Court of Appeals said in the WJR case, "He who decides anything, one party being unheard, though he should decide right, does wrong."

Although, as my learned adversary says, that case is up in the Supreme Court, certiorari having been granted last Monday, it is still the law in this jurisdiction, and in that case the FCC Act did not require a hearing, but the Court of Appeals said the due process clause required it.

THE COURT: It seems to me in one of these cases that are pending, Mr. Rhyne, you could go to the court and ask that it be advanced for early hearing and have this issue determined.

Mr. RHYNE: Your Honor, we have local attorneys in the ten cases, and our information is that on the libel actions there is no hope of getting any one of those tried before the criminal case is tried on the 5th of April in California.

THE COURT: Is that because of opposition by the Government?

1226 Mr. RHYNE: No, Your Honor, it is because of the condition of the calendar in the jurisdictions where they are pending. If we could get an injunction restraining them from mak-

ing further seizures, we wanted to combine those and make a motion to move it to Los Angeles, or as close as we could go to try it. We find it would be seven months in San Francisco, which is the adjacent district in one direction, and about the same length of time in Phoenix, which would be the adjacent district the other way. So that is the very practical problem we face there. If we made a motion to bring all of the cases together now, and they could make more seizures—and they have sent this information out to the District Attorneys in mimeographed form and they have told us very frankly they intend to make many seizures, since we have 7,000 distributors throughout the United States, Your Honor can see the situation we would be faced with very quickly. They can come to Los Angeles and get an injunction and close us down immediately if they have any case, but they do not choose to do that; they choose to bring all of these libel actions and, as Your Honor well realizes, that hurts good will terrifically.

Now, Your Honor, is that power given to an executive officer? I do not feel that Congress by this law intended to give this power to an executive officer. Of course, where there is anything
1227 dangerous to the public health, summary action is allowed, and the Supreme Court has said that many times, but of course, this is not a case where summary action is required. As I read this statute, it says the facts could be found without a hearing and could be found by any minor employee of the Federal Security Administration, but on the question of probable cause, it does not say that; it breaks that off and the Administrator has to make that decision.

THE COURT: He makes that on the findings of his subordinate?

MR. RHYNE: Yes, Your Honor. Then, I was faced with the question, in considering an attack on the constitutionality of the section——

THE COURT: Maybe that is the reason he does not give you a hearing, because he is bound by those findings.

MR. RHYNE: The statute does not say he is bound, Your Honor, and that is another problem. The statute is so unusual. I ran into professor Cavert at Duke, who drafted it. He said they were slipped in during the last conference committee when he was not there. He said he does not know why they were slipped in behind the findings of fact and did not apply to probable cause. He did not know anyone who could explain it. There was no discussion of it in Congress. It is unusual and has never been passed upon by any court, the question as to what the Administrator is required to do.

I had these cases that seemed to say that since only the
1228 Administrator could make this decision of probable cause, if I went before a three-judge court I would not only make

myself unpopular with the judges but would be thrown out on the basis that, as properly construed, I was entitled to a hearing. So it was quite a dilemma.

THE COURT: If I should decide this against you, you would not be forced into taking that course.

Mr. RHYNE: No, Your Honor. I feel if your Honor decided against us, then we would have a decision in this case saying we were not entitled to a hearing on these particular facts and then the three-judge court could not say, "We will read in this requirement of a hearing," and would say under the due process clause in all of these cases you are entitled to a hearing whether it is in the statute or not. It is quite a problem.

I will also say to Your Honor I came armed and am armed and was going to ask Your Honor to allow me, if you construed the statute in that way, to amend the complaint and attack the constitutionality. As I have said, the Government suggests "Why don't you attack the constitutionality?" I feel, after making a thorough study of this, when you attack the constitutionality of a statute you should be very sure there is no possible way of construing it so it will not be constitutional. That seemed to be so settled law

I was afraid if I come before a three-judge court, if I took
1229 the same position as in the Farley case and these other cases and say the statute does not say you are entitled to a hearing, I am afraid they would say, "You are entitled to it as a matter of due process," and I would be thrown out of a three-judge court and would be back here and it would prejudice our whole case and also take considerable time. As I say, in the meantime, I would we would be protected by a restraining order. But it did present quite a problem. I think that if the statute is construed as denying us a hearing by the Administrator, that it would be clearly unconstitutional because the determination would be as a result of what he does in the ex parte proceeding and our property is immediately endangered; our good will and our business all over the country has suffered terrifically because of what they have done. To show Your Honor that the Administrator and his people under him have proved wrong once before, during the time when they had hearings we have proved it countless times and can do it again on the merits of the case.

There is one final point I would like to mention, Your Honor. Under the Administrative Procedure Act, Section 10, without reading the language, certainly gives us the right to a review of any action by any Federal agency that affects us and hurts us, by any proper process before any court of competent jurisdiction where the statute

provides us a right of review. Of course, in our complaint we
1230 have asked that this finding and the decision of probable cause be reviewed and set aside not only for failure to give

us a hearing but because it is wrong as a matter of fact. We think under Section 10 it says you can have a trial de novo, and that issue would have to be passed on by this court in reviewing this case, and of course that is a conflict in the facts that would automatically require denial of his motion to dismiss because it seems to me we are entitled to that review under the Administrative Procedure Act, and I could detail the many conflicts in facts that exist. They have tried to answer all that we have said by affidavits, and the record is large, but I think, Your Honor, the main issue is whether or not our advertising is misleading. We deny affirmatively it is not, and they in their affidavit say it is. That is an issue of fact that will have to be passed upon by a court, and we would be quite content with a temporary injunction that would restrain them from making multiple seizures until that issue of fact could be passed upon by this court.

Your Honor, I have taken considerable time, but I think the question is important, that it is a new question, a novel question, and this point has not been raised before in any court.

My adversary refers to the Keller case before Judge McGuire. In that case the Attorney General was not a defendant. In
1231 that case the plaintiff had lost three libel actions and two injunction suits and furthermore the case is entirely distinguishable by reason of the fact the product was dangerous and ours is not.

So, Your Honor, it seems to me we are entitled to a hearing, and second, the National Remedy case, in spite of the contention of my distinguished adversary, is still the law and still will protect us until we can get a hearing; if we can have it before the Administrator, and finally, the Administrative Procedure Act gives us a method of reviewing the Administrator when something he does hurts us, and of course there is then a conflict in facts.

Mr. KLEINFELD: If Your Honor please, first I want to mention the statement by my adversary that the Government with malicious intent has seized his client's product merely to harrass and hurt them. The Government has only one deliberate intent, and that is to protect the public from being defrauded and also to avoid serious physical danger. That is all the Government has tried to do here. What the plaintiff is attempting to have Your Honor do is to have you change the law. The Federal Food, Drug and Cosmetic Act provides specifically, in clear language, that multiple seizures may be made under four explicit conditions and circumstances; (1) where the Government has won a suit in the past; (2) where the product is dangerous to the public health; (3) where the Administra-
1232 tor has probable cause to believe that the label of the product is fraudulent, and (4) where the Administrator has probable cause to believe that the labeling of the product is misleading in a

material respect to the injury of the consumer. All of those circumstances are set forth in the Act. The Administrator is given no more nor no less power with respect to danger to the public health than with respect to the finding the labeling is misleading in a material respect. The Administrator has done what Congress has told him to do. He has determined that the labeling is misleading in a material respect to the injury of the consumer. The Act reads:

> "When the Administrator has probable cause to believe from facts found without hearing by him or any officer or employee of the agency * * * "

So the statute is not only not silent with respect to the giving of a hearing, but specifically says no hearing need be given.

Now, Your Honor, the reason for that is not strange. This is not a judicial or quasi judicial function. It is a discretionary executive fognal function which eventually may lead to judicial action. Now, the fact that this was thoroughly thrashed out in Congress is clear from the legislative history. We have cited and quoted from the committee report. I would like to quote from House Report No. 2755 of the 74th Congress, Second Session. As I told Your Honor before, the question of multiple seizures was one
1233 of the most highly contested parts of the bill. Most of the proponents of the bill wanted none at all, but with the National Security and Public Health and Welfare in mind, it became part of the Act, and it was set forth as specifically as it could be in Section 304(a) of the Act. I quote from that report:

> "There are two substantive changes made by this committee. One is that multiple seizures would be permitted in cases where the Secretary has probable cause to believe that misbranding is in a material respect false, misleading or fraudulent. This will permit protection of the public against such nostrums as a brew of weeds labelled as a treatment for diabetes, which rob the consumer's pocketbook at best, and at worst rob him of his health or even his life through a mistaken reliance upon them."

That is the exact situation before this court. Here is a business of selling a drug to the tune of $500,000 a month, a drug which the administrative experts, charged with the administration of the law, say is absolutely of no value in the treatment of the diseases for which it is recommended in the advertising. They do not stop with making false recommendations. They say, "If your ailment is chronic rather than acute, no harm will come to you." In other words, if you have a chronic ailment, a small cancer, what is your

hurry about seeing a doctor? They say, "Take our magic
1234 Nutrilite first; if it works, fine, and if not, see a doctor."
I submit, Your Honor, that is as deadly as putting a bullet through a person's heart.

The committee report from which I read says that is the type of case for which this is designed. It is designed where there are advertising which is misleading and where there is an indirect danger, which is clearly involved in this case.

Now, the plaintiff says all they want is to have their day in court. Well, why don't they do it? This case started over two months ago, and they have made a million dollars since then. The people who have paid that million dollars have lost it irrevocably and have been kept away from doctors. The seizure section says they may go to any one of the courts in which the action has been brought and as a matter of right have them all consolidated and tried in any one of those districts, or in a district of reasonable proximity to the claimant's principal place of business. They are given that as a matter of right; that is what they are entitled to from the court. But two months have passed and they have not made the slightest effort to consolidate the cases, remove them to one particular district, and ask the court for a quick trial; which, we would not oppose. Now, they have stalled to the tune of $500,000 a month, which the people have lost irrevocably.

I say, Your Honor, if anyone comes into court with hands
1235 that are not clean, it is these people. They do not even take advantage of the right given them by Congress. They can ask to have the cases consolidated, but they have not done that. So, Your Honor, the case boils down to one fundamental fact: What has the Attorney General or the Administrator of the Federal Security Agency done that contravenes law? They have done merely *an*-exactly what Congress has said they may do and what it is their duty to do under the circumstances, in their expert opinion, warranted.

The reference to the Administrative Procedure Act which has been thrown in is obviously without any avail. What we have here is not a judicial or a quasi judicial action by the Administrator; it is a formal matter; it is a discretionary matter upon the basis of which ultimately the Attorney General may institute actions. Section 10 of the Administrative Procedure Act provides that except so far as the statute precludes judicial review, the agency action is by law committed to the agency's discretion. In our case, clearly, the statute provides for judicial review. As a matter of fact there are a number of final decisions and actions as distinguished from preliminary actions where the act calls for judicial review. Congress specifically chose not to provide for judicial review or hearing and said so in clear words. Certainly it is also true that the

determination of probable cause made by the Administrator
1236 is the exercise of agency discretion. Therefore, Your Honor, how is the Administrative Procedure Act at all applicable? I do not see.

I want to conclude by saying again what the Administrator has done here is what Congress authorized him to do and what he believes as the expert charged by Congress to effectuate this law, will protect the public health and pocketbook.

I submit, Your Honor, what these people want is an amendment of the statute, and that is for Congress.

Mr. RHYNE: Your Honor, my adversary goes into the merits of whether our advertising and labeling is misleading. That is a disputed question here, and I am confident if we could have a hearing on it we would be able to show it is not misleading in any way. He also talks about not going to the doctor, but reading the rest of it, we find:

> "When you begin the use of any food supplement be sure to consider also if there is any possibility you need the services of a physician. If there is any evidence that a doctor should be consulted, you should do so. Bear in mind that in the use of any food supplement you are only improving your nutritional status. You may have other conditions that require the services of a physician, in which event you should consult a doctor immediately. It is a sound health rule to see your dentist
> 1237 twice a year and to have a regular periodic check-up by your physician."

Your Honor, that shows the danger of their trying to pick out one tiny sentence in this booklet of ours and trying to reach a rather broad conclusion from it.

As for the Administrative Procedure Act, I stated it rather broadly before, Your Honor, but I would like to read briefly from it. It states:

> "Any person suffering a legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. The form of proceeding for such judicial review shall be any satisfactory statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence of or inadequacy thereof, any applicable form of legal action in any court of competent jurisdiction."

We think our injunction is such a form of action. It says, "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court, shall be subject to judicial review."

Certainly, under our interpretation of the statute, Your Honor, we did not have any review whatever of what the Administrator
1238 has done and which has had this immediate and disastrous effect on us.

He talks about what the courts can do. It says this court can compel the action unlawfully withheld. Certainly, if it is discretionary and he is wrong we should have a right to stop him. It seems to me he has no answer whatever for their need to make more than ten seizures. If they want to put us out of business entirely, they have a right to bring an injunction action. He refers to the legislative intent of this thing. Of course there is no legislative intent describing this particular thing because, as I explained to Your Honor it was slipped in in conference committee so it was not discussed. They say on the injunction procedure they have put in and which this House report describes "This remedy would reduce litigation. In some cases it should avoid the hardship and expense to litigants in seizure cases. In many cases it is believed injunctions can be used with equal effectiveness and with less hardship. A seizure case finally decided in favor of a defendant leaves him without recourse for his losses, including court costs, storage and other charges."

Now, he refers to the fact—he says why don't we try to get a hearing? I have already referred to that situation, Your Honor.

THE COURT: I have your views on that.

Mr. RHYNE: I have nothing further to say about that,
1239 Your Honor, except this one thing: We asked them, including Mr. Kleinfeld, to stipulate that all of this could be removed out there, and they will not stipulate.

THE COURT: On January 26, I entered an order denying the motion to dismiss without prejudice. At that time I had in mind that the law permitting multiple seizures, being a very harsh procedure, I was of the view that there should be a showing it was literally and strictly complied with and the responsibility placed where Congress intended before multiple seizures should be permitted. Therefore I denied the motion without prejudice. Now, however, the showing on this record is the law has been strictly and literally complied with and it is not disputed. Therefore I submit I have no other alternative but to grant the motion to dismiss the complaint.

Mr. RHYNE: May I have leave to amend and file an amendment attacking the constitutionality of this section, and may I also ask I be protected by temporary relief before that matter can be heard?

THE COURT: That was done by stipulation before. I do not know what the attitude of the Government may be in this instance.

Mr. KLEINFELD: As far as the amendment of the complaint to allege unconstitutionality, Your Honor, the complaint at present

alleges it. So I do not see an amended complaint would serve any purpose.

1240 THE COURT: It would be necessary to convene a three-judge court, and at all events I shall give him leave to amend. As far as the injunction is concerned, I do not make any suggestion one way or the other. As I recall, at the last hearing counsel agreed to make no more seizures until the matter could be brought back again upon literal compliance with the statute.

Mr. KLEINFELD: Yes, that is all we have agreed to, Your Honor. I think there is probably before you their original motion for a preliminary injunction.

THE COURT: If that is to be heard, I will have to put it off.

Mr. KLEINFELD: No, Your Honor; that is not on today, but I think if the Government's motion is granted, the motion for preliminary injunction falls of its own weight. I think that is what Your Honor had in mind when you heard our arguments then.

THE COURT: It would fall until he files an amended complaint.

Mr. RHYNE: I have the amendment, Your Honor.

THE COURT: There will have to be an order prepared granting the motion to dismiss with leave to amend, and then you can file the amendment. That can be done today, and then I will hear the motion for preliminary injunction unless counsel agrees to retain the status quo.

1241 Mr. KLEINFELD: I would rather not, Your Honor. They have had two months to take the steps to bring the action on for trial. In the meantime their product has been sold to the tune of $500,000 a month. I think we have been pretty decent to them before, but I do not propose to give them an injunction again.

THE COURT: Then I will be obliged to consider whether or not I shall grant a restraining order.

Mr. RHYNE: I certainly would ask for one under the circumstances, Your Honor.

THE COURT: Are you willing to retain the status quo until the motion is heard, which should be very early next week?

Mr. KLEINFELD: Yes, Your Honor.

THE COURT: It may be that will have to be heard before a three-judge court.

Mr. RHYNE: I think it would, Your Honor.

THE COURT: We will have to have it done rather quickly after you file your amended complaint.

Mr. RHYNE: And in the meantime, Your Honor, we will be protected against these multiple seizures until we can get a hearing?

Mr. KLEINFELD: I assume it will be brought on early next week. I do not like to bind the Government because the whole pur-

1242 pose of the seizure case is to get the product off the market.

THE COURT: I do not know the condition of the court's

calendar. How would it be if you maintain the status quo until the case can be set down, and if you think it is too long, you can give notice to Mr. Rhyne and come down and announce you will not do it any longer.

Mr. KLEINFELD: I would rather Your Honor not put the burden on me.

THE COURT: I cannot say what time the Court will hear it.

Mr. KLEINFELD: The trouble is——

THE COURT: Then, I will hear the motion for a restraining order and be done with it; I will hear that right now.

Mr. KLEINFELD: We are willing, Your Honor.

THE COURT: Then, I will not take anything up until the order is entered dismissing the complaint. Then I will take up a motion by you, Mr. Rhyne, for a restraining order. Maybe I will have to send it to somebody else, because I will not be in the three-judge court.

Mr. RHYNE: I think Your Honor can grant us the restraining order.

THE COURT: You will have to be prepared on the point whether or not I can enter it and still not be a member of the three-judge court.

Mr. RHYNE: I am not prepared on that, Your Honor.

1243 THE COURT: I say be prepared.

Mr. RHYNE: Do I understand Mr. Kleinfeld is to file an order this afternoon and I am to file my amendment to the complaint also?

THE COURT: I do not think you have to be concerned about that. I am sure he will not order the multiple seizures commenced until he gets an order by me granting the motion to dismiss.

Mr. KLEINFELD: We are in no race to seize anything, Your Honor. We just do not want to give them an injunction which we do not think they are entitled to.

THE COURT: After you have prepared this order I will sign it and then Mr. Rhyne can file his amended complaint and I can take up at that time whatever is necessary to be done on any application for a restraining order.

Mr. KLEINFELD: Do you want findings of fact and conclusions of law, Your Honor?

THE COURT: On a motion to dismiss?

Mr. KLEINFELD: And for summary judgment?

THE COURT: It will only be a motion to dismiss.

Mr. KLEINFELD: I will submit an order on the dismissal of the complaint.

THE COURT: You will submit it to Mr. Rhyne for his consideration so he may object as to form, and then the two
1244 of you will come down here and present it, and after it is signed, Mr. Rhyne may be permitted to file an amendment.

Then he may take up the question of a restraining order, which will be followed, of course, by a motion for a preliminary injunction, and at that time I want you both to be prepared to advise me whether or not I can hear the motion for a restraining order without injecting myself into the three-judge court, because that, I cannot do and operate the motions court at the same time.

Will you help me on that?

Mr. RHYNE: Yes, Your Honor.

Mr. KLEINFELD: Yes, Your Honor.

THE COURT: Very well.

(Thereupon, at 12:15 o'clock p.m., the argument on the motion was concluded.)

1245-1246 Reporter's Certificate to foregoing transcript omitted in printing.

1247

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

REPORTER'S TRANSCRIPT OF HEARING ON DEFENDANTS' MOTION TO DISMISS—(Filed May 3, 1949)

Washington, D. C., Wednesday, April 6, 1949.

The above-entitled matter came on for hearing before a Three-Judge Court at 10 o'clock a.m., on Wednesday, April 6, 1949, in the United States District Court for the District of Columbia, in the Courthouse, at Washington, D. C.

BEFORE:

Honorable BENNETT C. CLARK, United States Circuit Judge for the District of Columbia Circuit;

Honorable T. ALAN GOLDSBOROUGH, District Judge of the United States District Court for the District of Columbia; and

Honorable EDWARD A. TAMM, District Judge of the United States District Court for the District of Columbia.

1248 APPEARANCES:

CHARLES S. RHYNE, Esquire; EUGENE J. BRADLEY, Esquire, and LESTER L. LEV, Esquire, on behalf of the plaintiff; and

VINCENT A. KLEINFELD, Esquire, on behalf of the defendants.

PROCEEDINGS

THE DEPUTY CLERK OF THE COURT: Mytinger and Casselberry, Incorporated, v. Oscar R. Ewing, et al.

JUDGE CLARK: Are the parties ready?

MR. RHYNE: Yes, Your Honor; ready for the plaintiff.

MR. KLEINFELD: The defendant is ready.

JUDGE CLARK: How much time do you gentlemen desire for argument?

MR. KLEINFELD: The defendant will take about three-quarters of an hour.

JUDGE CLARK: How much time will you take?

MR. RHYNE: I will take about the same length of time.

JUDGE CLARK: Very well. You may proceed.

MR. KLEINFELD: If the Court please, I assume that the plaintiff, who is attacking the constitutionality of the statute and is asking for a preliminary injunction, should proceed first.

JUDGE CLARK: Very well.

1249 MR. RHYNE: It is perfectly fine for me to proceed but since he filed the motion to dismiss, I had thought that his motion to dismiss would be heard first. That is the usual procedure when we file a motion to dismiss.

JUDGE CLARK: I think that is correct.

ARGUMENT ON BEHALF OF DEFENDANTS

MR. KLEINFELD: May it please Your Honors, the plaintiff distributes in interstate commerce a product called Nutrilite. It is composed of parsley, alfalfa, and watercress, fortified by some minerals and vitamins.

In selling the product in interstate commerce an accompanying booklet entitled "How to Get Well and Stay Well," describes the product and indicates its effect in the prevention and treatment of many common diseases. In fairly skillful but disingenuous language the product is held out to be practically a panacea for most of the common diseases affecting mankind, and if one has the disease, it is held out as a cure for that. The language is very skillful.

There is rarely found a direct statement or allegation, but the entire booklet by inference and implication and innuendo conveys, in the opinion of the Government, the impression to the ordinary consumer and purchaser that this product will, if used, prevent the person from getting most of the common diseases of mankind and will help to dispel such disease if one has them.

The Government then proceeded to make seizures of the product under Section 304 of the Federal Food, Drug, and
1250 Cosmetic Act. After having made a number of seizures under that section, the plaintiff came into this district and sued to enjoin the Federal Security Administrator and certain subordinate officials of the Security Administrator, and the Attorney General,

from proceeding to make any more seizure actions against shipments of its product and requested the Court also to order the dismissal of those cases which had already been filed and also requested that the Court direct the removal of all existing cases to the Southern District of California.

The defendants made a motion to dismiss before Judge Pine on the ground that the complaint did not state a cause of action. Judge Pine, after hearing argument from both sides to dismiss, denied this motion, without prejudice, on the ground that the determination of probable cause made under the seizure section, upon the basis of which the seizure actions have been instituted, that this determination had been made not by the Federal Security Administrator but pursuant to delegation by him to a Commissioner and Associate Commissioner of Food and Drugs, and for that reason Judge Pine denied the motion to dismiss.

Although the Government was and is of the view that such delegation is proper, in order to bring the fundamental issue presented by the case to the fore as quickly as possible, we went back
1251 to the Federal Security Administrator, and the Acting Federal Security Administrator made the determination of probable cause specified in the seizure section upon the basis of which the seizures have been made.

The Government then again made a motion to dismiss, and after lengthy argument Judge Pine granted the Government's motion to dismiss on the ground that the complaint did not state a cause of action and the Government was doing nothing more than Congress had authorized it to do in specific language under the section.

Judge Pine then at the request of the plaintiff granted leave to the plaintiff to amend its complaint, since the plaintiff was now alleging that since the Government could make more than one seizure of its product, and since the statute did not provide for some sort of administrative hearing or preliminary trial of some sort before judicial proceedings were instituted, that this was a denial of due process in violation of the Fifth Amendment. That is the matter on which we are before this Court.

Now, in order to grasp the one issue before this Court, which is whether some sort of administrative hearing or administrative trial of some character is required before the Government may make more than one seizure of different shipments of a drug product, which the Government alleges is misbranded, there are three fairly important basic assumptions which I think must be kept in mind.

1252 The first basic assumption is this: These ten suits which have been instituted against this Nutrilite, of course, were instituted against a product called Nutrilite. Each suit, however, is a suit against a different and separate and distinct shipment of Nutrilite, which, in the opinion of the Government, is materially

misbranded and has been shipped in interstate commerce in violation of law and is therefore, in the language of the Supreme Court, an illegal and contraband shipment. We started each suit against a different shipment.

The second basic assumption is this: Each seizure action is an action instituted in Court pursuant to judicial process. No seizure is a so-called executive seizure.

Section 304 (a) of the Act provides, generally, that any article of food or drug that is adulterated or misbranded when introduced into or while in interstate commerce may be proceeded against and seized while in interstate commerce or anytime thereafter and condemned.

What the Government does in these seizure cases, and that is all it can do, is in each particular case to go into the District Court and file a complaint, or libel of information, which alleges that the product is adulterated or misbranded in various particulars under the Act.

The District Judge issues a writ to the marshal directing
1253 him to attach or seize or take into custody, in res, the article proceeded against.

Then any person who has an interest in the property seized may come into court and file a claim of ownership and an answer, and then a trial at law is had before the court, and if either party demands it, before a jury.

These seizures, therefore, are not executive seizures, and that is the main distinction between almost all the cases—I think all the cases—cited by plaintiff's brief, and that is the distinction between those cases and the cases before the Court.

The plaintiff cites case after case which is in connection with so-called executive or summary seizures, where under a particular state law an executive official is authorized to seize and destroy some property, without any judicial process whatsoever. Most of these cases hold that before such summary proceeding is instituted, taking the man's property without any judicial action or recourse, unless there is some real and immediate danger, a person is being deprived of property without due process, unless he gets some sort of trial or hearing.

We do not deny that.

But the seizures instituted under 304 of the Federal Food, Drug, and Cosmetic Act are not summary or executive seizures. We go into court, and we seize the property under the direction of
1254 the court, which is the procedure in any in rem action. But the issues are thrashed out before a court and jury with the same rights in a defendant as in any civil action.

The third basic assumption, which I think I want to point out in some detail, and in order to get a real comprehension of what is

involved in this case, is that the provision in 304 (a) of the Act with respect to so-called multiple seizures gives and conveys no right to the Government. It imposes restrictions on the Government.

Under the 1906 Act, there was no restriction whatsoever as to the so-called multiple seizures. The law provided that adulterated or misbranded foods or drugs, if they were in interstate commerce, could be seized and condemned, and Congress could have chosen to impose and provide for that same language. In other words, the seizures are made pursuant to the first portion of the section in which it says: Any article or drug that is adulterated or misbranded, when introduced into interstate commerce may be seized and condemned.

Congress could have stopped there in which case I don't know what the situation would be with respect to some sort of administrative hearing or trial.

But Congress said: We are not so sure we want more than one seizure action instituted in all situations, and we are therefore
1255 restricting the right of the Government to make more than one seizure action where the Government claim is misbranding.

Therefore, Congress said: We restrict the Government in these ways: We make no restrictions where the claim of the Government against the product is based on adulteration, but where the charge of the Government is misbranding, that the label bears false and misleading claims, in that situation more than one seizure may be made only in four specific situations.

One, where the Government has won a suit.

JUDGE GOLDSBOROUGH: What is that?

Mr. KLEINFELD: One, where the Government has a judgment in its favor against the product or its distributor.

Two, where the Administrator has probable cause to believe that the misbranded product is dangerous.

Three, where the Administrator has probable cause to believe that the labelling of the misbranded product is fraudulent.

And fourth, and last, where the Administrator has probable cause to believe that the labelling of the product is misleading in a material respect to the injury or damage of the purchaser or consumer.

As I have indicated in the present situation, originally the Commissioner of Food and Drugs and subsequently the Acting
1256 Administrator of the Federal Security Agency made a determination of probable cause. Under the statute, upon these findings, by subordinate officials, without hearing, that Nutrilite was misleading in a material respect to the injury or damage of the purchaser or the consumer, it was seized, and that is the determination of probable cause made in this situation pursuant to the statutory language.

Now, in the five years in which the Federal Food, Drug, and Cosmetic Act was considered by the Congress and was debated at great length, one of the provisions most severely fought about was the multiple seizure provision.

Advocates of a very strong bill contended very earnestly that since an attempt was being made to strengthen and reinforce the Food and Drug Act of 1906, and since the 1906 Act contained no restrictions with respect to making more than one seizure in a case where misbranding was alleged, such a restriction should not be imposed in the 1938 Act.

Others in Congress and out of Congress contended that only one seizure action should be permitted, particularly in cases of misbranding, except where there was some real and immediate danger alleged. There were many bills and many changes, many conferences, and much debate, and finally a compromise was reached by both sides in Congress, and the compromise was to the effect that I have just mentioned. There was no restriction made on the number of seizure actions which could be instituted where the charge was adulteration.

1257 Congress imposed these four restrictions which I have mentioned in cases of alleged misbranding.

Now, the specific purpose behind the congressional compromise is stated very clearly and very specifically in a committee report, which hits the present state of facts before this Court on all fours.

This is what the committee said, the House Committee:

> "There are two substantive changes made by this committee. One is that multiple seizures would be permitted in cases where the Secretary has probable cause to believe that the misbranding is in a material respect, false, misleading, or fraudulent. This will permit protection of the public against such nostrums as a brew of weeds labelled as——"

JUDGE GOLDSBOROUGH (interposing): What is that?

MR. KLEINFELD:—"against such nostrums as". I think I have pronounced it correctly—

> "—as a brew of weeds labelled as a treatment of diabetes and against innumerable other cheats and frauds which at best rob the consumer's pocketbook, and at worst rob him of health or life through his mistaken reliance upon them while his disease progresses unchecked. 'With this change the seizure section will continue to function as a means of "arresting the bullet in
> 1258 flight before it claims its victim', although the administrative agency will have materially less *atitude*, in making multiple seizures, than it had under the present law for the past 30 years."

Now, in the present situation, the administrative experts in charge of the Federal Food, Drug, and Cosmetic Act are of the view, and have so found, that Nutrilite, this alleged panacea for all ills, that the labelling of that product is materially false and misleading, and in addition to that, although again as I have indicated, the booklet How to Get Well and Stay Well is very cleverly worded, for example, every few pages in this pamphlet the statement is made: Do not forget you are about to die; if you have something acute, go see a doctor.

That puts up a good front, but there is a constant implication that if you have a chronic disease, what is your hurry. Take our magic Nutrilite; it may cure you, and it probably will, and if it doesn't, what harm is done; you can always go see your doctor.

Thus the booklet, after stating on several occasions: Do not forget you should see a doctor regularly, and here it lets the cat out of the bag, and here is what it says:

> "First, if the ailment is chronic rather that acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ailment has
> 1259 likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse."

Well, it can make things a lot worse if you are suffering from a chronic disease, such as a malignant disorder, and the committee report indicates that this is the situation which Congress had in mind in restricting the Government as to multiple seizures in four different respects, and the one which the Government utilized here—

JUDGE GOLDSBOROUGH (interposing): Is it your contention that if a person has cancer that that language you have read would tend to make the individual, instead of going to a medical expert, to delay that visit and take this medicine for some considerable time? Is that your contention?

Mr. KLEINFELD: That is in addition to our major contention. We are not claiming the product is directly dangerous or toxic but that the label makes false and misleading therapeutic claims, and in addition we say that there is indirect danger in persuading people to keep away from doctors if something has been bothering them, that they keep away from doctors, and when they go, it is too late.

We say that the label of the product makes false and misleading claims as to its therapeutic value, which is in violation of the Federal Food, Drug and Cosmetic Acts.

The plaintiff relies on National Remedy Company against
1260 Hyde, decided by the Court of Appeals for the District, under the Food and Drug Act of 1906.

I shall not spend much time on that because the facts are so clearly and readily distinguishable. In that case, as the opinion in the Court of Appeals states, the Government had proceeded against a drug product on the ground that the label was false and misleading. A trial was had and the Government lost.

According to the opinion of the Court of Appeals, the Government sat still for six years and did nothing, and then suddenly it instituted a large number of different seizure actions all over the country, and the Court of Appeals said: We are going to stop them; we think the District Court was wrong in dismissing the complaint; that looks like arbitrary and illegal conduct.

Well, of course, in the instant situation we have not completed any one suit against this product, nor have we lost any suit.

In the National Remedy Company against Hyde case, besides other factors of distinction, the Government had started a suit and lost it, and there was estoppel by judgment against the Government, and the attempt to start out, win or lose, with multiple seizures, was dead wrong. The Government had lost and was estopped by judgment of Court and jury in favor of the other side.

1261 If we had proceeded against Nutrilite, and had a trial by Court and jury, and we had lost it and had waited six years then started multiple seizure actions, that would be a different situation.

The fundamental argument of the plaintiff, I urge, comes down to the point that where the sanction provided by law is severe, a person has some right not to be sued.

These seizure actions are actions instituted in a court of law, following the in rem admiralty proceeding.

Suppose a defendant is proceeded against in a criminal case by means of criminal information. If he commits the offense in New York, he can be prosecuted in New York. If he commits a similar offense in New Jersey, he can be proceeded against there, and if he commits an offense in sixteen different jurisdictions, he can be prosecuted in sixteen.

I do not know that the Constitution requires, even in one or when sixteen are instituted against the defendant on the ground that he *is* violated a law, that some sort of preliminary trial must be had or else there is a violation of due process. In the instant case, these are civil actions, and the Government alleges each shipment that was made of the product is in violation of the Act, and the Government shows upon a determination of probable cause to proceed against each illegal shipment.

Now, suppose that those restrictions on multiple seizures
1262 weren't in the statute, that the statute just said, as it did under the 1906 law, that the product when misbranded and when shipped in interstate commerce may be seized and condemned,

and the Government made these seizures which the Government thinks violates the law. I don't know what kind of hearing he would have or before whom. The statute does not provide for any hearing.

It says, in restricting the Government: You may make seizures on a charge of misbranding when a determination of probable cause is made. That is a congressional and statutory limitation. The imposition of that by Congress does not require a hearing of some sort as a matter of due process. It does not follow.

Of course, if the plaintiff's argument was valid, they are also valid to the same extent where the Administrator makes a determination of probable cause that the misbranded product is dangerous. No distinction is made by him.

JUDGE GOLDSBOROUGH: What is that?

MR. KLEINFELD: Under 304, if the Administrator determines a misbranded product is dangerous, upon the basis of that also, more than one seizure may be instituted. In some instances it may be that the Administrator or the Department of Justice in instituting suit upon the basis of such recommendation may be wrong in some isolated instance.

Plaintiff can say that the Federal Security Administrator
1263 alleges this product is dangerous, and I say it is not. What I want is an administrative hearing of some sort before you; I want to show you the product is not dangerous. In other words, I want a little informal trial before any judicial proceeding is instituted against my product.

If we cannot seize the product more than once, we can seize two or more shipments of the product on the determination made under the statute that the label of the product is misleading.

By the same right, if a violation of due process is alleged, we cannot seize the product on the determination by the Administrator that the product was dangerous, unless similarly some sort of hearing is held.

Now, the results which ensue and the delay could be very grievous and very serious, so that the element of danger, it seems to me, is of very little constitutional significance. The same argument used with reference to the misleading character of the label, or the fraudulent character, can be made where a charge is one of danger.

Similarly, as I have stated several times, there is no limitation at all in the statute with respect to more than one seizure where the charge is adulteration. Now, adulteration in the statute is a word of art. It means a lot of things. Adulteration can likewise mean danger; adulteration can mean filthy, which can hurt nobody.
1264 It may mean decomposition, which can hurt nobody; it may mean economic adulteration, where a substance is added to a product to appear to give it a greater value than it has. Those are all encompassed within the meaning of adulteration.

No limitation upon making more than one seizure was prescribed in the statute where the seizure is made on the ground of adulteration. What happens when we proceed against a drug product where there is alleged adulteration, we seize the different shipments, whether two, three, or ten times, and the statute makes no mention that this may be made only upon a certain administrative determination of probable cause.

I assume, however, that since, according to the plaintiff, seizure actions are being instituted against more than one shipment, he is entitled to some sort of hearing. Now, what kind of hearing? Since the statute imposes no restriction on adulteration, before whom? Or as to what? I cannot say.

In addition, if due process as a constitutional matter requires that some sort of administrative hearing or trial be held before a trial in court is held pursuant to the institution of suit in any one seizure action, since any one seizure action is likewise predicated upon taking the res into custody by the marshal, and if the issue of fact and the issue of law will be litigated before a court and jury
1265 subsequently, I assume any in rem proceedings or seizure violates due process, because, as the plaintiff says here, he has not had an opportunity to come before the Administrator, or the person administering the law, to say: We think you are wrong, and if you start the seizure of our articles more than once, you will do us damage; it may get in the newspapers, and if you lose we cannot be reimbursed, and our product will deteriorate, and we demand as a matter of constitutional right that you let us come before you when you make this executive determination to recommend institution of suit to the Attorney General, that you let us come before you and prove to you that you are wrong and we are right.

I know of no provision in the Constitution which requires that before a man is prosecuted either once or ten times, or before his property is proceeded against, in a court of law or by an in rem proceeding, that there is a requirement that he must have a preliminary trial first, and that is what the plaintiff insists upon, and that is the violation of due process if he doesn't get it.

As a matter of fact, suppose the plaintiff is right, that he is entitled to some sort of trial before the Government proceeds in a court of law. Now, what will this hearing or trial consist of? There is no fair hearing or trial unless he has the right to be repre-
1266 sented by counsel, a right to present witnesses, a right to cross examine witnesses offered on behalf of the Government, and to have some sort of informal full-fledged trial.

Suppose he loses at the preliminary administrative trial, well, by the same token, I think constitutionally he would have some right to have a District Court, or some sort of court, review the deter-

mination of the Federal Security Administrator that the labeling of his product is misleading, or that the product is dangerous, or that the Government has won the suit in its favor.

If he claims that the decision finally reached by the Federal Security Administrator is not supported by substantial evidence, he would claim he is entitled to go to a court to see whether the determination is arbitrary, by review or injunctive proceeding, to test the alleged arbitrary conduct of the Administrator in reaching the determination, before any suit in a law court could be instituted.

Meanwhile, other people are being endangered by the product or they are spending their good, hard-earned money on a product, on drugs, whose label is false and misleading in material respects.

As far as the consuming public is concerned, it would be quite disastrous.

In summary, the situation boils down to whether a person, or a person's drug products, have a right not to be seized.

1267 Each shipment of Nutrilite, in the opinion of the Government, has a label that is false and misleading in a material respect. Each shipment of this product has gone into interstate commerce in a misbranded condition, and its label bears false and misleading claims. Thus it has violated one specific provision of the Federal Food, Drug, and *Cosmetic* Act, in the case of one shipment or ten shipments, and the Government proceeded against them in that each particular shipment violated the law.

I know of no requirement of due process which requires that before you start a suit either against the person who has violated the law or against a drug product which itself has violated the law in each shipment—I know of no requirement that a preliminary administrative hearing or preliminary administrative trial of some sort be had.

The persons charged with the administration of the Federal Food, Drug, and Cosmetic Act, presumably experts in that field, have determined that the product, that the label of the product is not only false and misleading, which is one of the criteria specified in the statute, but is materially false and misleading to the injury or damage of the consumer.

The plaintiff is entitled to come into court to exhaust the remedy which Congress has given him, but he has not attempted to do so.

The seizure section of the Act, 21 U.S.C. 334 provides

1268 that where more than one seizure has been instituted, the person whose product is proceeded against may come into any one of the courts where one of the actions is pending and obtain, as a matter of right, removal of all the seizure actions instituted to one of the districts where one of the actions has been instituted, or to a district of reasonable proximity to his home district.

In other words, the plaintiff has been suing the Government here

since early January, three months, and it is doing a business of a half million dollars a month, selling to the public a product which the Government thinks is materially misleading. The plaintiff could have gone to any court, as soon as the second seizure was instituted, and the plaintiff could have said: I demand all these seizure actions be consolidated for trial in any one of those districts where an action has been instituted, or if I prefer it, a district adjacent to my home district. The plaintiff could have done that.

The plaintiff could have then gone into the district where the actions were consolidated and said: The Government has instituted more than one seizure action against shipments of my product, and they may possibly—I don't know—but they may possibly, institute more, and I would like to get a preference, and I would like to get a trial started as soon as possible.

1269 I think the courts might well have given them a trial on that basis. However, no such request has been made by the plaintiff, but there have been tactics of delay, and three months have passed and not one effort has been made by the plaintiff to get any case to trial.

The plaintiff may say this: Judge Pine of the District Court here said that the original determination of probable cause made by the Commissioner of Food and Drugs, rather than the Federal Security Administrator, since the sanction was strengthened, the determination should be made by the Administrator himself. As I said, we differ with them about that.

We chose to go back to the Acting Federal Security Administrator and asked him to make a finding.

Plaintiff may then say: We think what Judge Pine said is the law of the case. As far as this district is concerned, it certainly is. Therefore, we claim that the seizures which you made are illegal.

But legal or illegal, there is nothing to prevent the plaintiff from going into any of the courts and have the cases consolidated for trial, and if he chooses to raise in any number of these cases the constitutionality, in the consolidated trial, that the seizure was illegal, he can do so. He raises that as a defense here. The first seizure action is not illegal, so that even there we seized the

1270 property in an in rem proceeding before giving him an administrative trial.

I say the plaintiff could have used the remedy provided by the same section which authorized the seizure. He could have gone immediately or at any time during the three months during which he has been litigating in this district and said to any district: I want, as a matter of right, to have the cases consolidated for trial, and after having them consolidated, he could say: I move to dismiss these actions which I think are illegal, but we will fight that one that

is not illegal. I ask for preference in the case because the Government may make further seizures.

In the state of facts and under the amended complaint, the plaintiff cannot claim deprivation of due process before he has attempted to use the statutory remedy which will get him in one court.

The plaintiff will say: If I do that, I have no assurances that the Government won't start the following day another action. He has no definite assurance, but certainly where there is a remedy given by the statute, that will cover most of the alleged damage and may cover it all.

If in January or February the plaintiff had gone to a court and asked for a consolidation and made an earnest, bona fide effort to get the cases tried before one court, I think the cases might be over by this time, and there might have been no multiple seizures.

1271 If the Government saw a bona fide effort to get the issues *thrashed* out, there might be no multiple seizures in addition. It is only for that reason that the plaintiff is in no position to claim violation of due process.

In conclusion, and I hope I have stated the major issue, whether the plaintiff is entitled to an administrative hearing or trial before the Government can proceed against more than one shipment of an illegal and contraband article. I say an illegal and contraband article because the drug product which is shipped in interstate commerce with a false and misleading label is an illegal and contraband article and may be seized at any time thereafter.

I see no requirement in the Constitution for administrative trial after a lawsuit is started. The same argument utilized by the plaintiff here could be used where a determination of probable cause with respect to a misbranded article refers to damage, or with respect to any seizure of adulterated products, where there is no restriction.

I urge, therefore, that the plaintiff's amended complaint states no cause of action, and shows no evidence indicating any deprivation of due process. There is no fact or no law indicating the plaintiff is entitled to an administrative trial before he can get into court and have the legal issues thrashed out. Therefore I urge Your Honors to dismiss the amended complaint.

(Thereupon a short recess was had.)

1272 ARGUMENT ON BEHALF OF PLAINTIFF

Mr. RHYNE: May it please the Court, first of all I would like to get one thing cleared up, and that is that this suit is entirely ex-advertised.

My adversary mentioned adulteration a good many times, but you will notice he himself conceded our product is entirely innocent

in itself. It is perfectly harmless. The whole argument that they make is that our advertising is misleading, and, of course, in our complaint we have denied that, and of course, that is the issue on which we want a hearing, and on which we have been twice denied a hearing by the Administrator of the Federal Security Administration.

I would like to get it very clear before the Court that we are not attacking the high purpose of the Food, Drug and Cosmetic Act in any way. We are attacking two words, two words that my adversary did not mention, or, if he mentioned them, I don't remember him mentioning them.

Those two words are "without hearing." They are in this Section 304 of the Act. And in that section it provides that the Administrator can make this authorizing decision which unleashes these multiple seizures on us all over the United States from facts found without hearing, and the Administrator has in an ex parte proceeding found and has signed a decision three times saying that in his opinion our advertising is misleading, and of course there is
1273 no contention that our product is dangerous. We filed affidavits of doctors showing that it was not.

There is no contention that the actual labels on our product are misleading.

I don't want the Court to be confused by the words "label" and "labeling."

Labeling refers to advertising. It is used in a technical sense in the Act. There is no contention that the labels which are on the product itself are not accurate and do not comply with the Act in every respect. They do.

The whole dispute between us and the Food and Drug Administration relates to our advertising, chiefly a pamphlet which he has referred to entitled, "How to Get Well and Stay Well." They say that has misleading statements in it. They say it is a very cleverly conceived thing, and I won't go into the merits of that at all at this time, but I do think I should get before the Court this picture.

If the words "without hearing," are stricken out of the Act that will not affect it one iota. His argument about the fact that it would affect a situation where something is dangerous, we don't for one minute contend under the Constitution you can't seize anything that is imminently dangerous at any time, and we have no issue here in this case at all on that.

I would like to say just a word about the facts as we
1274 allege them in our complaint.

This product has been produced and sold since 1933. We have had no trouble whatever with the Food and Drug people up until July, 1947. They had visited us twice, once in 1946 and once in January, 1947.

In July, 1947, they sent us a notice, and in that notice they said that our product was deficient in vitamin B_1, and they said that they did not like certain parts of our advertising. And so there was a conference or hearing, as we call it, out in Los Angeles, under Section 305 of the Act which relates to the criminal part of the Act, not to this multiple seizure provision, and they are required, before they can institute a criminal proceeding, to give you a hearing.

Our people went in there. They discussed this thing. They obtained a part of the products that had been seized and had it analyzed by a laboratory, and they found out it was not deficient in vitamin B_1, and they agreed to make changes in the advertising.

From that date, July, 1947, until September, 1948, we did not have any formal communications whatever from the Food and Drug Administration.

On September 15, 1948, there was a secret indictment returned in Los Angeles, and shortly thereafter they began these multiple
1275 seizures all over the United States, and, as I say, the charg in those multiple seizures is that our advertising is misleading, not that there is anything wrong with the product.

Well, the criminal matter was put off, because there was a case then pending in the Supreme Court of the United States that involved one of the issues. You see this pamphlet is not actually mailed right along with the product. It is a pamphlet that is given out to advertise it and to sell it, so one of the issues was whether or not it had actually accompanied the product, and this case in the Supreme Court involved that issue, so there was an agreement between our people and Food and Drug and the District Attorney out there that they would let the thing go off the calendar until the Supreme Court made this decision.

We also thought we had an agreement with them they would make no more seizures. They say they only intended that agreement to relate to Los Angeles, they did not intend to make any seizures in Los Angeles.

What have they done? They seized our product at Belleville, New Jersey; Seattle, Washington; Spokane, Washington; Clarkfield, Minnesota; at Hastings, Nebraska, at St. Petersburg, Florida, in Chicago, Illinois, and Buffalo, New York, and again in Belleville and in New York City.

They have made eleven seizures in nine different jurisdic-
tions, and as they have conceded in other arguments we
1276 have had before Judge Pine, the whole purpose of those seizures is to get our product off the market.

We allege in our complaint and they admit it has already cost us $100,000 a month. This product sells— before the seizures started,

it is a large outfit, large company, sales of more than $6,000,000 a year were involved, so there is no doubt but what the damage has been done to us by these seizure actions.

And we allege in our complaint, just as the Court of Appeals here said in the National Remedy case, that the whole purpose of these, and the pattern and design of these seizure actions is to hurt us for the reason that we have disagreed with them on our advertising, and that they were designed to oppress and harrass us, and put us out of business before we could get a hearing on this issue of misbranding and advertising. They say in their opinion it is misleading. We say in our opinion it is not, and we cannot in any of these libel actions, if we did move to consolidate them and take them out to San Francisco, Los Angeles—you see, they have been very, very careful not to make any seizure in Los Angeles where our business is located, and the best witnesses and everything is located—

We have 5,000 distributors, and they have the names of those distributors. They can grab it in 5,000 places, but they won't
1277 come into California at all, and if we make a motion to consolidate and move to California, of course they told us quite frankly when we talked to them about it they had other seizures in mind. It wouldn't do to move to consolidate them in San Francisco, where it would take us seven months to get this civil case to trial. What we tried to do was stop them.

I would like to say just a word about that. When I first started getting into this matter, I first thought I should attack the constitutionality of the Act to start with. I knew that was a very serious thing, and it should not be done if there was any way to avoid it, so I did not.

You see, we didn't know up until the 17th day of January, 1948, the basis on which they were seizing our products. They made this first decision condemning our labeling or advertising on September 30, 1947, but it was not until January 17, 1948, they ever gave us a copy. What they did, they kept it secret, and the proceedings in which they condemned us was secret. We didn't know anything about it.

So I decided to attack the administration of the Act, and to ask the Court to read in a requirement of hearing, because there is no prohibition against them giving us a hearing. It does say "without hearing," but I asked the Court to read that as applying to the fact, and not to the decision which the Administrator makes to unleash all these multiple seizures.

1278 Well, as Mr. Kleinfeld says, when we first came up before Judge Pine, Judge Pine said this was shocking, harsh. I have set forth in my brief some of his other remarks. He asked what kind of due process is it when the other side is not given a

chance to be heard. I will not state his position entirely, but he said:

"I don't know what I can do about it, because the Act itself has these words 'without hearing' in it."

So he said, "Under the circumstances I do think that the Administrator could not delegate his duty to any of his underlings to make this decision for him; he has to make it himself, because Congress intended it be made at a high level," and he so ruled, which, in effect, invalidated all the seizures that had been made up to that time except the first one. So, then, they went to the Administrator of the Federal Security Agency, and in between that time we used every means on earth to try to persuade the Administrator to just hear us. We told him the effect of his decision would be to put us out of business, it was already costing us $100,000 a month, what they had done illegally, and all we wanted was for him to just hear us, rather than let his employees come in and in their biased position tell him about our advertisting. We told him if he would just give us a chance to explain it to him, we thought he would agree with us rather than them.

1279 He twice denied us that right, although we told him the consequence of his act. He said under the statute he could go ahead, and he did, but all he did was just substitute his name for the name of these underlings who had signed this decision on September 30, and another on December 2nd, and in November. Whether they make three instead of one, I don't know.

Now, that is more or less the factual situation up to now.

When we came back before Judge Pine again he said there was nothing he could do, and of course the Government in its brief and and in the argument mentioned I had not attacked the constitutionality of the Act. I was trying to avoid that point by asking the Court to read in a requirement of a hearing. So he dismissed my complaint and gave me leave to amend to attack the constitutionality, and that is why we are here, and, as I say, I am attacking two words, whose elimination won't affect the Act in any way.

Now, these words "without hearing," I can't find that they have ever been inserted in any Federal statute in the history of this country, and I have made a rather thorough research into the question. I can't find that any city council or state legislature ever inserted the words "without hearing."

1280 It is true a good many ordinances and statutes have been construed as denying a hearing but the legislature has always left it to the due process clause of the Constitution and if there was an instance where immediate action was required, naturally they could make immediate seizures, but if not, if there was no impelling public necessity, as I have explained in my brief, always the hearing has been granted.

Now, when Judge Pine said he was shocked by this provision in the Act, I would like to say just a word about the legislative history, how it got there.

My adversary read from a report of the Seventy-fourth Congress. This Act was not adopted in the Seventy-fourth Congress. It was adopted in the Seventy-fifth.

The Act as passed by the Senate allowed multiple seizures of imminently dangerous products and where fraud was involved.

JUDGE CLARK: That was the whole theory on which multiple seizures were permitted at all.

Mr. RHYNE: You are absolutely right, Your Honor. And when it passed the House that language was just the same, but when it got into the Conference Committee there is where everything happened. I don't think it inappropriate to say I have had a little experience with Conference Committees, and can well picture just what happened, but, anyway, in the Conference Committee these words "without hearing" were placed in, and the language
1281 "misleading" was placed in there. It was not in there when it went by the House and it was not in there when it went by the Senate, and then when the Conference Committee report came before the Senate, Senator Copeland asked it be approved the very day it was agreed upon, and of course he inserted it in the Record at that time, but he certainly did not read it or anything, so the Members of Congress could know these words were in there. Then when it went before the house, no attention was called to the words "without hearing" at all. Attention was called to the "misleading" addition.

On the legislative history, I think that there is not much ground on which you can argue that the Congress really considered these words "without hearing."

I would believe from my study of the legislative history they all thought they were voting for a bill that allowed seizures when it was imminently dangerous to public health, or fraudulent, and of course neither of those charges are leveled against us here. They level a charge against us of "misleading," which is a matter of opinion, a very vague, conjectural, indefinite sort of thing. Almost any word you utter can be said to be misleading, unless you take two or three hours to explain it, and being a matter of opinion, of course that vested almost absolutely in the discretion of the Administrator.

Now, coming to this multiple seizure provision, there
1282 is a report, not by the Seventy-fourth Congress, but by the Seventy-fifth Congress when they put in the injunction as a remedy. If the Government thought our product was dangerous, they can go out to Los Angeles, they can get an injunction and put us out of business in one day. The Act has that remedy in it. They

can go right out there. If there was anything wrong with our product, they would do it.

Here is what Congress said when they said why they put in this remedy injunctions.

This is House Report 2139, Seventy-fifth Congress, special injunction remedy.

> "This remedy should reduce litigation. In some cases it should avoid the hardship and expense to litigants in seizure cases. In many instances seizure is a harsh remedy and should be discouraged and confined to those cases where the public protection require such action. In many cases, it is believed injunctions can be used with equal effectiveness and with less hardship. A seizure case finally decided in favor of a defendant leaves him without recourse for his losses, including court costs, storage and other charges."

And, of course, in our case we have a vitamin product whose
potency evaporates through deterioration while it is under
1283 seizure, and the product we get back from the Government is likely to be absolutely worthless, and we so allege, and they so admit.

Then I would like to quote from this National Remedy case to which Mr. Klemfeld referred in our Court of Appeals here, where the facts were almost similar. Of course that statute did not have the term "without hearing" in it. It did not have that term "misleading" in it. So the issues in some respects were a little bit different, but some of the language I think is very appropriate here.

The Court said:

> "Appellant has no plain, adequate and complete remedy at law, and its property, business and good will will be ruined and destroyed, unless relief is granted herein.
>
> "In the present case the action and proposed action of the Department would, under the averments of the bill in effect deprive appellant of its property through the destruction of its business before the issues involved could be determined by the Court."

1284 That is our exact situation here. They are grabbing our product all over the United States, they are threatening to grab it, and they have made eleven seizures, as you can see, way out in Washington, up in Chicago, down in Florida, up in New York, and out in the Mid-West, and they have the names and addresses of 5,000 of our distributors, and they have told us quite frankly they are going to make more seizures, and I might say they were making seizures right up until I filed this case.

I filed this case on the 29th of December. We went before Judge Schweinhaut. Judge Schweinhaut, it was during Christmas holidays, he ordered the counsel for the defendant to instruct his clients to make no more seizures until we could get a hearing. They made three additional seizures after that, and then they stopped.

Now, I think that this seizure situation in respect to food and drugs is a wonderful thing in the case of a situation where you need to protect the public from imminent danger, but where you have an innocent product such as ours, where it is not hurting anybody, and they have to admit it, and the only argument is over advertising, the least they could do would be to give us a hearing, and I think the Constitution requires it.

1285 And on this multiple seizure situation they say we can get a trial in one of the libel actions. I have explained how long it will take us there to get a trial, but you see we are not complaining about twelve trials. The thing we are complaining about and the thing that really hurts us is that you are in effect damned by your Government all over the United States. They grab it in Seattle, the whole trade knows it immediately. They grab it in Chicago, the whole trade knows it immediately. It has shattered the morale of our sales organization.

They knew it would have this effect, as they have said their intention was to take the product off the market, just because we don't agree with them on our advertising, and of course we have the direct injury of $100,000 a month. We have the fact that the product which they have grabbed and which they have threatened to grab deteriorates in value and is worthless when it comes back to us, so we do have an immediate and continuing irreparable injury, and they say that we can't stop them in any court in the land, that they are unstopable, and what we are saying is that this trial, surely we will eventually get a trial in one of the libel actions, but in the meantime we will be out of business. They know that better than anybody else. Our Court of Appeals recognized it; the Congress recognized it. That is the reason they try to throw certain safeguards around this multiple seizure thing, but I say the whole

1286 thing went wrong, it seems, in this Conference Committee, where a lot of things were inserted, and were not adequately explained.

Now, the defendants, they seek to color the whole case by all their argument that indirectly our whole advertising is misleading, and indirectly it will do this, and indirectly it will do that.

In doing that what they are trying to do is escape or color over this real constitutional issue, the fact that we have been denied a hearing on the authorizing decision, and I think the Court of Appeals in the WJR case, it is a case of WJR v. the Federal Com-

munications Commission, answered a similar argument made by the Federal Communications Commission very effectively.

The argument was in effect that, "Well, we are right, so why give them a trial; a hearing wouldn't accomplish anything." And that, in effect, is what the Government is asserting here. But the court there said, this denial of a procedural right guaranteed by the Constitution, in this instance denial of a hearing guaranteed by the due process clause is never harmless error. They had argued denial of a hearing before the Federal Communications Commission was harmless error.

> "An example of this may be supplied from criminal proceedings. Suppose that a verdict of guilty of murder and a sentence imposed under such verdict were appealed on a
> 1287 record which included the evidence, exhibits, arguments to the jury, and instructions, that is to say, all items conventionally necessary for review on the merits. But suppose that the contention of the appellant is that he was excluded from the courtroom during the trial, and that this was a denial of a procedural right guaranteed by the Constitution. Suppose that the Government conceded that the appellant was excluded from the courtroom during the trial, and contended, first, that the Constitution did not require his presence (just as the Commission contends here that the Constitution does not guarantee a hearing) and, second, that, in any event, the verdict of guilty was correct under the evidence and the instructions. If the Court decided that the exclusion of the appellant from the courtroom was a procedural error, in violation of a constitutional guarantee (this of course the Court would be obliged to decide) the Court would decline to consider the question of the correctness of the verdict under the evidence and the charge and would remand the case for a new trial with directions that the appellant should be allowed to remain in the courtroom during the trial. No matter how clear it may appear under the evidence that the appellant was guilty,
> 1288 the Court will be obliged to hold the verdict and sentence vitiated by the exclusion of appellant from the courtroom. The Court would recognize there can be no validity to the verdict, no valid 'guilt' until there has been a trial conducted in accordance with fundamental procedural guarantees."

So the Court of Appeals certainly recognized that mere procedural error is not harmless error, and so their attempt to argue the merits here and to color that over, I don't think of any avail.

Now, in our brief we have tried as best we could to brief this whole question rather thoroughly. I think in this argument I will

not attempt to review for you many of the cases there. I would like to call your attention to only three or four.

The first one I would like to call your attention to is the case of, a case decided by the Supreme Court of the United States in 1920, which appears in 254 U.S.

JUDGE CLARK: Is that in your brief?

MR. RHYNE: Yes.

JUDGE GOLDSBOROUGH: Is the constitutional question the only one before this Court?

MR. RHYNE: Yes, Your Honor. It is the only question before this Court. In other words, the whole question relates to the words "without hearing" and whether they can in effect destroy our
1289 whole business without a hearing, as they have done.

In that case the Georgia Legislature had given taxpayers this remedy in case of over-assessment of their property. They provided for arbitrators, three arbitrators, and if the arbitrators could agree on whether the assessment was high or low within ten days, the taxpayer could appear before them and he could get some relief, but if they didn't agree within ten days nothing could be done. In that case the taxpayer appeared before the arbitrators, but they couldn't agree within ten days, so the only thing the arbitrators couldn't agree on was how much to reduce his taxes, so his high taxes stayed in effect.

In other words, a remedy was provided, but it was abortive, it didn't accomplish anything. It was no protection to the taxpayer at all, just as in this case we say the trial of a libel action is no protection to us at all.

In the meantime, as I say, we are out of business. I don't see how there can be any dispute on the facts of this case that that isn't the effect of the multiple seizures.

Now, we have in our brief reviewed a number of cases relative to summary seizure, agreeing that in any case where a product is dangerous or that the public health requires it, the *due* process clause does not prevent you from grabbing it any place you want to by summary action. We don't dispute that and we cite those
1290 cases, and I have set them forth in full in our brief. In instance after instance they say where there is a dispute about whether or not a product or something is dangerous, you are entitled—and there is no impelling public necessity, you are entitled to a hearing before they take your property.

And I would like to call the Court's attention to just two of those cases, because of the language being most appropriate here.

I want to cite you a Maine case decided in 1919, the case of Randall v. Patch, which is cited in my brief.

In that case there was an action to recover damages for taking possession of and killing plaintiff's horse against his objection, and

it was contended by the plaintiff that a section of the statute under which the defendant officer acted was invalid, because it did not provide for a hearing to the owner before destruction or anything else.

The statute provided as follows:

"Any officer or agent of any society for the prevention of cruelty to animals may lawfully cause to be destroyed forthwith, any animal found abandoned or not properly cared for, appearing in the judgment of two reputable persons called by him to view the same in his presence, to be diseased or injured or in a condition from lack of food, water, or shelter, past recovery for any useful purpose."

1291 JUDGE GOLDSBOROUGH: Do you allege arbitrary conduct on part of the Agency or bad faith, or anything of that kind?

MR. RHYNE: Yes, I do. I allege they were arbitrary, their action was deliberately calculated to put us out of business before we got a hearing. I allege that in our complaint.

This Court said this in holding the statute unconstitutional:

"The plaintiff claims that he has been deprived of his property without 'due process of law' and in contravention of 'the law of the land'. The quoted phrases are identical in meaning. Notice and opportunity for hearing are of the essence of due process of law. A hearing before a judicial tribunal is not essential, but there must be notice and a reasonable opportunity for a hearing before some tribunal. An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and state Constitutions.

"But the defendant urges that a horse which has been decided by two reputable persons to be injured or diseased and past recovery for any useful purpose is no longer property.

1292 The word 'property', he contends, does not include a 'wreck of what was once a steed,' having no utility and no value. This reasoning, however, begs the question. The plaintiff claims that his animal is not past recovery and that it has value. To conclusively determine this question against the plaintiff without notice or hearing would be to nullify the constitutional guarantee. The defendant argues that the determination of the necessity or expediency of any legal enactment is within the exclusive province of the Legislature. That is true. The Court cannot declare a law to be void for the reason that it is unnecessary or inexpedient. But it may be the duty of the Court to pronounce invalid an act which violates an express mandate of the Constitution, even if the act is expedient and has been determined by the Legislature to be necessary.

"Again the defendant contends that Section 59 is a valid exercise of the police power. No Court has ever undertaken to define the limits of the police power of the State. New occasions teach new applications of it. It is based upon Society's right of self-defense and is coextensive with that right. Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation."

1293 JUDGE GOLDSBOROUGH: Is it your position that if you had a hearing before the Board, and you alleged in a complaint that the hearing was not a real hearing, a feigned hearing, conducted arbitrarily, not in good faith, is it your view you still couldn't come into court, although you would have this kind of hearing, you couldn't come into court and ask for an injunction?

MR. RHYNE: No, Your Honor, it would be my opinion that in that case we would be in the very position that the parties were in the famous Morgan case, and that we could come into court and ask for an injunction.

JUDGE GOLDSBOROUGH: Well, then, as I understand it you are not relying entirely upon the Constitution. You are relying upon the want of due process in issue here. And you are also saying that the action was arbitrary and not in good faith, the intention was to put you out of business before you get a trial.

MR. RHYNE: Yes, Your Honor.

You see the situation there is a little indefinite, because we did proceed on the other issues first, and asked that the Court here in effect require them to hear us, but Judge Pine said he couldn't do it, because these words "without hearing" were in the statute, that they precluded him from ordering them to give us a hearing.

1294 Since I made this reference to the Morgan case, I think there is some language there that is most appropriate here. I will just read one sentence.

JUDGE CLARK: Where is that case?

MR. RHYNE: Morgan v. United States, cited in the case of L. B. Wilson v. Federal Communications Commission, 304 U.S., page 18, and it said this: "Those who are brought into contest with the Government"—

JUDGE GOLDSBOROUGH: Does the Court understand you correctly in saying this product has been on the market since 1931?

MR. RHYNE: 1933.

JUDGE GOLDSBOROUGH: 1933? All right, proceed.

MR. KLEINFELD: "Those who are brought into contest with the Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

1295 Of course the final command is the command that goes out from the Administrator of the Federal Security Agency all over the United States to grab our product, just as they have done in this case.

Now, my adversary in his argument said in effect that if you hold these words "without hearing" shall apply to a charge of "misleading" against our advertising, if that is held invalid, that that affects the adulteration part of the statute. I can't follow that at all. I think that if the words "without hearing" were taken out, then the Constitution would take care of the situation in those instances where a hearing was required, a hearing would have to be granted, you would read in the requirement, you could then, contrary to Judge Pine's decision, because these words would be out, you could read in a requirement they would have to hear us when products are not imminently dangerous to public health, so the statute would not be weakened at all. The adulteration thing doesn't enter into this situation at all, in any way.

He has also cited in his brief a lot about the fact that this Administrator is acting in a discretionary manner. Well, whether he is acting in a discretionary manner, in a judicial manner, or anything else, he has effectively destroyed our property without a hearing, and has turned us down in our request for a hearing, so it doesn't matter under the cases as I read them in what capacity he
1296 acts, because the courts have always said, and I have cases in our brief on this, that be you administrator, be you judge or anybody else, he who decides anything, the other party being unheard, violates the due process clause.

We have a good illustration in a Supreme Court case coming up from Virginia, Southern Railway Company v. Virginia, where a State Highway Commissioner ordered a railroad to eliminate a grade crossing, no hearing, no notice, no nothing.

The statute said you can do this when you think the public convenience and necessity requires it, and the Supreme Court of the United States held that violated the due process clause, because you would have to give them notice and a hearing on whether the public convenience and necessity does require it, because he might be mistaken, but they say we cannot stop them, even if they are mistaken, that we can't stop them even where they are acting arbitrarily and without notice and in complete disregard of their constitutional rights. They say, "We are unstoppable."

And of course with this term "without hearing" in the statute, as it is Judge Pine's decision, although I disagree, I think he could have made them give us a hearing anyway under the Administrative Procedure Act, it is awful hard to do anything under the circumstances but attack those words "without hearing" and get them

out of the statute, so that under circumstances such as ours
1297 where there is no possible injury to anyone, and we allege that in our complaint, that no one will be hurt while they give us a hearing, no one could possibly be hurt, we allege that in their motion to dismiss they have to admit it—we allege there is no emergency, so, under the circumstances we think we have a rather unique provision here that hasn't appeared in any other law, to my knowledge. I could be wrong about that, but I say I can't find any legislature or congress or city council has ever inserted the words "without hearing" in any statute, and they have always left the Constitution to control it before. I can't find this term "misleading" is defined in the law.

JUDGE GOLDSBOROUGH: Leaving out the question of its constitutionality, are you conceding that the words "without hearing" justifies arbitrary action by the board?

Mr. RHYNE: No, Your Honor. I argued that for an hour before Judge Pine, and he ruled against me.

JUDGE GOLDSBOROUGH: That isn't in the case, then, at present, as I understand it.

Mr. RHYNE: Well, I would like to say it is my adversary's position Judge Pine's decision is the law of this case and we can't go into that. I would like to go into that, because this National Remedy case is direct authority in my favor on that very thing, and our Court of Appeals passed upon the issue on a situation very
1298 similar to the one before the Court, but I say if I am precluded from saying anything about the arbitrariness, although I think it is all involved, the fact that these words "without hearing" are in there let them act arbitrarily, but if I am precluded from going into it, it is clear the statute is unconstitutional, we are in very much the same position as when a case comes before the Supreme Court of the United States and the state legislature has enacted an act which the state court construes as not allowing a hearing. This statute has been construed as prohibiting a hearing to us under the circumstances.

So I would like to conclude that under every theory of the law that I can find under the broad principles that are written into our Constitution and into our law every man is entitled to a hearing before his property is taken from him except in those emergency instances where there is an impelling public necessity, where you dynamite a building to stop a fire, or you grab putrid or contaminated food to keep it from being sold.

JUDGE CLARK: Such as this substitute for salt, the multiple seizure.

Mr. RHYNE: And the sulfanilamide drug that caused all the deaths at one time.

I say to the Court again that this unusual, unique provi-
1299 sion is clearly unconstitutional as applied to us, where we have an absolutely innocent product, and if you take it out

by declaring those words "without hearing" unconstitutional, it will not affect the rest of the Act in any way, and the Government can go out and seize any product that is imminently dangerous, or where there is an impelling public necessity that they do so.

CLOSING ARGUMENT ON BEHALF OF DEFENDANTS

Mr. KLEINFELD: May it please the Court, the plaintiff has filed a brief of 61 pages. I don't propose to go into the law or the principles. It does contain a lot of irrelevancies, as well as many statements made in oral argument, statements taken out of context made by Judge Pine and myself, although I am flattered, statements made by counsel having nothing to do with the issues before this Court.

There is only one issue before this Court, and that is whether the plaintiff is being deprived of due process, whether his constitutional rights are being violated because more than one seizure of his product was made, without some sort of preliminary administrative hearing.

JUDGE GOLDSBOROUGH: But he says you gentlemen virtually concede the object of this was to put him out of business before he can get a trial.

Mr. KLEINFELD: We haven't conceded that. As a matter of fact the only issue ever raised either before this Court or before
1300 Judge Pine was this, that the fact that the Administrator did not give him a hearing may be constituted an unconstitutional deprivation of his rights. That is the only issue ever raised before this Court or before Judge Pine.

As a matter of fact, every single issue in connection with other facets was argued at length before Judge Pine, who dismissed the complaint. That is the law of this case.

The only thing remaining, and even that was adverted to in his original complaint, is the matter of unconstitutionality, that he is, as a matter of constitutional law, entitled to an administrative hearing before suits are started. That is the only issue he raises. That is the only issue that can be raised in this complaint, after the dismissal by Judge Pine.

That is the only issue before this Court, is he entitled to a hearing as a matter of constitutional right, although Congress has chosen as a matter of caution to provide specifically in the statute he is not entitled to a hearing. As a matter of fact, if those words were not in the statute, he still would not be entitled as a matter of constitutional law to some sort of administrative hearing or trial.

Again as a matter of constitutional law, there is no difference whatsoever between the institution of a seizure suit or seizure suits,

based upon a determination by the Administrator that the
1301 labeling of the product shows it misleading, or a similar allegation by the Administrator that the product is dangerous.

JUDGE GOLDSBOROUGH: Did Judge Pine hold that the words "without hearing," allow the board to make decisions to act arbitrarily and not in good faith, and with no recourse to be had to the courts to correct that situation? Is that what he held?

Mr. KLEINFELD: The only issue threshed out before Judge Pine was that the statute required, really required a hearing, and if the Administrator did not give a hearing he was therefore acting arbitrarily. That was the entire substance of plaintiff's complaint.

JUDGE GOLDSBOROUGH: Then Judge Pine hasn't passed on the question of whether or not if the action of the Administrator was arbitrary and capricious and not in good faith that no remedy could be successfully gotten from a court, an injunctive process.

Mr. KLEINFELD: Well, words of that general character were contained in the original complaint. Plaintiff's original complaint was long, contained very many allegations and conclusions.

Primarily it stated that if the plaintiff was not extended a hearing, the Government was acting arbitrarily and capriciously. It did
contain statements about threats having been made by the
1302 Government, the Government wanted to put them out of business, and would put them out of business, if they didn't get a hearing. All of these things were thrust into the original complaint, and those arguments were made before Judge Pine. Judge Pine considered all those arguments and dismissed the complaint.

I urge that the original complaint is part of the record in this case and may be examined by the Court. All of those issues alleged and brought out in the complaint were thrashed out in full before Judge Pine. He allowed the amended complaint to raise only one single issue, as to whether the failure of the statute to extend a hearing to the plaintiff before more than one seizure was instituted constituted an unconstitutional deprivation of plaintiff's property. That is the sole issue raised by the amended complaint, and the sole issue left after the original complaint was dismissed.

Plaintiff makes much of the fact that the Government's seizure actions are predicated on the false and misleading character of the labeling, rather than any direct danger. That is true, but the statute makes illegal the interstate shipment of a product which is falsely labeled, just as it makes illegal—

JUDGE CLARK: Do you contend there is anything false about the actual label?

Mr. KLEINFELD: Labeling, sir.

1303 JUDGE CLARK: I understand that. It is contended on behalf of the plaintiff here this book, which seems to be the crux of the case, doesn't go out with the product itself, but is sent in various other ways.

Mr. KLEINFELD: Your Honor, that constitutes labeling under the Act. Only last session the Supreme Court in two cases, Cordell v. United States, and United States against—

JUDGE CLARK: I understand that.

Mr. KLEINFELD: There is no claim by the plaintiff here, the booklet is not labeling.

JUDGE CLARK: I heard what the plaintiff said, but I still don't see how you can say this goes out with the product in interstate commerce.

Mr. KLEINFELD: With all due deference to Your Honor I say that issue is not before this Court, was never raised by the plaintiff, has nothing to do with the one issue upon constitutionality based on the failure of the Administrator of the Federal Security Administration to extend a prior preliminary hearing to plaintiff. That is not involved in this case. We have never gone into it. We didn't think it was necessary.

I think it is admitted the Government is proceeding on the basis of alleged false and misleading claims in labeling, and that this booklet, by the criteria used by the Supreme Court in the last session constitutes labeling. The plaintiff hasn't contended otherwise. I don't see what that has to do, very frankly, with the one issue of unconstitutionality.

JUDGE CLARK: Perhaps you don't.

Mr. KLEINFELD: I am sorry, Your Honor. I don't.

Again, the plaintiff relies to a large extent on cases, many cases, many state cases with respect to executive seizures, those seizures made by state or city officials without any judicial proceeding being provided for, where a state inspector is authorized to examine cattle, and if the inspector finds the cattle diseased, to destroy the cattle summarily.

JUDGE GOLDSBOROUGH: If, as a matter of fact, you put these people out of business before they can get a trial, your trial don't amount to anything. It is just nothing, futile gesture.

Mr. KLEINFELD: The Government by no means admits we do put him out of business before he gets a trial. That isn't a fact which we admit by a motion to dismiss, and it is not a fact. As a matter of fact, all he is saying is any seizure action, whether it is one seizure action or two seizure actions may do him substantial damage. That is no legal damage. The institution of any one suit: a criminal prosecution or a seizure suit, even if it is one suit, may possibly put him out of business. The attendant publicity of one suit may be possibly as bad as the attendant publicity of more than one suit.

That is the sort of thing one has to contend with in modern society. Nobody has a right not to be sued. Once in a while the plaintiff loses, but I don't know that the Constitution prohibits

the Government from issuing more than one suit against more than one illegal shipment. If he is prejudiced by that, it is a prejudice anybody suffers from the institution of a lawsuit.

Certainly the least that the plaintiff can do before alleging unconstitutionality or that he is being driven out of business is to attempt to utilize the remedy given him by the statute, to consolidate these actions, try to get them tried. He has never done that. They come into court and say the Government's action is arbitrary, "My constitutional rights are being violated." I think at least and first he has to say, "I have attempted to utilize statutory procedure."

Otherwise, how can he say the institution of these cases is putting him out of business. He hasn't tried to stay in business by following the remedy given him, but unless and until he does that, I don't know that he has any standing to argue anything about any unconstitutionality or arbitrary conduct.

All these cases, case after case, executive seizure, executive destruction or forfeiture of property, in the instance we take,
1306 the seizure made under court direction, with specific provision for trial, the seizure of the property is implicit in any in rem proceeding, whether it is against a food or drug, narcotics or an automobile, any in rem proceeding constitutes a seizure and necessitates seizure of the property before the case is tried.

To argue that it is unconstitutional to start more than one seizure because he may be damaged thereby, that same argument is of the same effect when the Government makes only one seizure. There, too, I could say, "When you institute one procedure, you would start one case, the publicity may probably put me out of business."

JUDGE GOLDSBOROUGH: There is a difference. You make one seizure to have a test case. That doesn't mean there is any reason why you should go around the country and destroy a man's business before he can get a trial. Now, that may not be before this particular Court at this particular time and we can't go into that, because that has already been settled. I don't know about that. But if this product has been on the market since 1933, and you come in here in 1949 and take actions all over the country to virtually destroy the business before they have an opportunity to have the case tried, it is a very bad thing for the Government to do, if that is what you are doing.

MR. KLEINFELD: I would like to explain that, Your Honor.
1307 As far as the products having been in existence since 1933, the difficulties with these products have arisen only within the last two or three years. It is only when this pamphlet, this labeling, since 1945, that this product has been put out with the labeling of which the Government complains, and that, I don't think, is a disproportionate period of time.

The business started to assume the proportion it now has, half a million dollars a month, only since 1945 when they started to put out this grossly misleading literature. I say that is only since 1945.

Too, these shipments are on the market, they have been shipped in interstate commerce. Supposing we did try to enjoin them. Our main reason for not doing so was because we did not want to harrass them too much. We did get a criminal indictment. We started multiple seizures. We didn't want to harrass them so much.

As far as policy considerations are concerned, here is a book put out since 1945, a product they have been shipping in interstate commerce to the tune of half a million dollars a month. Each person who buys this product is being grossly misled and defrauded, as well as being kept away from doctors. Perhaps an institution of two or more seizure actions may prejudice, may damage the plaintiff, but those consumers who buy every shipment of this product
1308 are being irremediably damaged. They can't get their money back, just because they found out later the product is valueless for the diseases they claim. I urge that is at least as important as the damage that may possibly be done this product by the institution of more than one seizure action, especially since they can ask for a remedy, which has not been done.

The institution of an injunction suit might prevent and would prevent further shipment of the product, but would have no effect on removing from the market products which have been illegally shipped in interstate commerce, and which the law authorizes the Government to seize and condemn to protect the public.

The plaintiff again attempts to make some sort of distinction between cases where adulteration is charged, and cases where misbranding is charged. Again the statute makes no limitation whatsoever with respect to adulteration. It authorizes seizure of any adulterated product, it may include economic adulteration, or some other, but the very same arguments used by plaintiff here, if he is entitled to a hearing on a charge that his product has violated the law, because it has been shipped in interstate commerce with a misleading label, he is entitled to some sort of hearing before the Government has a right to charge that the product is adulter-
1309 ated or dangerous, or that there is decomposition. As a matter of constitutionality his argument must prevail with respect to danger as well as misbranding, and to adulteration as well as misbranding.

In each case the seizure or seizures are made upon the basis of an administration decision that the product has violated the law in some particular respect. The claim, therefore, if upheld, would require some sort of administrative hearing or trial on the merits before any suit is started involving either misbranding or adultera-

tion or danger. Constitutionally the same exact arguments are before the Court.

It has been held time and time again that the power of Congress under the commerce clause is plenary. Certainly there is a very good rationale for Congress to say, "We prohibit the shipment in interstate commerce of any form of a product that is adulterated or misbranded."

It is perfectly proper for Congress in exercising its plenary power to delimit the Government's power by saying, "In cases of misbranding you may proceed only upon a determination of probable cause." Congress could have left that out or put it in. Congress could have left out the words, "without hearing" and it put them in out of an abundance of caution.

1310 The argument still remains that in this as in any other situation a person has no right not to be sued. If the person ships in interstate commerce ten illegal contraband articles or drugs he has violated the law ten different times. He has no more right to complain than if he shipped ten different shipments of one drug in ten different jurisdictions and thereby violated the law criminally ten different times. Could it be claimed the Government could not file criminal informations in every district? I think not. Not any more than a defendant has a right to go before a grand jury which is considering an indictment, or go to an administrative official and say, "Before you recommend the institution of criminal proceedings or seizure proceedings I am entitled as a matter of constitutional law to a hearing."

Plaintiff has cited the WJR case. The case is readily distinguishable. In the instant situation the Federal Security Agency is performing an executive function, he is merely making a determination of probable cause that the product is misleading. Subsequent to that the Administrator must recommend, must transmit the case to the Department of Justice or the United States Attorney with recommendations. Subsequently the Department of Justice or the United States Attorney, which have plenary authority to institute suits, must then determine whether or not to institute these suits.

1311 In the WJR case, as the Court of Appeals pointed out very clearly, there the Federal Communications Commission was performing a quasi judicial function on the point of law involved in determining whether the document submitted by the proposed intervener in that case constituted constitutional grounds for the intervention. The Court of Appeals held that was a quasi judicial function, and where a body is performing a quasi judicial function the defendant is entitled to a hearing.

This clearly is obviously not a quasi judicial function, but an executive function which may eventually lead to a trial in a court of law.

Thank you.

JUDGE CLARK: Do you wish to say anything further?

MR. RHYNE: I merely want to tell the Court we have filed a motion to consolidate and dismiss the others on the ground they were illegal, because the wrong man made the decision.

JUDGE CLARK: You have filed them?

MR. RHYNE: Yes.

JUDGE CLARK: The case is submitted.

(Thereupon, at 12:22 o'clock p.m., the proceedings in the instant case were concluded.)

1312-1313 Reporter's Certificate to foregoing transcript omitted in printing.

1314 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Reporter's Transcript of Proceedings—Filed April 14, 1949

Washington, D. C.
Wednesday, April 13, 1949.

The above-entitled matter came on for hearing in the chambers of Judge Edward A. Tamm at 10 o'clock a.m., on Wednesday, April 13, 1949, in the Courthouse, at Washington, D. C.

BEFORE:

HONORABLE EDWARD A. TAMM, District Judge of the United States District Court for the District of Columbia.

APPEARANCES:

CHARLES S. RHYNE, ESQUIRE, and LESTER L. LEV, ESQUIRE, on behalf of the plaintiff; and

VINCENT A. KLEINFELD, ESQUIRE, and WILLIAM W. GOODRICH, ESQUIRE, in behalf of the defendants.

1315 PROCEEDINGS

THE COURT: Mr. Reporter, will you first take the names of counsel so that we may have a record of who is present and who they represent, please?

MR. GOODRICH: My name is William W. Goodrich. I am an attorney for the Federal Security Agency, Food and Drug agency.

MR. KLEINFELD: I am Vincent A. Kleinfeld of the Department of Justice, representing the defendants.

MR. LEV: I am Lester L. Lev, one of counsel for the plaintiff.

MR. RHYNE: Charles S. Rhyne also representing the plaintiff.

MR. GOODRICH: I have a young lady from my office. She would like to sit in, too.

THE COURT: The purpose of this conference this morning is to outline to counsel certain considerations that the Court believed should be emphasized in order that the attorneys would know the factors that the Court considered in reaching its determination at the hearing on Wednesday of last week.

Judge Goldsborough had requested that we have a further hearing on Monday of the current week, basically to go over with you certain factors that we considered all counsel should know, in order that no one would be at a disadvantage in the
1316 subsequent hearing of the case.

Unfortunately, Judge Goldsborough is ill and it was necessary to postpone the Monday hearing.

Consequently, I am going to undertake to tell you the position of the Court in this case and try to get some general outline in the nature of a pretrial proceeding which will clarify for counsel and expedite for the Court the hearing set for April 25th.

First of all, Judge Goldsborough wanted counsel advised that the Three-Judge Court in issuing the restraining order of last week did not act solely upon the constitutional question involved but attempted to consider the complaint and the answer upon the basis of the merits of the cause.

The Court consequently issued a restraining order, rather than a temporary or permanent injunction, in a desire to continue the status quo and notify counsel that the Three-Judge Court would go beyond the constitutional question and consider the case on its merits, so that everyone would come to court with a full understanding of what the Court was going to consider.

The Court further felt that Judge Pine's previous ruling in connection with the previous complaint, the motion to dismiss, and so on, was not the law of the case or binding on the Court, in so far as the decision of the Three-Judge Court was concerned.
1317 As a matter of fact, it felt in issuing the restraining order an inclination, at least, to overrule certain of Judge Pine's findings.

It was with this general background in mind that the Court issued what appears to be an additional restraining order, rather than a temporary injunction, to put counsel on notice that the Court desired to hear the case upon its merits by the introduction of testimony to support the contention of the plaintiff that its Exhibit A, and in referring to Exhibit A, I don't know whether I

am referring to the exhibit by the plaintiff or by the defendant, and to permit the Government to introduce such testimony as would support its contention that the exhibit is materially misleading, and so on.

With that background, the Court has instructed me to hold a pretrial conference for the purpose of, first, determining a satisfactory date to counsel for both sides upon which a hearing on the merits can be held.

And secondly, to effect some agreement as to the number of witnesses that will be called, particularly if the plaintiff or defendant consider it necessary to call expert witnesses in support of their positions.

Third, to obtain stipulations as to the admissibility of evidence without formal proof, particularly documentary evidence, and to simplify the issues to a point, in so far as is practicable,
1318 where we will know just what we are going to meet and meet it head on.

The first matter then is the matter of the date of the trial. The Court has presently continued the case to April 25th. We felt within the Court that counsel on one or both sides might desire a continuance after that, a week or two weeks, or some reasonable period, particularly if there is a question as to the availability of witnesses.

The Court was inclined in the beginning almost to encourage any reasonable request for continuance, but at the present time the court commitments are such that if April 25th is entirely agreeable to both sides, we can hear the case on April 25th.

As I say, in determining and fixing the date, I want you to consider it and I am asking you to assist. I don't know whether from the nature of this exhibit, which seems to be about all we have in the case, whether you are going to offer expert testimony.

Mr. RHYNE: Frankly, I don't know what the expert testimony could be about, except as to the phraseology of the book and so on.

THE COURT: It is the function of the Court to hear the case, not to try it. That is your problem, rather than ours, to consider what you have in the way of proof, availability of witnesses, and so on.

I would like to hear from you as to the suggested date
1319 for trial.

Mr. KLEINFELD: May I address the Court first?

THE COURT: Certainly.

Mr. KLEINFELD: The Government would like for the record at this time, as I will on the date of trial, to object, one, to the jurisdiction of the Court on the ground that what the Court is determining shall be tried is beyond the jurisdiction of this Court.

Two, that the Government objects to the propriety of what is going to be tried. It is the Government's position, one, that this

Court is a particular Three-Judge Statutory Court set up for one particular purpose, to determine the constitutionality of the seizure provision of the Federal Food, Drug, and Cosmetic Act, and for no other purpose.

The Government's second position is that every issue in this case, other than the constitutional question was determined and argued at great length before this District Court, before Mr. Justice Pine, on two different occasions, and that in dismissing the complaint this District Court determined every single issue, except the constitutionality of the seizure provision of the Federal Food, Drug, and Cosmetic Act.

It is our present position that Judge Pine gave plaintiff leave to amend for only one specific purpose, to allege the unconsti-
1320 tutionality of the seizure provision of the Federal Food, Drug, and Cosmetic Act, and that is the only issue which this Court has properly before it, or properly can determine.

It is the Government's further position that this Court is without jurisdiction to perform a function which the statute has specifically vested in the Federal Security Administrator, to wit, to determine whether there is probable cause to believe that the labeling involved in this case is materially misleading to the injury or damage of the purchaser or consumer.

To that extent, the Government will proceed in a trial on the merits as directed by this Three-Judge Court, only with the premise that it is objecting to the trial on the ground that the Court is without jurisdiction, and it also is objecting to the propriety of this Court substituting itself for the Federal Security Administrator.

Do you have anything else to add?

We also state to the Court that this Court on April 6, 1949, apparently granted, one, a further temporary restraining order, and two, a preliminary injunction. Since the order of this Court provides, in addition to the granting of the temporary restraining order, that the defendants are enjoined temporarily pending final judgment here from continuing further prosecution of seizure actions or the institution of further seizure actions, we therefore are
1321 of the view that this Court did grant a temporary restraining order and a preliminary injunction, and that by the Federal Rules of Civil Procedure, Rule 52, findings of fact were required before such an order could be issued, and we therefore request that this Court vacate that temporary injunction.

With respect to the first portion of the order of April 6 with respect to the temporary restraining order, we urge that 28 U.S.C. 2282, designating the jurisdiction of the Three-Judge Statutory Court, requires that statutory findings be made even with respect to a temporary restraining order, and that such finding has not been made; and we ask the temporary restaining order be vacated.

We object to both the temporary restraining order and the preliminary injunction on the ground that the respective statutes have not been observed.

Mr. RHYNE: If the Court please, first of all, addressing myself to the date of trial, I would like to say that it is the position of the plaintiff that on a matter as important as the constitutional issue presented in this case that the Court is entitled to be fully informed by the trial, in which testimony is presented in support of the allegations of the complaint, before it is required to pass upon that important issue, because our attack on the statute is as applied to the plaintiff.

Therefore, the Court is entitled to have the facts before
1322 it showing how this statute is applied to the plaintiff, unless the defendant is willing to admit all the facts in the complaint. Of course, the defendant has not yet filed its answer so we don't know just what facts the defendant will admit.

But the defendant did in support of its motion to dismiss go beyond the usual motion and file affidavits which created a conflict of fact for the Court, and thereby making it necessary for the Court to either ignore those affidavits filed by the defendant or pass upon the issue of fact, so that the defendant itself has forced the Court to hear the merits in this case, aside from the question of the constitutional issue.

On the other suggestion made by Mr. Kleinfeld, I do not suppose it is incumbent on us to say anything at the present time.

THE COURT: It is not necessary for you to defend the Court's action.

Mr. RHYNE: So I will therefore address myself simply to the question of date.

THE COURT: One moment. I do want to put on the record the fact that the Court in reaching its determination considered that Judge Pine's action resulted in the filing of an amended complaint, which set forth all of the issues in the proceeding, and the
1323 Three-Judge Court consequently considered the amended complaint as the basis upon which it was required to take action. It considered the amended complaint, which raised certain factual issues, and so on, and the action of the Three-Judge Court was predicated upon the amended complaint, which, as I have indicated, the Court considered to embrace all the issues raised by the entire pleading of the amended complaint. I failed to make that clear in my statement that the Court considered all the factors, but it was predicated upon the phraseology of the amended complaint.

Mr. KLEINFELD: May I speak another minute?

THE COURT: Yes.

Mr. KLEINFELD: If Your Honor please, as far as the contention that the Government raised some issues of fact by affidavit, I believe it is up to the Court to consider the affidavits or not, as the Court chooses. They do not raise any question of fact. The Court on motion to dismiss may ignore the affidavits, it may do so, and if it wishes to use them, it may. That is for the Court to determine.

As far as the allegations in the amended complaint, other than the allegation of constitutionality, it is the Government's position that those allegations were put in improperly and without authority.

This Court through Judge Pine gave the plaintiff leave to amend its complaint, to allege one thing and one thing
1324 only, and that was all that was left after the original complaint was dismissed, and that was the alleged unconstitutionality. All the other allegations of the amended complaint are irrelevant and improper.

The Government did not have time to move to strike them, but it you permit us, we hereby urge every allegation of the amended complaint, other than any allegation specifying an attack on unconstitutionality, were improperly put in the amended complaint. Notwithstanding what Judge Pine permitted them to do, every allegation, other than unconstitutionality, is improper and should be stricken, and it is not properly before this Court.

I urge that this Court, after determining that some trial on the merits be had, that this Court should determine that there is no substantial question of constitutionality raised, and that this Court should determine that before reaching the other issue.

There is legal authority for that, and I will be glad to give the Judge citations.

In my opinion of the case, it is that the case should be remanded to Judge Pine of the District Court for trial, whatever trial there can be on the merits. I urge the only question really before this Court is the alleged unconstitutionality, and not a trial on the merits which this Court has directed.

1325 There has been no allegation by plaintiff in the complaint or amended complaint for any desire for a trial on the merits, and the Government cannot see what such trial can be, that no issues have been framed in the case with respect to any trial on the merits, and a trial on the merits is beyond the purview of the pleadings in this case, as well as beyond the jurisdiction of the Court.

The case I would like to cite to Your Honor is Jamison against Morgenthau, Secretary of the Treasury, 307 U.S. 171, which, I believe, indicates that this Court should either determine the constitutionality of the question involved here, or remand the case to a one-Judge District Court for a determination.

I also respectfully submit to the Court, if it is considering only the amended complaint, that Exhibit A was not attached to the amended complaint, and that therefore it is not properly before the Court. Since Your Honor said it is considering only the amended complaint, I wish to bring to the attention of this Court that Exhibit A was not the advertising or labeling material upon the basis of which the Federal Security Administrator, in reaching and performing the function vested in him by law, determined whether there was probable cause to believe that the alleged misbranding was materially misleading to the injury or damage of the purchaser or consumer. Exhibit A was not before the Federal
1326 Security Administrator.

It was merely inserted in the original complaint by the plaintiff and has no bearing on the case whatsoever, and we object to having any trial with respect to it.

Mr. RHYNE: First of all, as to the date, since it was mentioned first, I would like to discuss that for just a moment, if I may.

Since my clients are in California, it will be necessary for us to bring such witnesses as we have from California, and I believe we must take certain depositions out there, and I think the 25th is a little too early. I say that for this reason: I believe that the more time the Court can give us to prepare, the more time I can save the Court at the trial. We can be better prepared and make our case much more concise and save the time of everyone concerned.

Also, I believe it is the intention of the Government to object to my subpoenas, which I must issue to them, to find out what their contentions are. They have not filed any answer to date, and it will take some time to get objections to the subpoenas passed upon.

I believe it is your intention to object, isn't it, Mr. Kleinfeld?

Mr. KLEINFELD: I cannot say until I know what subpoenas are issued and to whom they are addressed.

THE COURT: I do not think that there will be any
1327 difficulty there. You can take a deposition from Government counsel to get the names of his witnesses. We will come to that issue when we reach it.

Mr. RHYNE: I would suggest that probably May 9th, which would be an additional two weeks, would be a more reasonable date in view of the nature of the case, and the nature and extent of the preparations we must make for trial.

I anticipate bringing people from California and of taking the depositions of people out there that we cannot get to come here. I would like to save the Court as much time as possible at the trial, and it has been my experience that if you prepare yourself thoroughly, you can do that, and I think I need that much time, and it would be in the interest of justice in giving it to us.

THE COURT: You propose May 9th?

Mr. RHYNE: Yes.

THE COURT: What is the Government's position?

Mr. KLEINFELD: The Government objects most earnestly to any further delay. These proceedings have been pending since early January, back and forth, in the District Court before Judge Pine, and temporary restraining orders have been granted, the Government has on several occasions consented to informal stays, over a period of three months, I think.

This product has been sold and is continuing to be sold, and we think that in view of the fact that in the opinion of
1328 the Government the public is being defrauded to the extent of a half million dollars a month, that a trial should be had at the earliest possible moment.

We urge that since this Court on April 6th granted a temporary restraining order and the preliminary injunction, the plaintiff has had plenty of time, in addition to the last few months, to present its testimony. Since it has obtained what it is has been seeking all along, some sort of trial, it has had plenty of time to prepare its evidence to submit it to the Court, and we urge that the statute under which his Court is proceeding provides clearly that a trial should be had as early as possible or practicable.

In view of the fact that it is the opinion of the Government Food and Drug Administrator in charge of the administration of the law that this product is grossly and materially misleading and is defrauding consumers to the extent of a half million dollars a month, we think that the trial ought to be not later than April 25th.

Mr. RHYNE: May I say one word more as to his statement about consenting to delays? The only time the Government has consented to anything is when Judge Pine dismissed their first motion, and he said he would issue an injunction unless they did consent, so Mr. Kleinfeld consented then, but it was never voluntary consent, and I think the record should be clear on that.

1329 I would like to say also that Mr. Kleinfeld used the word "defrauded." There is no question of fraud in this case, and the only charge the Government made is that our label or advertising is misleading in a material respect to the injury of the purchaser or consumer. So I think that there can be no issue of fraud before the Court, and I think I should object to the statements that seem to imply that there is a question of fraud because there is not.

Mr. KLEINFELD: In any event, it has been over three months.

THE COURT: Yes, I recognize that fact, but also the other members of the Court commended on the fact that the Government, by your statement to the Court, had had since 1945 in which to move in this case. So that the Government has consumed a period

of some four years in initiating its action. I do not think that two weeks additional will make any difference.

We will set the case down for hearing on May 9th at 10 a.m.

Now, the next question is the one of witnesses, particularly as to the limitation of expert witnesses. Is there any occasion or necessity for using expert witnesses? What do you contemplate in that regard?

Mr. RHYNE: Your Honor, we will not present any expert witnesses unless necessary to answer the Government on some
1330 matter that I cannot imagine at the present time to be raised by any expert that they present. For example, I believe that the Government concedes that our product is harmless. We have doctors who we can produce who will testify that our product is harmless, and they prescribe it for their patients, and it is one of the very best vitamin products that there is.

If the Government will admit, and we don't have their answer and we don't know what they admit, but if they will admit that these facts are true, it will be unnecessary for us to prove it. The issue will come into the case if brought in by them.

THE COURT: Do you contemplate any medical testimony? Are you going to challenge the product itself? There is no question of expert testimony is so far as the Government is concerned. The question is whether this labeling is misleading; is that correct?

Mr. KLEINFELD: Well, that is the question that the Court says is the question.

THE COURT: Yes. So that you contemplate no expert witnesses in the sense we use the term, do you?

Mr. KLEINFELD: I doubt it very much, Your Honor. It will depend on what they put on.

THE COURT: They have indicated they won't use them unless the Government does, and the record indicates that
1334 there is no apparent requirement for expert witnesses.

The issue before the Court fundamentally, in so far as the testimony is concerned, will be the question of misleading labeling in the use of the book How to Get Well and Stay Well. Is that the title of the predecessor document? It did bear the same title?

Mr. RHYNE: Yes.

THE COURT: Is the Court's understanding correct that that is not the document upon which the Government has predicated its action, referring to the present Exhibit A in the pleading?

Mr. RHYNE: Could I explain that in a word? Last September when the Government made its first move against us, the thing that they pointed out in the then current edition of How to Get Well and Stay Well was certain testimonials sent by people saying that Nutrilite helped them in various ways, and when they pointed it out to us, we withdrew it from the book, and this book is the

book that the Government has libeled, except for the testimonials, and they are out.

THE COURT: But that is not the document upon which the Government predicates its action? That is correct?

Mr. RHYNE: Could I say one other word? The first three libel actions seized the first book, and all the others have seized this one, so it is the book that the Government is proceeding against.

1332 Mr. KLEINFELD: That is just not so. The Administrator made three separate determinations of probable cause upon the basis of three different pamphlets entitled How to Get Well and Stay Well. Since the Government made the seizure actions the pamphlet has been changed from time to time and that is one reason we haven't been able to get these people since 1945.

This last Exhibit A made further changes subsequent to the changes made in each of these three pamphlets upon the basis of which the Federal Security Administrator made his determination. This Exhibit A in its present form was not before the Federal Security Administrator when he made the determination of probable cause under the Act.

THE COURT: Is it possible for you to identify by date or copyright date or other description the several booklets entitled How to Get Well and Stay Well?

What I am interested in next is a stipulation that the Court will receive, without formal proof, and so on, the pamphlet entitled How to Get Well and Stay Well. I would like to have that identified, particularly if there are three separate pamphlets, each the basis of a separate libel action. I think the Court should have each succeeding pamphlet before it.

1333 Mr. KLEINFELD: But I urge these pamphlets are not before this Court and are not part of the case. They haven't been set forth in the complaint or in the amended complaint. They are not part of it.

Mr. LEV: May I say a word? I grew up with this case. The customer book, which was the subject of the first three seizures, was that book, except that it contained 58 pages, and the first three seizures took the pages from 37 to 58, inclusive, and we thought that is what the Government objected to, and we sent out orders to everybody to tear out those last several pages, from 37 to 58, inclusive.

Those are the ones which are Exhibit A, attached to the libel, as it is the claim of misbranding in the first Belleville, New Jersey, case, and the Buffalo case, and New York City.

We had all the distributors tear out these pages, and in the interim, before we could print and distribute new pages to take the place of those taken out, one or two, I think, maybe three more seizures took place, and they got the booklet which ended on page 37 and without the last pages.

Then we got out substitute pages, only 7 pages to take the place of the 20 torn out, and we now have a 42-page booklet, and that 42-page booklet, which had been revised in October, was used from October, 1948, up to the present time, and is still in use, and that last booklet, which is booklet number 3, which has substituted pages in it, has been the subject of the last several seizures.

1334 That is the only book we have been used since October 1948. I think October, 1948, is the date.

Mr. RHYNE: We take the position, Your Honor, that in order to show our utmost good faith that we should not use anything that the Government attacked, that was the reason these pages were taken out.

Since then, in Dr. Dunbar's affidavit and statement of counsel, they say this booklet which you have before you there is the same in substance as the other, and they level the same attack against it.

That is your position?

Mr. KLEINFELD: The entire booklet is entirely, materially false and misleading.

Mr. RHYNE: This new book of 42 pages, which you have before you, is Exhibit A, and has been an exhibit in the libel actions in Spokane, Seattle, Clarkfield, and St. Petersburg, and the copy of the book is Exhibit B in the Chicago case.

Mr. LEV: These exhibits were mimeographed and these list Exhibit A.

THE COURT: Is it agreeable to counsel on both sides that the pretrial record show and it is stipulated that three separate or successive issues of the pamphlet or booklet How to Get Well and Stay Well will be admitted in evidence, without formal proof as to the publication and the printing, and so on?

1335 Is that agreeable to the Government? You are already on record as protesting the Court's consideration and so on.

Mr. KLEINFELD: Yes. We would like to check on the last three books, Your Honor.

THE COURT: Let me revise the stipulation to provide that there will be received, without formal proof, such copies of the pamphlet How to Get Well and Stay Well as plaintiff and defendant desires to bring to the Court's attention. Let us not confine it to three or any particular number, and if the Government has in one locality no copy of the pamphlet, they would not object within the three specified, so that there will be no necessity of formal proof with the introduction of the pamphlet. Nobody is restricted to three or four, or copies on certain pages.

Mr. KLEINFELD: I would rather put it this way: The Federal Security Administrator made findings on three pamphlets, and we have copies of those, and everybody can see them, and if the Court desires, we will bring those three pamphlets before the Court.

THE COURT: There is no question it will be more than three?

MR. KLEINFELD: No; we will be glad to bring them and submit them to the Court.

THE COURT: The record will indicate that the Court will re-
1336 ceive three separate or successive issues of the pamphlet How to Get Well and Stay Well.

Mr. RHYNE: Including one of these as Exhibit A because that is one of the ones.

Mr. KLEINFELD: We will check our third pamphlet with Exhibit A.

Mr. RHYNE: You will find it is.

Mr. KLEINFELD: If it is, that will be Exhibit A.

THE COURT: Very well.

Mr. RHYNE: But in any event, we will introduce Exhibit A.

Mr. KLEINFELD: We will object to it unless it is Exhibit A.

THE COURT: Of course, in these matters there is reserved to counsel the right to object on grounds of materiality to any pamphlet or any other documentary evidence.

The purpose of the stipulation is to waive formal proof of the publication and identification of the document, and preserving objections as to materiality and competency, or any other objection, that goes to the probative value of the document.

Are there any other exhibits in the form of documents, first as to the plaintiff, on which we can agree may be admitted without formal proof? Do you have any other documentary evidence you desire to tender?

1337 Mr. RHYNE: Yes, I have certain extracts from medical journals and other publications, many of them official publications of the Government, which I would like to introduce at the proper time. I don't have them with me. They are being prepared in California.

THE COURT: For what purpose?

Mr. RHYNE: To meet any statement that the Government might make as to, for example, in the book that preceded this one, where you have those letters in there from various people, and they say that this product proved beneficial to them in the treatment of a certain thing. And if the Government claims that that letter is all wrong, that our product could not be beneficial for that particular thing, I have statements in medical journals which I would want to put in to show that the Government's opinion is wrong.

I will use it in rebuttal entirely, you see.

THE COURT: This will be entirely in rebuttal?

MR. RHYNE: Yes, Your Honor.

Mr. KLEINFELD: We would object on a number of grounds to putting in such evidence. One, it is hearsay, anyway, and it is not proper.

Two, it has nothing to do with the issues in this case.

THE COURT: I think the Court in an informal discussion of this kind is not required to pass upon materiality. Fundamentally, I do not see the materiality of your documents to the issue of
1338 the mislabeling charge. However, I would suggest in the interest of meeting all issues, that you furnish to Government counsel a list of the articles from medical journals and publications, and so on, which you have in mind in order that, if the progress of the trial develops the necessity for your tendering such documents, and so on, that Government counsel will have a complete chance to review them and will be in a position, without delay, to enter objection on the ground of materiality, competency, or anything else.

MR. RHYNE: Yes, but I would like to say this: Under the so-called findings and conclusions made by the Administrator of the Federal Security Agency, he keeps repeating that the consensus of medical opinion is this and that, and that is what I wanted to use the documents for, to show that is not the consensus of medical opinion.

I am willing to meet the other objections at the time.

THE COURT: The record will indicate your position; but with documents of this kind it will facilitate the Court's action if Government counsel has been furnished with the citations, so that they have ample opportunity to check them to determine what objections they desire to make, and so on, so that there will be no question of delay by reading the document or checking the identity of the author.

MR. KLEINFELD: I repeat, but we do object to any document which is of that nature.
1339 THE COURT: Your objection goes fundamentally to the trial of the case.

MR. RHYNE: It is not in issue.

THE COURT: But the objection can only be made at the trial. I cannot pass on the objection here. But in order to avoid delay, you will have an opportunity to review all the documents which he may use or tender to the Court as authority, prior to the trial.

What other documentation, if any, do you intend to tender?

MR. RHYNE: None.

THE COURT: You better consult counsel.

MR. RHYNE: Well, Mr. Lev calls my attention to the fact that we do not have an answer, and we don't know what they might admit as to the fact that we are incorporated, and so on.

I suppose the Government will admit this so that we do not have to prove our incorporation. Other than that we do not contemplate any other documentation.

THE COURT: Very well. Does the Government have any formal exhibits or documents?

Mr. KLEINFELD: May I ask a question as to whether the plaintiff is going to put in evidence as to the truth or falsity of the allegations, the statements in each of the three pamphlets, on the
1340 basis of which the Federal Security Administrator made his conclusion and finding? Is the plaintiff going to put in any evidence as to the truth or falsity of those three pamphlets?

THE COURT: The truth or falsity? Can you go to any section?

Mr. KLEINFELD: No, Your Honor. With reference to this whole pamphlet; the Administrator made it on the basis of the whole pamphlet.

THE COURT: In its entirety?

Mr. KLEINFELD: In its entirety. I am trying to find out if they are going to put in any evidence to establish the truth or falsity of the three pamphlets.

Mr. RHYNE: I might say, first of all, not knowing which part of the pamphlets they are attacking, we are in a rather unusual position.

I am inclined at the present time to simply say: Under the circumstances or conditions in which the pamphlets were prepared, to let the pamphlets speak for themselves. If the Government points out something that they claim is untrue, then we will meet that.

I think the pamphlet is in writing, and it is unambiguous, and it would, as a matter of law, speak for itself.

Mr. KLEINFELD: Well, that brings a fairly important question which has not been decided. The Government has an understanding, since the plaintiff is the plaintiff in this action, the burden of
1341 the trial is on them to prove their case.

THE COURT: The plaintiff is the moving party, and the burden of proof is on the party proceeding, and is on the plaintiff not only to establish a case but to establish a prima facie case before resting.

The Three-Judge Court, of course, sits both as a finder of fact and the finder of law and upon admission of the pamphlet, with the collateral proof, and so on. The Court is faced squarely with the issue of finding, as a matter of fact, whether the pamphlet is misleading, and so on.

You contemplate on this point that counsel for the Government has raised, you contemplate no testimony as to the proof of the statement that you make? The pamphlet speaks for itself?

Mr. RHYNE: May I say: We take the position that the pamphlet is unambiguous, and we cannot find anything wrong with it whatever, and that the pamphlet itself makes out a prima facie case.

We will explain how it was written and the background of our business as related to the pamphlet, and its use in the sale of our product, and I think we have made out a prima facie case then.

If the Government finds any objection, it is up to it to make them out. I do not see how he can disprove or negative it.

1342 Mr. KLEINFELD: All I can say about that: That is your problem. You have the burden of proof, I assume.

As far as the Government is concerned, I think to simplify the trial, we are going to offer, of course, copies of the finding of fact and the determination of probable cause upon the basis of which the Administrator made his final determination.

THE COURT: Now, just one minute. Does plaintiff's counsel stipulate that the Court may receive those findings of fact and conclusions from the Federal Security Administrator, without formal proof of all the people who participated in the finding, and so on?

Mr. RHYNE: If Your Honor please, on that question, of course, we will object to their admissibility on the ground that they are hearsay, and since we had no opportunity to appear to find out who participated in the whole proceeding, that they are not admissible. I say, in any event: I would like to say so far as the stipulation is concerned, that they are authentic but not as to their admissibility. In other words, that the paper that they gave us was, in fact, signed by the Administrator, and that is about as far as I can go.

I would like to go as far as we can in the interest of saving time at the trial, but I do not see how we can go further than that in view of the fact that we were not there, and we do not know any-

1343 thing other than that they now say this was signed by the Administrator. As a matter of fact, he didn't even date it when he signed it. So we are in a rather peculiar position today, but I would not contend that is not his signature and that he did not sign it.

THE COURT: I think we will take a ten-minute recess.

(Thereupon a short recess was had.)

THE COURT: We are now talking about the hearsay status of the Government report.

Mr. KLEINFELD: I am puzzled because the entire case revolves around the finding made by the Administrator, and they are in the record and submitted to the District Court; and I didn't think counsel would object to the fact that they were made.

Mr. RHYNE: I am not objecting to the fact that they were made, but I am objecting to the contents, that we were not there, and had no opportunity to participate, and any facts therein are hearsay.

Mr. KLEINFELD: That goes to the ultimate question, after all, and these are the words of the statute. I think you are attacking the law again. I don't think you will dispute that the Administrator under the law, without hearing, under the law may make this find-

ing of probable cause, and certified copies were filed with the Court.

THE COURT: Is it the Government position that they are
1344 admissible as official Government documents? Is that the position upon which you tender them, that they have the same official standing as any other official Government document?

Mr. KLEINFELD: Yes, and they were already part of the case and not objected to by plaintiff's counsel.

THE COURT: I think you are on notice that counsel intends to make objection to their admissibility, so that you are confronted with the problem of proving their contents by the persons who made the reports, and so on, in the event the objection to the introduction is sustained. I cannot speak for the Court, but I want you to be on notice that the plaintiff does take this position, and that you may be confronted with the problem from an evidentiary viewpoint of establishing by witnesses the conclusions and the findings, and so on, that are made in behalf of the Federal Security Administrator.

Let me ask about any other documents. Do you have anything further in the form of documentary evidence?

Mr. KLEINFELD: Only one thing, Your Honor. The plaintiff's amended complaint refers to an exchange of correspondence on two different occasions between counsel for the plaintiff and the Federal Security Administrator. I would like to stipulate that the letters transmitted by counsel for the plaintiff, and the reply, his reply from the Federal Security Administrator, are offered and admitted in evidence.

1345 THE COURT: Without formal proof?

Mr. RHYNE: Yes. I was really going to offer those myself.

THE COURT: Is it stipulated that there will be admitted in evidence, without formal proof correspondence exchanged between the Federal Security Administrator and the plaintiff?

Mr. KLEINFELD: I might particularize those, the letters I have in mind.

THE COURT: Very well.

Mr. KLEINFELD: His letter dated January 28, 1949, addressed by Mr. Rhyne, counsel for the plaintiff, to the Honorable Oscar R. Ewing, Administrator of the Federal Security Agency. The second document is a reply to the letter of January 28, 1949, the reply being dated February 11, 1949, and addressed to Mr. Rhyne and signed by J. Donald Kingsley, Acting Administrator of the Federal Security Agency.

And the third document is a letter dated February 18, 1949, addressed to Mr. J. Donald Kingsley, Acting Administrator of the Federal Security Agency, and signed by Mr. Charles S. Rhyne.

The fourth document is a letter dated March 2, 1949, replying to the aforesaid letter of February 18, 1949, addressed to Mr. Rhyne

and signed by J. Donald Kingsley, Acting Administrator of the Federal Security Agency.

I would like counsel for the plaintiff—

1346 THE COURT: (Interposing) Is this separate from the letters?

MR. KLEINFELD: Yes, this is separate.

MR. RHYNE: I agree to that.

THE COURT: It is stipulated that the letters enumerated by Government counsel, representing an exchange of correspondence between the Federal Security Administrator and the plaintiff corporation, and counsel, will be admitted in evidence without formal proof.

MR. RHYNE: Yes.

THE COURT: Now, Mr. Kleinfeld.

MR. KLEINFELD: I would like to request counsel for the plaintiff to stipulate to the admission in evidence of a memo to all California distributors, a memo to all California distributors, dated March 17, 1949, entitled Your chance to help and distributed by the plaintiff in this case.

MR. RHYNE: Neither Mr. Lev nor myself have ever seen it, but we will agree if it was, in fact, mailed out by our client, it may be admitted without formal proof.

THE COURT: You will notify him that you have ascertained it was mailed out? Do you have the date and sufficient identifying data so that you can check with the corporation?

MR. KLEINFELD: I want to have him make it more definite. That page was an insert in another document, and he may

1347 be able to check it up. It was an insert in the Nutrilite News, copy of March 17, 1949.

MR. RHYNE: I will advise you on that.

MR. KLEINFELD: Thank you.

THE COURT: Now, what is your next?

MR. KLEINFELD: I don't believe we have any further documents.

THE COURT: I thought you had a blue one.

MR. KLEINFELD: That is a report.

THE COURT: You have no other documentary evidence on which we can avoid the formality of proof?

MR. KLEINFELD: No.

THE COURT: In the light of the Government's presentation, does the plaintiff have anything further to tender as documentary evidence?

MR. RHYNE: Not at this time, Your Honor.

THE COURT: Do you have any other matters upon which you desire to suggest stipulations?

MR. RHYNE: Well, I would like to have the Government stipulate that they made these seizures at the time and the place indicated in the complaint. Of course, it might be when we receive their answer—they may not have known what I would request now

but it would not be necessary. I mean, they would admit that they made them at this time and place.

1348 THE COURT: Let us clarify the position of the Government with reference to the filing of an answer. What is your plan?

Mr. KLEINFELD: We haven't considered it very seriously, Your Honor.

Mr. GOODRICH: We are bound to file it within 60 days from the overruling of the motion to dismiss. That was done on April 6; is that correct?

I would just like to put in the answer as soon as possible; certainly in time for the trial.

Mr. KLEINFELD: As long as we are anxious to have a trial as soon as possible, we ought to put in the answer.

THE COURT: Can you make any suggestion as to when you will file the answer so that plaintiff will know what concessions are made?

Mr. KLEINFELD: Not later than a week.

THE COURT: A week from today?

Mr. KLEINFELD: Yes.

THE COURT: Which would be the 20th, which gives counsel almost three weeks to prepare in the proceeding.

Mr. RHYNE: I would like to say that the rule provides that it is 10 days, rather than 60 days, from the overruling of the motion to dismiss. Sixty days to answer is what the Government has when we originally filed the complaint, but not when the motion to dismiss is overruled.

1349 THE COURT: Well, I think counsel is well within the rule. Since the pretrial conference has delayed this, the Court will consider that any difference of a few days is the result of the Court's action rather than any reluctance on the part of the Government to file an answer.

Mr. LEV: That is April 20th?

THE COURT: April 20th.

Now, there was a question collaterally raised with the matter of the answer, that the Government would stipulate, or would it stipulate, as to the fact that the plaintiff was a corporation, duly incorporated, and so on.

Do you stipulate as to the corporate status, and so on, of the plaintiff?

Mr. KLEINFELD: Yes, I do.

THE COURT: Very well.

Mr. RHYNE: Do you also stipulate as to the harmless character of our product? Or must we bring doctors and other experts here to prove that?

Mr. KLEINFELD: The Government never claimed that the product is directly toxic or dangerous. We think that there is an indirect danger to the consumer but no direct toxic or dangerous effect.

THE COURT: As the result of following what the Government considers this misleading labeling?

1350 MR. KLEINFELD: The misleading labeling, and its concluding advice to use the product instead of seeing a doctor.

THE COURT: I think the question of toxicity or non-toxicity of the product is not before the Court since the Government has predicated its action upon misleading labeling, identifying that as the booklet How to Get Well and Stay Well. I think testimony as to the toxic character of the product would be outside the pleading, and the Court would have to rule it is immaterial to the issue.

There are two questions before the Court, one, a question of fact as to whether the labeling is misleading, and two, the question of whether the action which the defendant in the case took violated the constitutional rights of the plaintiff.

That is all there is. I do not think that there is any question of harmlessness of the product. I do not think that enters into the issue at all.

Mr. RHYNE: Since they agree to that, I want to be sure they agree to it.

THE COURT: As a matter of fact, Mr. Kleinfeld at the previous argument had stated that the Government never took the position that the question of the toxic character of Nutrilite was in issue.

Now, is there any other point or item of evidence upon
1351 which plaintiff desires to stipulate, and upon which the Government will stipulate?

Mr. RHYNE: I think the rest of it we will just prove by evidence.

THE COURT: Very well. What is the Government's position? Do you have anything else upon which you desire a stipulation?

Mr. KLEINFELD: I doubt it, Your Honor. Did you have anything, Mrs. Goodrich?

No, we do not request any further stipulation, Your Honor.

THE COURT: Is there any question as to the taking of depositions, and the identity of witnesses, and the exchange of information, which will materially facilitate the determination of the Court?

Mr. RHYNE: I might say that in my preparation I intend to take depositions of Dr. Dunbar and other officials of the Food and Drug Administration to find out—since we have no answer—just what their objections are to our How to Get Well and Stay Well. I want to develop those facts.

THE COURT: Do you know the identity of the people from whom you are going to take depositions?

Mr. RHYNE: I do know I will ask Dr. Dunbar the names of the people who have worked on that particular question inside the Food and Drug Administration at the Federal Security Agency, and
1352 I will then take the depositions of those people who know the facts.

THE COURT: Are you going to take Dr. Dunbar's deposition in order to determine that fact?

MR. RHYNE: Yes. I will ask him to give me the names of the people inside his organization who worked on this.

I will also ask him to produce documents as they relate to the issue here.

I may also take Mr. Larrick's deposition, and possibly Mr. Ewing's. Based on that information, I will have to determine what other depositions will be necessary. It may be in his answer.

THE COURT: Is there any way we can facilitate the proceeding by the Federal Security Administrator furnishing to the plaintiff the names of those persons who would be furnished, in turn, by Dr. Dunbar? Can we save the time of one deposition, or do you want to take Dr. Dunbar's deposition, regardless?

MR. RHYNE: I would like to have Dr. Dunbar's deposition because of his affidavit.

THE COURT: Very well.

MR. RHYNE: But I will be glad to have from Mr. Kleinfeld a list of the people who have worked on this misleading material, where we are charged by the Federal Security Agency, or the Food and Drug Administration, so we can determine whether I want
1353 their depositions in preparation for trial.

MR. KLEINFELD: First of all, I think such a list might entail a list of hundreds of people.

Two, it is our position that any attempt to get such information which counsel for plaintiff will attempt to get from Mr. Dunbar is irrelevant and immaterial and not part of the issues involved in this case.

The issue is not what Mr. Dunbar did or thought, but the issue is with respect to the misleading nature of the labeling here. What Mr. Dunbar did or thought seems to me, Your Honor, has nothing to do with the issue. We will object to it in the form of a deposition or otherwise. It has nothing to do with the case.

MR. RHYNE: It is my position that this is a civil case, and just as in any other case either party is entitled to take the deposition of a party on the other side, or employees having knowledge of t' facts, and we are entitled to take his deposition.

THE COURT: You have that right. As a matter of fact the person from whom you take the deposition does not have to have any knowledge in order to give you the right to take the deposition.

Under Rule 26 and 33 you have the right to take the deposition of a party to determine from them the identification of persons who have information.

1354 MR. RHYNE: That is right, Your Honor.

THE COURT: Reading from Moore's Federal Practice under the new Federal rules, Volume 2, at page 2620, with reference to

Rule 33, it states: Disclosure of names of witnesses and addresses of witnesses may be obtained under Rule 33, which permits discovery as broad in scope as discovery by deposition, which is governed by Rule 26 (b), which expressly accords a right to the disclosure of the identity and location of persons having knowledge of relevant facts.

A party may also take the deposition of the attorney of the party answering the interrogatories.

You have that right. I would suggest, and it is a suggestion and in no way binding on counsel, that anything that you can do to facilitate the furnishing of names of persons—and we don't want hundreds of persons—but there must be three, four, or five key people in this thing that reached the determination, and I think that will assure us that we will proceed to trial on May 9th.

Mr. KLEINFELD: My only point is—I want to facilitate the trial as much as he does—but the Administrator has made the determination of probable cause under the statute, and he said so and it is on file with the Court, and the determination pursuant to the statute is made on certain factual findings, and these are before this Court together with the names of the persons, wherein
1355 the Administrator stated—and counsel knows that and it is in the record—that I, the Acting Federal Security Administrator on the basis of facts found, without hearing, by Mr. John Doe and Mr. Richard Roe. As far as the employees, those names are listed and they are in the record. He has those names. I don't know what more is relevant.

THE COURT: I do not think that there will be any difficulty on that. Both sides agree that the sooner we can dispose of the matter the better.

I have pointed out previously in the interpretation of Rule 26 and 33 that you have the right to take the depositions, either to obtain evidentiary material or to obtain the source of evidentiary material.

Do you have any other questions as to deposition? Of course, in the taking of a deposition, counsel on both sides reserve the right to object to the deposition as a whole or to any part that is considered immaterial, and it is unnecessary for the Court to go into that.

MR. RHYNE: Yes. I have another question. I will take certain depositions in Los Angeles, and I will give the notice required by the rules to Mr. Kleinfeld.

Mr. KLEINFELD: Did you say you intend to get depositions from people in California?

MR. RHYNE: Yes, I intend to take the deposition of Mr. Born,
1356 head of your Los Angeles office, and such other persons out there as have knowledge of this controversy.

THE COURT: That is one of the reasons I thought it would be desirable to grant a couple of weeks extension. I anticipated you would want to take the depositions of some California employees of the Federal Security Agency, of the Food and Drug section, and that Government counsel might want appropriate chance to participate, and so on.

Mr. RHYNE: Yes, sir.

THE COURT: Even to the extent of someone going out there, where the plaintiff has an advantage in having counsel out there to take the deposition.

What does the Government want to do in the way of depositions?

Mr. KLEINFELD: I don't believe we have any depositions to offer or wish to take any.

THE COURT: There is no problem upon which the Court can make any suggestion or formulate any practice of procedure that will facilitate the preparation of the cases in any way?

Mr. KLEINFELD: I don't believe so, Your Honor. Thank you.

THE COURT: Very well. What other factors can we clarify in this discussion that will afford both sides a full and complete understanding of the trial procedure, and so on, in order that no one
1357 is caught at any disadvantage? Is there anything further from the plaintiff?

Mr. RHYNE: The only suggestion I have is that when we receive their answer there may be some question I cannot anticipate at this time that may arise, and until I receive the answer I have nothing further, Your Honor.

THE COURT: Anything further from the Government?

Mr. KLEINFELD: No, Your Honor.

THE COURT: We have taken care of the matter of the answer. I have made a note of that.

The Court's order in this case, carrying as it did no heading, and which I have stated that the Court considered a restraining order, instead of the phraseology and enjoins, and so on, will expire by operation of the rules, how soon?

Mr. RHYNE: As I read Title 28, Section 2284, it would not expire until the determination of the cause by the Court.

THE COURT: Under the rules, on a restraining order the Court is required to hold a hearing within ten days, unless the Court grants at its discretion a further extension of ten days.

Mr. RHYNE: Yes; but if you will look at that Section 2284 etc. it is provided there, and it is an exception to the ordinary rule, with respect to a restraining order that the Judge to whom the matter is first presented can enter a temporary restraining order that will last beyond ten days.

I want to see if I can find that.

1358 THE CLERK: It is up on top there.

Well, I do not think we have to go into too much detail. What I was going to suggest: If there is any technicality that requires reissuance of the order, I thought it would be well for counsel to stipulate on both sides that the matter will remain in status quo until the trial on May 9th.

MR. KLEINFELD: My only request is the request originally made, and the only reason we raised it is that we may consider taking some preliminary action on appeal. We believe that the temporary restraining order, and that part that was a preliminary injunction, in either case, finding of fact would be required.

THE COURT: The Court thought it would be taking unfair advantage of the Government in issuing a restraining order because counsel felt that Judge Pine's finding constituted an adjudication other than a constitutional question, and issuing a temporary injunction, the Court felt would be taking unfair advantage of the Government, which came in on the assumption that the Court felt bound by Judge Pine's ruling, and it was for that reason that the order was drawn in the form it was.

The Court felt that the temporary restraining order would maintain the status quo and afford the Court an opportunity to explain for counsel its position with reference to matters which Government counsel, at least, and possibly plaintiff's counsel have 1359 considered res judicata.

The Court intended to issue an interlocutory order to afford both sides an opportunity to prepare and present evidence upon which the Court would then make a finding upon the facts, on which an appeal could be taken by either or both parties.

MR. RHYNE: May I read what I have reference to? This is Section 2284, Title 28, and it provides: In any such case, that is a Three-Judge case, in which application for interlocutory injunction is made, the District Judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage.

The order, unless previously revoked by the District Judge, shall remain in force only until the hearing and determination by the full Court. It shall contain specific findings, based upon evidence submitted to such Judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

Your original order contained that.

THE COURT: We are beyond that stage in the case. The Court held here we are beyond that part of the statute which involves the District Judge who issued his temporary order pending a hearing by the full Court.

In so far as findings of fact are concerned, I have no per-
1360 sonal reluctance to prepare findings of fact and conclusions of law, observing to say that we have in mind that Judge Goldsborough is sick, and he is in Maryland. I do not know whether it is feasible but I do not know whether it is practicable in any way to get him to concur or approve any such findings.

That is a practical problem that confronts me, and I say, dissolving any doubt in favor of affording you immediate action, you can see, whether I concur with you in that position. I do not see how with Judge Goldsborough sick we can get a finding in which he will concur.

Mr. RAYNE: May I suggest to the Court that if they desire you to make such findings, that counsel for the plaintiff will be happy to submit proposed findings for the assistance of the Court, and submit them to counsel for the defendant.

Mr. KLEINFELD: I don't think with respect to the restraining order or preliminary injunction of April 6, or even with respect to the original temporary restraining order which Your Honor granted, that the plaintiff has ever submitted evidence, according to the statute, to such Judge and identified by reference thereto, that specified irreparable damage would result if the order is not granted. I don't believe any such evidence has ever been submitted to this Court.

THE COURT: The Court passed upon that matter on the
1361 occasion of our first conference when the motion for the temporary restraining order was filed, and the Court concluded upon the basis of the pleading presented to the Court in chambers that afternoon that the action of the defendant, if not restrained, would cause a dissolution of the plaintiff's sales organization, allegedly constituting some 5,000 employees, and would otherwise destroy, discredit and destroy, the plaintiff's business, and that irreparable harm would result thereto. I think the Court passed on that point with respect to the original temporary restraining order.

As I say, we took a rather technical step, a rather unusual one, in granting another restraining order because we did not want anyone to be at a disadvantage in feeling that we had ruled solely on the constitutional question.

I can say that the Court considered seriously the question of many other cases pending in the Federal Security Administration, which might be affected if the Court issued a temporary injunction on the ground that this section of the Act was unconstitutional. In other words, the Court tried to weigh all the factors involved and took the action which it felt would maintain the status quo only of the plaintiff and the defendant in this case, without working to the advantage or the disadvantage of the Government or any other

persons operating under the provisions of the Federal Food, Drug, and Cosmetic Act by its action.

1362 While we felt that the restaining order was a little unusual, we felt that by taking that step we would act only in this case, and the repercussions and the cross-currents would not reach to any other case that the Government or any other litigant had. That was the reason that the document was drawn as a restraining order; and one of the factors that the Court considered in going upon the basis of the whole record, rather than solely the constitutional question.

Mr. KLEINFELD: I would like to make my position a little clearer, and that is that it is honestly a matter of good conscience on my part. I have always honestly felt and still do that balancing the equities on both sides that the public was being damaged to the tune of a half million dollars a month.

Judge Pine at one time suggested an informal stay to be given, and I declined because I didn't want to be a party, in good conscience, and permit this product to be sold, in my opinion, in violation of law and to deprive the persons of a half million dollars a month, and keeping them away from doctors. I feel if any Court wishes, in its discretion and pursuant to law to give a restraining order, that was a matter for the Court.

But the Government, in view of the period which elapsed

1363 THE COURT (interposing): 1945?

Mr. KLEINFELD: I think I told the Court, and that is before Your Honor, that the libel changed from time to time, and they kept away from us, and maybe we were not as diligent as we should be, but the Government moves slowly and it has been a tough case; it has not been this big business until recently. It was a much smaller business. But the Government felt it should not participate, unless required to do so, in any stipulations which would permit the further sale and distribution of this product again to the tune of half a million dollars a month, which the people who buy it cannot get back, and which, more important, pursuant to the pamphlet keeps them from seeing their doctors, and which may be to their irreparable damage in the way of health. That is why we have been very reluctant to participate in the stipulations of the plaintiff.

That is why we ask Your Honor and this Court to make findings. We think it was important.

THE COURT: I cannot speak for my senior associates on the Court, I will, however, accede to plaintiff's counsel's suggestion that you prepare as promptly as possible, within the next day or so, findings of fact and conclusions of law to be submitted to Mr. Kleinfeld for his observations, and I will then consult with the other members

of the Court to see whether they consider it proper that such
1364 findings be made. That is as far as I can go in the matter.

Mr. Rhyne: I will prepare them directly and solely on the interlocutory relief, rather than on the constitutional issue then?

The Court: You may include whatever you want on the constitutional issue. The Court will have to decide what it will leave in the findings and what it will eliminate, if the Court considers it proper to make such findings.

Are there any other questions?

Can we estimate in any manner about how long it will take us to try the case? I ask that with no intention of restricting the time in any manner or degree, but only in dealing with the Assignment Commissioner and trying to fix future assignments, that they have some general idea of the Court's commitments, which facilitate their making other assignments.

Mr. Rhyne: I would say for the plaintiff's affirmative case, I would hope to finish it in one day, depending on the cross examination, and not more than two days. We will try in every possible way——

The Court (interposing): I do not want to say to try to keep it to the minimum because, after all, you have the responsibility of trying the case in the manner that you feel is best, but you think about one day in general terms.

1365 Mr. Rhyne: Yes, Your Honor. I will try my best to do that.

Mr. Kleinfeld: I think we will take about one hour.

The Court: About one hour?

Mr. Kleinfeld: Yes.

The Court: So if the Court allows on a tentative basis two days to the Assignment Commissioner for the Court's commitment, it will be reasonably accurate?

Mr. Rhyne: Yes.

The Court: Is there anything else, gentlemen?

Mr. Rhyne: I have not, Your Honor.

Mr. Kleinfeld: I have nothing.

The Court: I do not think we reached a conclusion on the matter of the status quo on the hearing.

Mr. Rhyne: No.

The Court: The Government took the position that they were reluctant to stipulate any continuance. The Court would like to avoid the responsibility for any more paper work than is necessary, but if necessary the Court will issue an order which will say that the status quo established by its order of Wednesday, April 6, will remain in full force and effect and binding on all parties to the litigation until disposition on May 10th of the trial on its merits.

Mr. KLEINFELD: In any event, remembering John L. Lewis and there being an order of this Court, I do not see what can be done except obey the order of the Court.

(Thereupon the instant hearing was concluded.)

1366 Reporter's Certificate to foregoing transcript omitted in printing.

1367 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

REPORTER'S TRANSCRIPT OF ARGUMENT ON MOTION TO QUASH SUBPOENA—Filed April 29, 1949.

1368 Washington, D. C.
Tuesday, April 19, 1949.

MOTION TO QUASH SUBPENA

The hearing in the above cause came on before Honorable Bennett Champ Clark, Associate Justice, at 3:30 p.m.

APPEARANCES:

CHARLES S. RHYNE, Esq., Attorney for Plaintiff.
VINCENT A. KLEINFELD, Esq. and WILLIAM W. GOODRICH, Esq., Attorneys for Defendants.

1369 PROCEEDINGS

THE COURT: I am not clear whether a one-judge court has jurisdiction on these matters. However, I will be glad to hear you subject to changing my mind on jurisdiction.

Mr. GOODRICH: Here is the three-judge statute. Down at the bottom, we think, is the authority for a single judge to pass on a motion of this kind. That is the authority, we think, that sustains your right to do so.

Do you have any comment on that, Mr. Rhyne?

Mr. RHYNE: I do not object.

ARGUMENT ON BEHALF OF DEFENDANTS

Mr. GOODRICH: We filed with you our brief and a copy of the subpena.

Fundamentally, we are raising two points or three points with respect to the documents; and one point as to the right of counsel

for the plaintiff to interrogate Mr. Kingsley on his so-called mental processes in reaching a decision.

First, I will devote myself to the documents. As you will note from the subpena, what is called for is all the documents in the possession of the Federal Security Agency relating not only to Mytinger and Casselberry, Incorporated, in this case, but also to Nutrilite Products, the manufacturer of this food supplement and Carl Rhenborg, who is president of Nutrilite Products, and
1370 Mytinger and Casselberry in their individual capacity.

The rule on subpena recently has been amended by Rules on Civil Procedure. I refer to Rule 45 (d) 1, which indicates that designated documents may be called for. That rule is to be interpreted in the light of Rule 34, which requires a showing a good cause before records may be required to be produced for inspection. There is no order, simply subpena.

In addition to that, we object to the subpena on the ground that it is unduly broad. It calls for records which relate back as far as 1939, records which are in the possession of all 16 of the Food and Drug Administration district offices, as well as the Washington office. For that reason we say it is unreasonable and oppressive.

A further reason on which we base our claim was the administrative and clerical work involved in getting the records. We believe we are excused under the authority cited in the brief and because of a regulation promulgated a number of years ago which now appears in 21 Code of Federal Regulations in cumulative supplement dealing with disclosure of records of a government agency.

There is in this case no question of waiver, in view of the fact
that the United States is not a party, this action having been
1371 brought on the theory that the statute was unconstitutional. For that reason these people sued in their individual capacity. Of course, they would have no right to sue the United States without its consent.

Now, with respect to questioning Mr. Kingsley, the authorities I have cited are the Morgan case and the decision of Norris and Hurshburg against the Securities and Exchange Commission of this Court, both holding that inquiry into the mental processes, so-called decisional processes, is not proper. I know nothing else that can be asked of Mr. Kingsley than the details of decisional process.

Those are the grounds on which we base our motion to quash.

Argument on Behalf of Plaintiff

Mr. Rhyne: In this case, of course, we object to the motion to quash. We say it is merely a part of the Government's stalling tactics to prevent the trial on merit in this case, to which we object. I think of all the people who are subject to the Federal Rules of Civil Procedure, the Government should be the one that is the

quickest to allow discovery freely and give facts that are necessary to prepare to try a lawsuit.

In this case they charge our labeling is misleading, which is a very broad charge. We have asked for the records.

When this case was pre-tried before Judge Tamm he himself raised this question. I will not read all that he had to say about it, except that he called attention to the rules. He tried to obviate this necessity of having all of these motions to quash, and everything, because I told him that I thought the Government would probably make such a motion. He pointed out, "You have that right." He had pointed out previously, "Under the interpretation of Rule 26 and 33 you have the right to take deposition either to obtain evidentiary material or obtain the source of the evidentiary material.

In this case I certainly am not trying to learn anything that it is improper for me to learn. As I say, they have leveled a very broad, general charge. I think if there is anything in their records that relates to us, we are entitled to see it. It will avoid surprise. It will shorten the length of the trial if we know what we are going to be faced with.

This charge about inquiring into the mental processes of Mr. Kingsley, I think, is far-fetched. Mr. Kingsley has been acting for Mr. Ewing for a long period of time. He has had correspondence with me. He has had conversations with Senators and Congressmen who have asked him to grant us a hearing and to hear our side of this before he made this decision. So, I do not think it is improper for us to ask him about those things.

All I want to do is develop the facts that are relevant to the issues in this case. The issue is a very broad one. I have had other subpenas against other Government agencies. The only one that I can remember any contest on was against the RFC, and it did not take Judge Schweinhaut very long to rule that we were entitled to everything that they had in their files that related to this particular case, which was a damage case, and which included the insurance policy. He said that the Government, of all people, should not try to hide facts, they should be coming forward to see that justice is done.

I was handed this memorandum this morning, their motion, and I have not had a chance to study their authorities. I think the rule is so clear that it gives us the right to these. It says, "the subpena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any matters within the scope of the examination permitted by Rule 26 (b)."

This is in the nature of discovery as well as for evidence. So, I think their motion is not well taken at all.

1374 We cannot be expected to name all of the documents in their files since we do not know what is in there. For example, the only deposition we have taken so far was that of Mr. Nelson, who is head of their Vitamin Division, who testified that the first time his attention was called to this was by the American Medical Association, and he wrote them an opinion and they refused to let us look at that opinion to see just what he told them. So, I believe that our subpena is entirely proper, entirely within the rule.

I do not see how a Government agency can say it is oppressive to them to have to produce documents within their possession which we need in order to prepare for trial. Therefore, I ask that the motion be denied.

Mr. Kleinfeld: Your Honor, first, I am a little bit surprised that the Government is being accused of stalling tactics. We wanted to try this case on April 29, the day originally set, and it was at Mr. Rhyne's earnest behest that we adjourned for two weeks. I do not see how we can be accused of stalling. It was Mr. Rhyne who asked for the extra two weeks.

The Court: I would not say that, Mr. Kleinfeld. As a matter of fact, the reason the case was continued for a little while was that Judge Goldsborough and Judge Tamm had to be temporarily out of town. I have been here all of the time.

1375 I would have been glad to hear the case any day when I was not sitting over in this court myself. I do not think it is fair to say there was any continuance at the behest of either side.

Mr. Kleinfeld: At the pre-trial conference before Judge Tamm the question did come up. I objected to it and Mr. Rhyne did not. Whatever the reason, it was fought out there before Judge Tamm at the pre-trial conference.

The Court: I have read the record of the pre-trial.

Mr. Kleinfeld: Mr. Rhyne mentioned the question of his being surprised at the trial. At the pre-trial conference both sides set forth what they intended to prove at the trial. The Government indicated that the only documents the Government intended to produce at that time are the original findings of fact and conclusion of law which are involved so closely in this action. We do not intend to put on any documentary evidence. We said that at the pre-trial conference.

Supposing we served a similar subpena duces tecum on the plaintiff here such as they served on us, just serve a subpena to produce all the documents in your possession involving or pertaining to nutrilite. It would disrupt their entire business. They are asking us to do that very thing.

THE COURT: Mr. Kleinfeld, I have tried a lot of those
1376 subpoena duces tecum cases. It does seem to me that this is a peculiar case, in view of the fact of the multiple seizure operation which the Department has been carrying on. They cannot possibly tell the precise documents which are set out.

As I see it, the only point under the statute is the word "designate".

It seems to me that this case of multiple seizure is outside of the general rule. When people are being sued all over the country, they cannot know precisely what documents are relied on by the Department and therefore what they want to find.

Undoubtedly—I say "undoubtedly", although I am not authorized to represent them—the petitioners here would be glad to stipulate as to what documents they want, but the Department will not tell them anything. It is like an income tax case where the Defendant is always at his risk and the Department refuses to disclose anything that they may have or what they propose to do.

Now, it seems to me that in multiple seizure cases the adverse party has some rights to find out on what the prosecution is based.

Mr. GOODRICH: There are now in process oral depositions of
Dr. Dunbar and Mr. Larrick, the two principal officials
1377 of the Food and Drug Administration. We have just come from Dr. Dunbar.

This question goes to the production of records, not to the oral part. The only time we are raising the question of oral deposition is with Mr. Kingsley.

THE COURT: Aren't they entitled to have the basis of what the oral depositions would probably be? It seems so to me.

Mr. RHYNE: That is certainly my interpretation of it.

In so far as private parties are concerned, there would be no question that you would have a right to look at the records. This is a civil case under the rules. It would seem that is the only way we can test the truth of the oral statements they make; for example, by looking at the writings in the record.

Mr. GOODRICH: The authorities we have cited are authorities in private litigation, for the most part. They point out that where a party asks for a large number of documents he must show their relevancy.

THE COURT: I am very familiar with that rule.

For instance, one time the Commissioner of Securities in Missouri urged all the brokerage firms in New York to bring up all
of their records to St. Louis. I went up and protested
1378 that. They employed me. I was rejected by the Securities Commissioner and I went across the street and got a writ of prohibition, which we use very frequently in Missouri, against the Commissioner of Missouri from doing it. That does not seem to

me to be the case. That is a case of multiple seizure. These people allege that their business is being ruined without due process of law. Therefore, it does seem to me that they are entitled to their day in court.

I might say at this time that the holding of this three-judge court—and I say frankly that I have never been absolutely certain of the jurisdiction of the three-judge court—but according to our view we are not bound by Judge Pine's decision in this matter.

Since there has been an amended complaint filed, we think we have not only the question of constitutionality but also the question of oppressive use of what may be a constitutional process in force.

That is what we want to be enlightened on.

In that view it seems that the complaint is entitled to take evidence on the merits of the case.

Mr. GOODRICH: We do not dispute that.

THE COURT: I understand you dispute that.

Mr. GOODRICH: I beg your pardon.

1379 THE COURT: That at the present time is the holding of the Court. Certainly, I have not changed my mind about it.

All I want to know now is whether this subpena exceeds limits of a proper subpena. In this peculiar kind of a case, up to date I cannot see that it does.

They have no means of knowing the specific documents that they want to see. There is no possible means by which they could know the file number or anything else of the reports on which you have based these multiple seizure actions. It does seem to me that that rule does not apply in such a situation.

Mr. KLEINFELD: May I address the Court?

THE COURT: Yes.

Mr. KLEINFELD: I am a little puzzled, because the Government has stated, and I think will state at the trial, that it is proceeding on the basis of a determination made by the Federal Security Administrator, made on his looking at the label of advertising, and, as the statute states, relying on a certain finding of fact made by medical doctor, which we have referred to, and which we will introduce at the trial. That is going to be, as far as I know, the Government's case.

We are not going to introduce any horde of documents. We are anxious to help. As a matter of fact, when counsel for plaintiff, Mr. Rhyne, asked us to agree to the subpena,

1379 A I stated, "No, but let's find out approximately what you want and then we can decide."

If we had any idea, approximately, what they want, I think we would be happy to give it to them. But, to say every document all over the country pertaining to Nutrilite, I think, in spite of the fact

it is an unusual case, it is putting a tremendous burden on the Government.

THE COURT: Can you stipulate what documents you want or anything of that sort?

Mr. RHYNE: It is very difficult for me to do so.

THE COURT: I can understand that.

Mr. RHYNE: You can understand the situation I am in. I do not know what they have in their files. We have been denied a hearing and a right to present our side of this case at all. So, we do not know what they have. We would like to know so we can meet it at the trial. I think the only way we can meet it is have them produce the documents.

If their objection goes to the fact that some of these records are in other parts of the country, I would be quite willing, until they could produce them, or I would be quite willing to examine what they have in their Washington office and then tell them whether it is necessary to produce the others. But, I think, without
1380 at least a look at their file and the records, we are completely in the dark.

We come up to the trial and it would probably mean the trial would be prolonged by our requiring certain documents that I cannot specify now. I think I am in a rather unusual position since we know so little about the Government's side of the case. I took Mr. Kleinfeld's deposition and asked him who his witnesses were and he could not tell me. I took this Mr. Nelson's deposition, who is head of their Vitamin Section, and he indicated a lot of unusual things. He stated that although it is his duty to render opinions on labeling, he had never been consulted except by this Medical Association man, besides some assistant to Mr. Kingsley recently on price only.

So, it is a rather unusual case. It is very difficult for me to do more than to ask to look at their records.

It seems to me that all the records with respect to Nutrilite are in one place and we could look at them in a very few minutes. They can pull their files out and we can go through them. I have done that in many cases. I do not see why it is objectionable here unless they have something in there they do not want us to see. I would like to see this opinion they rendered to the American Medical Association. I think I am entitled to see it for the
1381 purpose of discovery. I do not know whether it would be evidence. It might lead me to evidence that would be very, very unusual in this case, because if the head of their Vitamin Section did not know anything about this case until the first of this year when the American Medical Association people contacted

him. It might give me a lot of leads to the oppressive things they have done, why they have done them, and who is back of them.

So, I think the request is not unreasonable.

I will be glad at this time to limit it to the records here in Washington, and then if I find those records indicate that they have other records in other parts of the country, especially in Los Angeles, where this case has been developed, I would certainly want to look at them. I just can't see how that is an unreasonable position at all.

THE COURT: You mean you would be willing to have a court order permitting you to see the records in Washington without prejudice to an application to examine the records in some other place?

Mr. RHYNE: Yes, Your Honor. The only qualification on that that I would like to make at this time is that in Los Angeles, in particular, I have associate counsel who is going to take depositions out there. We would like to look at their records out there
1382 that relate to it. But, these 15 other places in the United States where they have records, why, I would not want them to produce those at this time. I would be quite willing to have that limitation imposed.

THE COURT: What do you say, Mr. Goodrich?

Mr. GOODRICH: As Your Honor knows, those records, as I stated, go back to 1939.

There is a criminal indictment pending against this firm in Los Angeles. They have been indicted by a Federal Grand Jury. That case is approximately ready for trial. As you know, no discovery is allowable in that type of case. The records in that case could have no possible relationship to these cases, that case having been instituted, as Your Honor knows, in September, before the first of these seizures.

We are concerned by the long span of time and the large volume of records. For that reason we respectfully ask Your Honor, if you are disposed to grant these discovery of those records, to place some reasonable restriction on it as to time and place and to exclude from it the criminal case in which discovery would be entirely improper.

THE COURT: Mr. Kleinfeld, did you wish to say anything?

Mr. KLEINFELD: I may be repeating myself, but again I say, Your Honor, that if we consider the issue involved in this case, as
1383 it stands before this Court, to wit, whether the labeling is materially misleading, I really do not see how there is such an urgent necessity on their part, which, apparently, is a fishing expedition to find something that may help them.

The issue before this Court would really be for the Court to decide, to look at this pamphlet

THE COURT: (interposing) Mr. Kleinfeld, this thing has gone on for several years without the Government ever moving in.

Mr. GOODRICH: If I might explain those facts.

Mr. RHYNE: Before you do it, may I say a word about the criminal case? I think the Court should be advised that the delay there was first at the request of the Government because there was a case pending in the Supreme Court of the United States. We thought we had an understanding that they would make no seizures during that time. But, they say their understanding only related to seizures in Los Angeles and not to the United States, and they made these other seizures.

Then when the case came up, I believe it was on about the 5th of April, the judge there indicated that he did not see that it would do a lot of good to try a case on labeling when it was admitted
1384 that they had discontinued almost two years before. He put the thing over on his own motion. So, there has been no delay at our request in the criminal case at all. The delay only came at the Government's request. I would like for the record to show that.

Mr. GOODRICH: Actually, I hate to get into those side issues.

THE COURT: I will be glad to hear you.

Mr. GOODRICH: The case was scheduled on April 5th. A few days in advance of April 5th the defendant filed some motions to suppress evidence and to dismiss. That is the reason the case went over rather than what Mr. Rhyne states.

But, going back to these records, this product is produced by a man named Carl Rhenborg. He started in 1939 in California. He did no interstate business of any significance, that is, until 1945, when Mytinger and Casselberry took over the national sales. Up until that time they did only one percent of interstate business, and that amounted to one percent of $10,000. Starting in 1945, in September, which is admitted in the complaint by the Plaintiff, they took over the national distributorship and in the first year sold about $100,000 worth.

Beginning in 1947, October 1947, they hit upon this plan of "How to get well and stay well" in its present form,
1385 and other sales manual and other sales technique, from 1947, October, until the present date there have been tremendous increases in distribution.

After the distribution became a substantial figure of our national life, as you will see, the Food and Drug Administration agents encountered it from place to place. That took a little time to investigate. The people were notified to come in for a hearing in advance of the facts being reported to the Department of Justice for criminal action. That was in July of 1948. No, I believe it was July of 1947. I am not sure. But, anyhow sometime before,

and there were several delays there. The Government has not delayed in striking at what we consider a serious imposition upon the public from that time on, although it has been on the market, and, I freely admit, since 1939.

Those are the facts.

THE COURT: How long would it take the Government to get in these divers reports? What I mean to say that is that, I used to be a regimental commander in the Army at one time. If the commanding authority of the War Department or division commander, or anybody else, had wired me to get in my consolidated morning report, it would not have taken me 15 minutes to send it in.

1386 Mr. GOODRICH: Having been in the Navy, I know what you mean there. The Government moves a little bit slower. We could get them in in a reasonably short time. It is a question of having some reasonable limitation on the amount of papers they might look at.

THE COURT: On depositions you can always object to the introduction of anything that you do not think is material.

Mr. GOODRICH: We believe the authorities authorize us to object in advance to anything that is not relevant. Those are the cases which we have cited to Your Honor.

THE COURT: That leaves it to the Government bureau to decide what is material and what is not. But, in a procedure where the Government is the aggressor, so to speak, why shouldn't the other side have the opportunity of using the right of deposition to discover the position of the Government and to determine whether the reports on which the Government has operated is relevant or not?

Mr. GOODRICH: We wish only to proceed under the rules. They have the right under the rules to free discovery on oral deposition of our people. Under the rules they have no right to documents without showing of relevancy. That is our opinion of the law. We could be wrong, of course. That is the question that is before Your Honor.

1387 We respectfully submit those authorities to you and ask your indulgence in considering them.

THE COURT: I will be glad to examine them in detail.

Mr. KLEINFELD: I would like to ask Your Honor that since the proceedings are in discovery, and since the Government has nothing to hide, and I am sure Mr. Rhyne's clients have nothing to hide, that whatever right of discovery Your Honor grants to the Plaintiff, Your Honor grants to the Defendant here, so that we may examine all the documents of the Plaintiff with respect to Nutrilite.

Mr. RHYNE: We have no objection whatever to your examination of our records. As a matter of fact, you have been through our files many, many times. Your inspectors have been looking out

there and they have looked at everything we have got. So, we have no objection to your looking at anything we have.

Mr. KLEINFELD: Whatever Your Honor does enter, I respectfully ask that the Government be given the same right.

THE COURT: The Court will deny the motion to quash, with a provision that either side may have the same opportunity for examining the documents involved.

Mr. GOODRICH: Does your denial go to our point about the interrogation of Mr. Kingsley? That is a separate point.

THE COURT: Yes, it does. I think Mr. Kingsley is
1388 entitled to be examined.

Mr. RHYNE: Would you like for me to submit a formal order?

THE COURT: I would be glad for you to do if if it provides that both sides have the opportunity to examine the documents.

I can understand that it is very difficult for either one of you to pick out a particular document and specify the date and number of it. I do think that either side is entitled to examine the essential documents leading up to the action of the Administrator.

Mr. GOODRICH: Will Your Honor qualify as to the "essential" documents leading up to this decision in this probable case"?

THE COURT: Yes.

Mr. RHYNE: May I ask one question about this latest matter? Who will determine the essentiality of documents?

THE COURT: The Court will ultimately have to do it.

Mr. RHYNE: I am entitled to look at all the documents now in this discovery proceeding?

THE COURT: I think that is true, and they are entitled to look at all the documents in the discovery process, too. If it turns out to be burdensome to get these reports from the outlying districts, the Court then will entertain a motion to modify *at* to them.

1389-1390 Mr. GOODRICH: Does Your Honor's ruling go to the documents in the criminal case?

THE COURT: No, it does not.

Mr. GOODRICH: No documents in the criminal case?

THE COURT: It goes to documents having to do with this particular case. That is all we have jurisdiction over.

Let me stated to you that what Mr. Rhyne stated the other day over in the court is perfectly correct, that this language that you rely on in that statute was slipped in there. I was a member of the subcommittee, as well as the full committee of the Commerce Committee of the Senate, which fought over that bill for a number of years, and we fought particularly over multiple seizures; and Mr. Campbell, who was then the head of the Food and Drug Administration, came up and he made a fine case on exactly the same basis of this business of the seizure of this salt company. We

finally agreed to it. I did not happen to be a member of the Conferees, and I was negligent, I freely admit, that I did not notice it in the conference report. It was slipped in the conference report and never intended to be there, neither in the Senate nor the House. This is off the record.

(Thereupon, at 4:00 p.m., the hearing was concluded.)

1391 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

REPORTER'S TRANSCRIPT OF HEARING ON PLAINTIFF'S MOTION FOR MODIFICATION OF PRE-TRIAL ORDER—Filed Oct. 10, 1949

Washington, D. C.,
Wednesday, September 21, 1949.

The above-entitled matter came on for hearing at 2:15 o'clock p.m., on Wednesday, September 21, 1949, in the United States District Court for the District of Columbia, in the Court House, in the City of Washington, District of Columbia.

BEFORE:

Honorable T. ALAN GOLDSBOROUGH, Judge, United States District Court for the District of Columbia.

APPEARANCES:

CHARLES S. RHYNE, ESQUIRE, and DAVID E. BAMFORD, ESQUIRE, on behalf of the Plaintiff; and

VINCENT A. KLEINFELD, ESQUIRE, and WILLIAM W. GOODRICH, ESQUIRE, on behalf of the Defendants.

1392 PROCEEDINGS

Mr. RHYNE: Your Honor, you will remember that in this case when there was some argument about what the Court was going to pass on when it went up to the Supreme Court, the Court in its return says:

> "Furthermore, the amended Complaint brought before the Court every factual allegation therein. Judge Pine's order gave general leave to amend and did not preclude Respondents from inquiring into these facts as they relate to the issues before Respondents."

And then it was also stated:

"These foregoing facts which are set forth more fully in the Amended Complaint, in the view of Respondents, present two issues: (1)"

THE COURT: Who were the respondents in that?

Mr. RHYNE: The three judges.

THE COURT: Were the respondents?

Mr. RHYNE: Yes, sir, on writ of mandamus as directed to respondents.

THE COURT: What three judges are you referring to?

Mr. RHYNE: You and Judge Tamm and Judge Clark in this suit of Mytinger and Casselberry that went up to the Supreme Court.

THE COURT: Oh, yes.

Mr. RHYNE: This matter related to that, and I think I
1393 can state it by reading this extract:

"These foregoing facts which are set forth more fully in the Amended Complaint, in the view of Respondents, present two issues: (1) Constitutionality of that provision of the Food, Drug and Cosmetic act which provides for multiple seizures without a hearing prior to the authorizing decision in cases, where as here no danger to public health exists and no emergency requiring immediate action appears, and (2) violation of due process by alleged arbitrary, capricious, unlawful, oppressive and unreasonable actions of the defendants."

Your Honor, of course I represent the plaintiffs, and we understood that there were these two issues, the issue of constitutionality and the issue of oppressive conduct.

On Monday of this week we argued in the District Court at Newark, New Jersey, the motion for consolidation of all these labeling cases and their removal to Los Angeles, California. The motion came on their Motion Calendar there. The Government, in opposing the motion for consolidation and removal, stated that it would be their position before the three-judge court, the issue of constitutionality and this statement of pretrial issues; the first issue which states the constitutional issue, and the second was whether the defendants, in violation of the Fifth Amendment to the Constitution, acted arbitrarily, unlawfully, oppressively and
1394 capriciously in determining under Section 304(a) of the Food, Drug and Cosmetic Act, that the labeling of the plaintiff's product was, in a material respect, misleading to the injury or damage of the purchaser or consumer, without affording the plaintiff a hearing; that the only conduct of the Government

which should be brought into the hearing before the three-judge court would be the conduct which preceded that determination. In other words, that we were precluded from offering evidence before this Court relating to the oppressive conduct which came later, the filing of these suits all over the United States.

THE COURT: Later?

Mr. RHYNE: After we admitted our labeling in this administrative proceeding without a hearing. You see, first of all they decided administratively that our little pamphlet was misleading, and then they authorized the filing of all these line of cases all over the United States.

THE COURT: Isn't the issue whether or not the operation of these suits are arbitrary and capricious, and destroy you before you get a hearing? Isn't that all in the pleadings?

Mr. RHYNE: I thought it was.

THE COURT: I don't mean in the issues, but in the pleadings?

Mr. RHYNE: Yes, it is.

THE COURT: I have no doubt about it.

Mr. RHYNE: We set forth in the Supreme Court——

1395 THE COURT: The only thing that disturbs me is why you bring it before me because the other two judges have to pass on the question.

Mr. RHYNE: The reason is that I thought that there could be no doubt about it, that the oppressive conduct and constitutionality were before the Court. I admit in reading this second issue there can be some question about the conduct they are talking about, but this relates to prior rather than afterward. It is perhaps open to more than one interpretation on that.

Now, since we have approximately three weeks before the trial starts, would be a good time to get it settled once and for all so that we won't have a lot of wrangling at the trial over the issues, and if the Government would be willing to concede that those are the issues, to try to get us out of business before we get started——

THE COURT: If those issues were before us, it is immaterial whether or not there was any inappropriate language used at pretrial. The pretrial is just a skirmish to try to get the matter in shape so as to avoid conflict of evidence. It does not control the trial judge at all. It doesn't control me. It would be a good thing to have something like that in, but what I am driving at is why do you bring it to me? What right have I to do that without the concurrence of the othe two judges?

1396 Mr. RHYNE: Your Honor is one judge, and you are the available judge. One judge can take such action as is necessary before the trial, and if the other side isn't satisfied they can take it up before the three judges. So you are the judge, and I have prepared a statement to show—I thought we were all satisfied.

THE COURT: So was I. That was the principal thing that was argued before us. Are both sides before me?

Mr. RHYNE: This is Mr. Kleinfeld here.

THE COURT: I will hear you.

Mr. KLEINFELD: Your Honor, I don't know that that is the fact. I am a little surprised at it coming up, but both sides submitted proposed orders, Mr. Rhyne and I did, and Your Honors took them under consideration and finally came out with this order.

THE COURT: I understood that was the issue. I thought you had been before Judge Tamm and that is all there was to it, and I didn't even read it.

Mr. KLEINFELD: It was signed by the three judges, and while we were not entirely well pleased about it, we took it.

THE COURT: If you are going into court and contend that the only thing before the court is the question of whether or not you had a right to make administratively, or to reach administratively a conclusion that this advertisement was a violation of the
1397 Food and Drug Act and is unconstitutional, and then take the view that that is the only thing before the court, then it isn't worth trying, that is all.

Mr. KLEINFELD: Let me try to make this plain. I thought it was, Your Honor. I thought this raised this question when the motion to dismiss was argued. The only argument was on the question of unconstitutionality, and then Your Honor raised the question from the bench whether that was the only issue, and whether or not the administrator had acted arbitrarily.

THE COURT: You created that in your own mind, not out of my mind.

Mr. KLEINFELD: Well, I am sorry.

THE COURT: You just construed what I said.

Mr. KLEINFELD: I don't know what other issue there could be, Your Honor. I always understood that those were the two issues.

THE COURT: Do you mean to say that the question before the Court is whether or not you had the right to go all over the country and bring suits indiscriminately, that it could not be decided by this three-judge court?

Mr. KLEINFELD: Of course it could, and that was the question, whether the Administrator acted illegally or arbitrarily in making his determination, because those suits could not be brought unless the Administrator made determination.

THE COURT: I know, but the question arises whether or not it was proper for the Government to bring a multiplicity
1398 of suits when one suit could determine the question, and we certainly discussed that when we had our hearing over in the other court. That was the principal thing discussed, and both sides, as I understood it, considered that to be one of the things for the court to pass on.

Mr. KLEINFELD: I agree with Your Honor.

THE COURT: If it is not, there is no use talking about it.

Mr. KLEINFELD: I think we are talking about substantially the same thing. The question in Your Honor's mind was, I believe, and everybody's mind was, "All right, was the Administrator arbitrary in reaching the determination on the basis on which these suits were started?" We thought that was not the issue originally, but Your Honor said it was and we said, "All right."

THE COURT: What is the reason for your objection?

Mr. KLEINFELD: I think it is entirely vague and indefinite, and not a part of this case.

THE COURT: Do you mean this question was not raised by the pleadings?

Mr. KLEINFELD: Exactly, not at all raised by the pleadings, and could not be, because, if we review that, what are we asking this Court to do; to stop the Administrator from acting arbitrarily, we want to estop the Administrator from acting arbitrarily in making more seizures. That is what they are asking the Government to stop, and enjoin the Government from making further
1399 seizures because they say the Administrator acted arbitrarily in making multiple seizures.

THE COURT: That is not my understanding at all.

Mr. RHYNE: When I made——

THE COURT: It is perfectly evident if you wanted to reach the decision and then try the case, and then let the Court decide whether or not you were justified in reaching the conclusion, but the only question of any real interest to the three-judge court is whether or not you were justified in going all over the country and bring multiple actions to destroy these people before the cases were tried.

Mr. KLEINFELD: Wouldn't that depend, Your Honor, on whether the Administrator's determination was justified?

THE COURT: No.

Mr. KLEINFELD: The statute says he may do it.

THE COURT: It doesn't say he may do it arbitrarily and capriciously.

Mr. KLEINFELD: No.

THE COURT: And that is the question this issue raises, as I understand.

Mr. KLEINFELD: We agreed that is the issue before the Court now, whether it was acting arbitrarily or capriciously.

THE COURT: Let me see it.

Mr. KLEINFELD: Your Honor has a copy of the pretrial order?

THE COURT: I have it. (After reading document) Well,
1400 this is satisfactory to me. I don't know what the other judges would say.

Mr. RHYNE: It is certainly satisfactory to me because I think it is the only way in which we can clear up this apparent mis-

understanding that they have, and we want to stop this filing of suits.

THE COURT: It is the only question that ever made any impression on my brain at all.

Mr. KLEINFELD: The language here says, whether the defendants have, by oppressive, arbitrary, unlawful and capricious action, inflicted irreparable injury upon plaintiff and threatened further such injury by so planning their actions against plaintiff as to irreparably injure plaintiff. It is just a blunderbuss so that they try to hit at everything in the case generally. It is vague and——

THE COURT: I don't see anything vague about it. The question is whether or not—it is so simple to me, the only practical question that we are going to pass upon, as I see it, is whether you should not have brought one suit to ascertain whether or not you were justified in doing what you did, and not going all over the country and bringing other suits to destroy these people's business before the case could be determined. That is the only practical question we have to determine.

Mr. KLEINFELD: But there I don't see how that could
1401 be determined without having it before the Administrator.

THE COURT: I see no objection to this as far as that is concerned.

Mr. RHYNE: May I submit an order, then, adding that issue?

THE COURT: Yes.

Mr. KLEINFELD: I respectfully request an opportunity to be given us to argue it before the three judges.

THE COURT: I see no necessity for it; counsel says he is satisfied.

Mr. KLEINFELD: If they don't like the order they can appeal to the other of the three judges.

THE COURT: Of course, I said to Joe before you came in that they should have the three judges pass on it. It is a question—it is none of my business whether you may not prejudice your case by having one judge do it.

Mr. RHYNE: We had Judge Tamm pass upon, for example, a number of interrogatories.

THE COURT: He was acting as a pretrial judge, wasn't he?

Mr. RHYNE: And it was pointed out I could talk to both of the other of the three judges but I didn't do it, but I thought it was so well understood, until I heard this argument Monday, that it was not necessary, and I believe the Government concedes that one judge can pass on the matter initially. Don't you?

1402 Mr. KLEINFELD: I concede that Judge Tamm——

THE COURT: That isn't answering the question he asked you. If you don't want to answer, you don't have to.

Mr. KLEINFELD: I can answer, I think Judge Tamm passed on it as a pretrial judge.

THE COURT: All right, I will sign it.

Mr. GOODRICH: May I ask one thing?

THE COURT: Yes.

Mr. GOODRICH: Goodrich is my name. I am just trying to find out who is on trial. Is the Administrator, or Mrs. Dunbar, or Mr. Crawford, or the Food and Drug Administration on trial? That is a different thing; they are points that give me some concern. If this is an initial action of Government and they intend to try out the things the Government has done in this case, I believe we are entitled to know a little more clearly than that.

THE COURT: Then why don't you get it all in, everything?

Mr. GOODRICH: The pleadings, sir, are as vague to my mind as this is, but apparently it is not vague to you, and there is some difficulty in my expressing myself to you, but the question in my mind is whether the Food and Drug agency is on trial, or whether these defendants are here as usurpers who acted over and above their authority. As I understand, there is no right to sue the United States except on the basis of usurpers usurping authority.

1403 Now, there are general allegations in the complaint which say that these particular defendants have acted above and beyond their authority, and that is the question I thought was on trial. Now, if there is to be a general issue put in this case that goes to everything, any agent or any member of the Food and Drug Administration they may have done in this case, then we have an entirely different case to meet, and I believe we should be permitted to know that in advance. That is the point that is confusing about this pretrial question to me.

Mr. RHYNE: Mr. Goodrich, you and I have both been told many times that the Court could expect me to prove the allegations of my complaint.

Mr. GOODRICH: I have all those allegations set out but I do not care to burden Judge Goldsborough with them at this time. If we are going before the three-judge court that is what we have to do, but I would like Judge Goldsborough to give me an expression of his views as to this entire case.

THE COURT: I am not going to do that, but unless these other two judges understand that the Government's view of the pretrial order limits that inquiry as to whether or not the initial proceedings of the Government violated the Fifth Amendment to the Constitution, they may take the view that this issue is not necessary. What I mean is they will have to be enlightened, just as I have to be enlightened before they can pass upon it, it seems to me.

1404 Mr. RHYNE: Then can we have it brought before them before having it signed and, if necessary, they can take an appeal?

Mr. KLEINFELD: I think it might be brought before the three judges.

THE COURT: Is it satisfactory for both sides to understand that this will be brought up on trial date as a pretrial matter and passed upon before it goes to suit, and this will give you an opportunity to have the question passed upon pro and con?

Mr. KLEINFELD: Mr. Goodrich, who is chief counsel for the Food and Drug Administration makes the point that the decision of the three judges on this point will decide whether we will want to bring three witnesses from California, so it might be preferable to have it thrashed out before the three judges before the date of trial.

THE COURT: That is satisfactory. I am satisfied to sign the order, but the question in my mind is that if you are going to see the other two judges after I sign the order, that both sides are ready to say the other two judges can understand the conditions just as I understand them.

Mr. RHYNE: It would be my understanding, Your Honor, of the procedure as it has been more or less explained to me as we go along, if you sign the order then all three judges would have to sit and pass upon the discussion.

1405 THE COURT: Is that your view about it?

Mr. KLEINFELD: Yes, sir. You see, what bothers us, also, is what the injunction against the Government would be, other than the injunction from making multiple seizures, but once that is done I don't know whether we can or cannot make multiple seizures, so I think that should be thrashed out in advance before the hearing before the three judges, so that if we are licked we won't have to bring witnesses from the West Coast. I think, frankly, Your Honor; Your Honor is not in accord, not putting it eloquently, with the Government's action emanating from the Administrator and resulting in ten actions, whether that was arbitrary and capricious. We agree that that is the issue, and those are the issues in the entire order, and the only issue the Court could entertain. What other possible relief could you give to the order other than that they couldn't make more than one seizure case? That is what is said in the pretrial order.

Mr. RHYNE: You want to make it limited to this, and I think your conduct, after hearing you, you could have brought a thousand actions.

Mr. KLEINFELD: They are all one, the same part and parcel. The Administrator makes the decision and the Government makes the seizure, whether we brought one or a thousand.

THE COURT: Is it your view that the constitutional questions are the only ones involved in the case?

1406 Mr. KLEINFELD: No, Your Honor.

THE COURT: Apparently it is an issue involving only some constitutional question.

Mr. KLEINFELD: I think the second issue is more as to the violation of due process; if the Administrator in its multiple actions, were the actions arbitrary actions and illegal, it would be a violation of due process.

Mr. GOODRICH: We could put that in this finding, that is the point we make.

Mr. RHYNE: I think the big decision between us, Your Honor, is in this second point, whether the defendants, in violation of the Fifth Amendment of the Constitution, acted arbitrarily and capriciously in determining, under 304(a), whether the label was material without a hearing. We say it is these other actions that followed the determination that involved the oppressive conduct of the defendant, and it is not what went before.

THE COURT: Not entirely, you mean?

MR. RHYNE: That is right, that involves both, because they didn't have to institute more than one action; they instituted about 20 of them.

THE COURT: Counsel for the Government say the action of the three judges on this third issue would determine in their minds whether or not they should bring certain witnesses here from
1407 as far away as California. That being so, they want the three judges to pass on this question as soon as possible. Now, if that has got to be done, why isn't the smart thing to do to wait until all three judges can be gotten together and pass on it? I am perfectly willing to sign the order but I am afraid, as I said before, it is none of my business, it is none of my business whether the doing of that is going to prejudice the other two judges, or not, that is for you to decide, but sometimes one determines with a perfectly honest mind, and then somebody else is going to undertake to do something that they had as much right to do as they did, and it may prejudice your case.

Mr. RHYNE: I am perfectly willing to wait and let all three judges pass on this all at once. The only thing is that this is set for trial on the 10th of October. We also have to bring witnesses from California. I wonder whether it is going to be possible for us to get the three judges together before the 3rd of October when, I believe, most of the judges will be back. I guess we can find out.

THE COURT: The point is that the three judges have to be gotten together because the Government has said they are going to appeal my decision, and the three judges have to be gotten together as soon as possible.

Mr. RHYNE: I think Your Honor's suggestion is a good one. Why don't we get the three judges together and have them pass on it as soon as possible?

1408 THE COURT: I think that is the smart thing to do.

(Thereupon the instant hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ralph E. Miner, an official reporter for the United States District Court for the District of Columbia, do hereby certify that the foregoing is the official transcript of the proceedings in said court in the above-entitled cause.

RALPH E. MINER,
Official Court Reporter.

1408-A [Caption omitted].

1409 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208—'48

MYTINGER AND CASSELBERRY, INC., a California corporation, 1724 Santa Fe Avenue, Long Beach, California, Plaintiff,

v.

OSCAR R. EWING, Administrator, Federal Security Agency; PAUL B. DUNBAR, Commissioner, Food and Drug Administration; CHARLES W. CRAWFORD, Associate Commissioner, Food and Drug Administration; LOUIS D. ELLIOTT, Assistant Commissioner, Food and Drug Administration; GEORGE P. LARRICK, Assistant Commissioner, Food and Drug Administration, and TOM C. CLARK, Attorney General of the United States, Washington, D. C., Defendants.

[File endorsement omitted].

COMPLAINT FOR TEMPORARY AND PERMANENT INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed December 30, 1948

1. Plaintiff is a California corporation, having its principal place of business in the City of Long Beach, California, which is located in the jurisdiction of the United States District Court for the Southern District of California, Central Division. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott, and George P. Larrick are the Commissioner, Associate Commissioner and Assistant Commissioners, respectively, of the Food and Drug Administration of the Federal Security Agency; and Defendant Tom C. Clark is the Attorney General of the United States; all of the said defendants being officers or agents of the United States Government empowered by the Congress of the United States and

by the Federal Security Agency with the due and proper
1410 administration of the Federal Food, Drug and Cosmetic Act, of 1938, as amended, and having their principal places of business in the District of Columbia. This action arises under the provisions of the Federal Food, Drug and Cosmetic Act, Title 21, U.S.C. Sections 301-392, the Administrative Procedure Act, Title 5, U.S.C. Sections 1001-1011, and the Constitution of the United States, as hereinafter more fully appears.

2. Plaintiff is and has been since September, 1945 the exclusive national distributor for a vitamin and mineral food product known as "Nutrilite Food Supplement" which consists of capsules containing a base of a concentrate of alfalfa, parsley, and watercress, fortified with added vitamins, and tablets containing several food minerals. Sales of Nutrilite Food Supplement are made through plaintiff's distributors direct to consumers and in connection with said sales a booklet prepared by plaintiff under the title "How to Get Well and Stay Well" is used. Said booklet contains a general discussion of nutrition, the need for vitamins and minerals in nutrition, and the deficiency conditions which can result from a lack of such factors in the diet. The edition of said booklet now in use is attached to this Complaint as Exhibit "A" hereto. The plaintiff has also made statements and representations concerning the said Nutrilite Food Supplement in labels upon the bottles containing the same, upon the cartons in which the said bottles are enclosed and in said booklet, "How to Get Well and Stay Well". The statements contained in and upon the said labels, cartons and booklet have been prepared with care, under scientific and legal direction, and in the utmost of good faith; no representations have been made thereunder which the plaintiff and its officers and agents did not believe, and have reason to believe, were and are true; and nothing contained therein has been or is false, fraudulent or misleading.

3. The product Nutrilite Food Supplement contains no substance or material or combination of substances or materials harmful or deleterious in any manner whatsoever to human users thereof and in fact does contain substances and material which have been demonstrated by scientific tests and by actual experience of users to be helpful to the health of human beings. No claim has at any
time been made by any Federal, State or other governmental
1411 agency that Nutrilite Food Supplement is adulterated or harmful in any manner whatsoever to the health of human users thereof. On the contrary, there is submitted concurrently with this Complaint the Affidavits of Roger W. Truesdail, Ph.D., of the Truesdail Laboratories, Inc., of Los Angeles, California, and Gordon J. McCurdy, M.D., of Miami, Florida, to the effect that said product is entirely safe for human consumption.

4. Plaintiff distributes Nutrilite Food Supplement in inter-state commerce throughout the United States and, through energetic and resourceful techniques, has developed and expanded its distribution business to a point where it has representatives in each of the forty-eight States of the United States and has, through sound and honest business practices, built up a lucrative trade amounting to more than $500,000 a month at present, all of which is more particularly described in the Affidavit of W. S. Casselberry attached to and made a part of this Complaint. Plaintiff further alleges that a very large percentage of its present total volume consists of sales to unsolicited persons to whom Nutrilite Food Supplement has been recommended by users thereof and by other persons not connected directly or indirectly with plaintiff or its organization. The very nature of plaintiff's business makes good will its most valuable asset, and plaintiff states that the good will built up for its products by honest and conscientious effort since their product was first marketed in 1933 makes possible its present success.

5. In the latter part of the year 1946, representatives of the Food and Drug Administration of the Federal Security Agency visited the offices of plaintiff in the city of Los Angeles, California, and were furnished, at their request, copies of all literature then used by plaintiff in connection with the sale of said product, including the then current edition of the booklet entitled "How to Get Well and Stay Well", and in addition thereto, requested and were furnished with names and addresses of certain of plaintiff's distributors of said product in States other than the State of California.

6. In January, 1947, an Inspector of said Food and Drug Administration visited the offices of plaintiff at Long Beach, Cali-1412 fornia, and requested and received the names and addresses of additional distributors of Nutrilite Food Supplement, and in particular, distributors to whom shipments of said product had just recently been made and who would therefore most probably have said product on hand at said time and for a number of days thereafter. Plaintiff alleges that one of the distributors whose name and address was obtained at said time was a distributor to whom a shipment of said product had been made by plaintiff in the month of January, 1947 and which shipment was subsequently made the basis of two of the counts of the indictment hereinafter referred to in Paragraph 9 of this Complaint. On the occasion of said visit by said representative of the Food and Drug Administration, additional copies of the booklet "How to Get Well and Stay Well" were voluntarily offered by plaintiff and without solicitation or request therefor from said representative and at said time plaintiff requested said representative to advise it if the Food and Drug Administration had any objections to said booklet or the contents thereof. Plaintiff was then and there informed by said representa-

tive that so far as he knew, there were no objections thereto and that copies, additional to those previously furnished as alleged in Paragraph 5 hereof, were not needed. The affidavit of Lee S. Mytinger attached hereto sets forth these facts.

7. In June, 1947, said Food and Drug Administration in Los Angeles, California, addressed a notice to plaintiff, acting under the provisions of Title 21, Section 335, United States Code, and a hearing pursuant thereto was held in the offices of said Food and Drug Administration in Los Angeles, California in July, 1947. At said hearing it was alleged by representatives of said Food and Drug Administration generally that said booklet "How to Get Well and Stay Well" and certain other literature contained objectionable material which, however, were not specified. Notwithstanding the fact that representatives of said Food and Drug Administration made no specification of any purportedly objectionable matter in said booklet and the other literature, the legal representative of plaintiff at said hearing advised the representatives of said Food and Drug Administration that the objectionable literature would be immediately discontinued and that said booklet would be reviewed in its entirety and revised so as to eliminate any possible objection that might be made by the Food and Drug Administration, and plaintiff alleges that said plaintiff did immediately discontinue the use of such literature and took immediate steps toward the
1113 revision of said booklet and it was in fact thereafter republished in the revised form in conformance with the views of the Food and Drug Administration as the same were explained to plaintiff and its attorney. Following said notice and hearing and the action in good faith of plaintiff in complying with all suggestions made at said hearing by the Food and Drug Administration, no further changes or hearings with respect to said revised booklet have been made. Instructions were issued to all of Plaintiff's distributors to destroy the old booklets. At said hearing it was also alleged by representatives of said Food and Drug Administration that one of plaintiff's products known as "B & E" Nutrilite Food Supplement contained a 30% shortage of Vitamin B_1. Thereupon, Plaintiff obtained from the Food and Drug Administration a portion of the specific sample so alleged to be deficient and secured an analysis thereof from a reputable independent laboratory which determined that said deficiency was no more than 5% and could be attributable to the length of time elapsing between the shipment of the tested product and the analysis thereof. Plaintiff alleges in this connection that Vitamin B_1 is a product the potency of which diminishes with the lapse of time. No further charges or hearings with respect to said alleged deficiency of Vitamin B_1 have been made or had to date hereof. At said hearing, representatives of said Food and Drug Administration also stated that the labels used

by Plaintiff on said product did not fully comply in certain particulars with the Federal Food, Drug and Cosmetic Act. Thereupon, Plaintiff immediately revised said labels to meet said objections and said labels have at all times since complied and do now comply with said Act. All of said facts are fully set forth in the affidavit of Lee J. Myers which is attached hereto and by this reference made a part hereof.

8. Following the hearing of July, 1947 referred to in Paragraph 7 hereof, Plaintiff learned that agents of said Food and Drug Administration were interrogating many of Plaintiff's sub-distributors and customers. In order to determine the basis of such interrogations, Plaintiff arranged a meeting with representatives of said Food and Drug Administration in the offices of the latter in Los Angeles, California. At said meeting, the Chief of the Los Angeles 1414 station of said Food and Drug Administration was informed by Plaintiff that Plaintiff desired to comply in every respect with every phase of the Federal Food, Drug and Cosmetic Act, and requested said Chief to advise Plaintiff if said investigation and interrogations were prompted by a belief in the minds of representatives of said Administration that any phase of Plaintiff's labels or labeling in any manner or at all violated any provision of law. In reply thereto, said Chief advised Plaintiff that said investigation and interrogations were merely "routine" in nature, and no statement was made by said Chief that any phase of Plaintiff's labels or labeling was suspected of being in violation of the Federal Food, Drug and Cosmetic Act.

Plaintiff alleges that the term "misbranding" is undefined in any provision of the Federal Food, Drug and Cosmetic Act except in general terms as contained in Sections 201(n), 403 and 502 of said Act (21 U.S.C. §§321(n), 343, 352). To the best knowledge of Plaintiff and its attorneys there is no published book or standards which specify with certainty whether labeling or literature is false or misleading. By reason thereof, whether or not criminal or civil proceedings are instituted against any person because of the alleged misbranding of their product depends entirely upon the views, interpretation and policy of said Food and Drug Administration as the same then exist, with the consequent uncertainty in the minds of the industry, notwithstanding their conscientious efforts to avoid misbranding, as to whether a product distributed by them will cause said Administration to institute civil or criminal proceedings against them. By reason thereof and with said circumstances in mind, Plaintiff stated to said Chief that should any question arise at any time in the future concerning the alleged misbranding of any product distributed by Plaintiff or in connection with any phase of Plaintiff's business or operations, that said Food and Drug Administration notify Plaintiff thereof immediately, and that upon such

notification Plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

9. On September 15, 1948, a secret indictment was returned in the United States District Court for the Southern District of California, Central Division, against Lee S. Mytinger, William S. Casselberry (the two principal stockholders of Plaintiff corporation) and Carl F. Rehnborg, for an alleged violation of the Fed-
1415 eral Food, Drug and Cosmetic Act, charging two counts each of misbranding and fraud in connection with two interstate shipments of the aforesaid food product Nutrilite Food Supplement made in January, 1947. The basis for said indictment was certain literature which had been withdrawn from circulation by Plaintiff approximately 14 months prior thereto and the edition of the booklet "How to Get Well and Stay Well" which had been withdrawn from circulation by Plaintiff approximately 8 months prior to the return of said indictment, as more fully set forth in Paragraph 7 hereof; and of which withdrawal the Food and Drug Administration had prior notice as aforesaid.

10. Subsequent to the return of said indictment; the Defendant, Federal Security Administrator, by and through the Defendant officials of said Food and Drug Administration, and Defendant Tom C. Clark, Attorney General of the United States, instituted or caused to be instituted and commenced numerous libel actions against certain of Plaintiff's products, and has made or caused to be made without prior notice to Plaintiff seizures thereof at the following localities and on or about the following dates, in connection with said libel actions:

Belleville, New Jersey, September 30, 1948 and December 14, 1948.
New York City, New York, October 14, 1948.
Buffalo, New York, October 28, 1948.
Hastings, Nebraska, November 24, 1948.
Seattle, Washington, December 10, 1948.

Plaintiff has been informed by Defendant George P. Larrick, Assistant Food and Drug Commissioner, that he has approved additional seizures, and based upon such information alleges that further and additional seizures and libels are being contemplated by Defendants, all as more particularly set forth in the Affidavits of William S. Casselberry and Lester L. Lev attached to and made a part of this Complaint. All of the several libels so already instituted in the several States by seizures as aforesaid, and those which are threatened, contain statements which are in substance identical and allege the misbranding of the said Nutrilite Food Supplement, and there are no separate issues of fact or of law which necessitate such numerous libels in the several States and

the trial and determination of the several issues involved in any one of the said libels can and will determine the validity of
1416 the claims of the Plaintiff in and concerning the said Nutrilite Food Supplement and no necessity exists for harassing the Plaintiff with these numerous filed and threatened seizures and libels.

11. Plaintiff further alleges that the Food and Drug Administration, through its officers and employees, has caused embargoes to be placed on Plaintiff's products in New York, New Jersey, Washington State and Florida and various other localities in the United States by request to state and local health authorities; that such embargoes have generally been instituted prior to the institution of libel for condemnation proceedings; and that such embargoes are unwarranted and deliberately calculated to interfere with and ultimately destroy Plaintiff's business and good will.

12. Plaintiff alleges that the several packages, cartons and bottles of Nutrilite Food Supplement so seized at various times and places by and under the direction and authority of the Food and Drug Administration, all as hereinbefore alleged, exclusive of the seized booklets, are of the approximate retail value of $5,000.00 and are being retained by Defendants or under their authority in the several jurisdictions wherein said seizures were made, and none of said property is available for sale by Plaintiff and cannot be sold while said libels are pending. If Defendants proceed with other seizures as they have threatened to do, a very large percentage, if not all, of Plaintiff's product now in the hands of its various subdistributors will be held by Defendants or under their authority for an indefinite period of time. Vitamin products such as those seized as aforesaid are subject to deterioration and loss of potency by the passage of time, and by the time the respective libel actions can be determined said products will be unsalcable and of no value to Plaintiff, even if said libel actions are determined in its favor. The business and good will of the Plaintiff are very valuable and this business and good will are threatened with total destruction by the said arbitrary and illegal action of the several defendants. By reason of the libels which have been brought and the seizures made thereunder, and of the threats of further similar libels and seizures, the business and good will of the Plaintiff is being harassed and destroyed and its property is greatly depreciated. The prosecution of such libels in various courts in widely separated parts of the United States is unnecessarily oppressive and is ruining and will ruin and destroy the business and good will of the Plaintiff
1417 If such libels be prosecuted in widely separated parts of the United States and in different jurisdictions, the business of the Plaintiff will be wholly broken up and its good will and its property completely destroyed prior to any adjudication of the merits of the claims of the Plaintiff or of the claims of Defendants

with respect to Plaintiff's alleged misbranding of its said product. Furthermore, there is no provision of law requiring or permitting said Food and Drug Administration to reimburse Plaintiff for the loss of said product in the event of a determination of said libel actions in favor of Plaintiff and there is no provision for payment to Plaintiff for damages incurred through destruction of its business and good will by the actions of the Defendants.

13. Title 21, Sec. 334(a), of the United States Code, prohibits the institution of more than one libel for condemnation based upon the same alleged misbranding unless the Administrator has probable cause to believe from facts found without a hearing by him or any officer or employee of the Federal Security Agency that the alleged misbranded article is dangerous to health or that the labeling thereof is fraudulent or would in a material respect be misleading to the injury or damage of the purchaser or consumer, or unless such alleged misbranding has been the basis of a prior judgment in favor of the United States in a criminal, injunction or libel for condemnation proceeding under said Statute. Plaintiff alleges that said alleged misbranding has at no time been the basis of a prior judgment in favor of the United States in a criminal, injunction or libel for condemnation proceeding under said Statute. Plaintiff further alleges that said Nutrilite Food Supplement is not now nor has it ever been dangerous to health as more fully appears from the Affidavit of Roger W. Truesdail, Ph.D. and Gordon J. McCurdy, M.D., attached to this Complaint and filed concurrently herewith.

Plaintiff has no information concerning whether said Administrator, any officers or employee of said Ageney has at any time found that the labeling of said Nutrilite Food Supplement is fraudulent or would be in a material respect misleading to the injury or damage of the purchaser or consumer, and in this connection Plaintiff alleges that if said Administrator, or any officer or employee of said Agency has so found, said finding has been without hearing afforded to Plaintiff and without any facts
1418 in support thereof as is set forth in the affidavit of Lee J. Myers attached hereto, and that by reason of the failure of said Administrator or any officer or employee of said Agency to afford Plaintiff such a hearing prior to such a finding if such were made, said finding as applied to this Plaintiff upon the facts herein set forth deprives Plaintiff of its property without due process of law contrary to the terms and provisions of the Fifth Amendment to the United States Constitution. By reason of said lack of hearing and by reason of failure to make public and serve upon the Plaintiff said finding of said Administrator and any officer or employee of the Federal Security Agency who has made or may make such a finding Defendants, other than Tom C. Clark, have violated the

requirements of the due process clause of the Fifth Amendment of the United States Constitution, and have exercised an uncontrolled discretion arbitrarily and oppressively in violation of said Amendment. If said finding has been made as the basis of the institution and threatened institution of the numerous libels described herein, said finding was made arbitrarily and oppressively to completely ruin and destroy Plaintiff's business and good will notwithstanding the fact that Plaintiff does have a valid and meritorious defense to said finding and to each of said seizures as shown by said Myers affidavit. Even though upon the subsequent trial of each of said libels for condemnation it should be determined by the Court that said seizures were unlawful and that said product was not misbranded Plaintiff's business will in the meantime have been completely destroyed. Plaintiff further alleges that in the event said Administrator did not nor did any officer or employee of said Agency make the aforesaid finding, then all seizures and libels for condemnation instituted against Nutrilite Food Supplement subsequent to the first seizure and libel for condemnation were void and in violation of said Statute and are of no force or effect. Plaintiff further alleges that in none of the libel actions aforesaid filed subsequent to the first libel action was any allegation made that any finding had at any time been made by the Administrator or any officer or employee of the Federal Security Agency that said product Nutrilite Food Supplement was dangerous to health or that the labeling thereof was fraudulent or would in a material respect be misleading to the injury or damage of the purchaser or consumer or that said alleged misbranding had been the basis of a prior judgment in favor of the United States in a criminal, injunction or libel for condemnation proceeding under said Federal Food, Drug and Cosmetic Act.

1419 14. Plaintiff alleges that the defense of the various libels already instituted or caused to be instituted by the Defendants herein in widely separated parts of the United States is unreasonably oppressive and causes great and unnecessary expense to Plaintiff in employing counsel to defend such libel proceedings and that the threatened institution of further seizures in connection therewith will put Plaintiff to further and additional expense which will all result in the destruction of and irreparable injury to Plaintiff's business and good will.

Plaintiff further alleges that the Food and Drug Administration, arbitrarily and for no legal, practical or other reason, refuses to stipulate with Plaintiff so as to permit the removal of the existing libels to the United States District Court, Southern Division of California as provided for in the Federal Food, Drug and Cosmetic Act, so as to permit Plaintiff to try the issues involved in such libel proceedings at a location where witnesses are available to Plaintiff and where Plaintiff can make a complete defense to such

actions. Plaintiff further alleges that representatives of the United States Department of Justice have expressed their willingness to stipulate to the removal of the existing and pending libel actions to the Southern District of California, which is a District of reasonable proximity to the principal place of business of Plaintiff, to wit: the Southern District of California, but that said United States Department of Justice has refused and will continue to refuse to so stipulate unless and until approval to such stipulation is obtained from the remaining Defendants, and that said remaining Defendants do now refuse and at all times herein mentioned have refused to authorize such a stipulation by the defendant Tom C. Clark, Attorney General of the United States, and that said refusal deprives Plaintiff of the opportunity of producing witnesses available to testify to competent, relevant and material facts in said libel proceedings and thereby deprives Plaintiff of its opportunity adequately to defend said libel proceedings and each of them. Plaintiff further alleges that notwithstanding the fact that said libels for condemnation and each of them are as provided by law under the control of the Defendant Tom C. Clark, Attorney General of the United States, and that said representatives of said Attorney General have as aforesaid expressed their willingness to stipulate for the removal of said libel proceedings to the United States District Court, Southern District of California, which is a District
1420 of reasonable proximity to Plaintiff's principal place of business, nevertheless, representatives of said Food and Drug Administration unreasonably, arbitrarily and capriciously refuse to consent to such stipulation for such transfer notwithstanding the fact that said representatives of said Food and Drug Administration have admitted to Plaintiff that by reason of the great distances existing between the Districts of the United States District Courts in California and adjoining States, great hardship, inequities and great expense would be thereby thrust upon Plaintiff. These facts are set forth in the attached affidavit of Lester L. Lev.

15. Plaintiff further alleges that in addition to the duties and responsibilities of the Defendants with respect to the administration and enforcement of the Federal Food, Drug and Cosmetic Act, Defendants have deliberately pursued and instituted a course of enforcement against Plaintiff herein which is designed solely toward the harassment of Plaintiff and the complete and total destruction of their business and good will, all of which is described with more particularity in the attached affidavits of Lester L. Lev, William S. Casselberry and Lee J. Myers.

16. Plaintiff further alleges that the Defendant Administrator of the Federal Security Agency and the Defendant Commissioner, Associate Commissioner and Assistant Commissioners of the Food

and Drug Administration have pursued, are pursuing or have caused to be pursued a course of enforcement of the Federal Food, Drug and Cosmetic Act, over and beyond their prescribed statutory duties, which are designed to harass and to ruin Plaintiff's business and good will prior to any adjudication of the merits of Plaintiff's labels and labeling, all of which is more particularly set forth in the attached affidavits of Lester L. Ley and William S. Casselberry.

17. Plaintiff alleges that under the provisions of Section 1009(e), Title 5, U. S. C., the Administrative Progedure Act of 1946, it is entitled to have the finding, if in fact there was such a finding, of the Administrator of the Federal Security Agency or of the officer or employee of the Food and Drug Administration of the Federal Security Agency that the Plaintiff is employing fraudulent or misleading labeling in connection with the sale of its product, judicially reviewed, declared void and set aside because it is an arbi-
1121 trary, capricious and unreasonable exercise of discretion, because it is not founded upon any fact, and because such finding under the facts herein alleged deprives Plaintiff of his property without due process of law in violation of the Fifth Amendment to the United States Constitution.

18. Plaintiff further alleges that even though there may be no finding by the Administrator or by officers or employees of the Food and Drug Administration that the labeling employed by Plaintiff in connection with the sale of its product is misbranded or fraudulent, Plaintiff is, nevertheless, entitled under the provisions of Section 1009(a) of the Administrative Procedure Act to judicial review of the administrative action which was taken, and which resulted in the institution, without just cause or without any reason in law or justice, of the aforementioned libels and threatened libels, for the reason that such action requires and will require Plaintiff to defend a multiplicity of actions when, in a single action, the question of misbranding or of mislabeling could be satisfactorily adjudicated; and furthermore, the Federal Food, Drug and Cosmetic Act requires a finding such as that above referred to.

19. Plaintiff neither desires to delay nor impede any proper administrative or judicial determination of the disputed questions of fact presented in the controversy with the Food and Drug Administration over the labels and labeling of Plaintiff's said products, but is hereby merely seeking to protect its property from multiple seizures and its business and good will from complete destruction until judicial determination of said questions can be had.

20. Plaintiff alleges that if other seizures are made by the Defendants herein as threatened, the entire good will and business of the Plaintiff will be irreparably harmed and injured and destroyed, and that Plaintiff has no plain, adequate or complete remedy at law.

Wherefore, Plaintiff prays the Court that it take jurisdiction of this case and cause appropriate process to issue against the Defendants and each of them, and require the Defendants to answer this complaint, as provided by the rules of this Court and the law.

1422 Plaintiff further prays that Defendants and each of them and their successors in office and all persons acting or claiming to act under their authority, or by their direction, be restrained and enjoined both temporarily, pending the suit, and permanently, at the final hearing, from:

(a) Continuing or causing to be continued the prosecution of any of the pending libel actions referred to in said Complaint, other than the first libel action referred to therein, unless and until said first libel action be finally determined;

(b) Instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement unless and until one of the pending libel actions referred to in said Complaint be finally determined;

and that Defendants and each of them be:

(a) Ordered and directed to abandon, dismiss or otherwise discontinue each of the aforementioned libel actions instituted subsequent to the first, and to release to Plaintiff all of the products, literature and material seized in connection therewith;

(b) Ordered and directed to forthwith vacate and set aside any findings or Order ordering multiple seizures and the institution of libel actions subsequent to the first made.

Plaintiff further prays that this Court order the removal of the trial of the first libel action from the United States District Court for the District of New Jersey to the United States District Court for the Southern District of California, Central Division.

Plaintiff further prays that pending hearing herein, this Honorable Court forthwith cause to be issued a temporary restraining order in accordance with the rules of this Court restraining the Defendants and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, from

(a) Instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein.

1423-1425 Plaintiff further prays that it shall be granted such other, further and general or special relief as the nature

of the case may require and the Court may deem proper and just in the premises.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
730 Jackson Place, N. W.,
Washington 6, D. C.

1426-1470 Exhibit "A" to complaint omitted. Same as Plaintiff's exhibit No. 3. Printed side page 1819.

1471 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS AND FOR SUMMARY JUDGMENT—Filed January 19, 1949

Come now the defendants, by their attorneys, and move this Honorable Court to dismiss this action pursuant to the provisions of Rule 12(b), as amended, of the Federal Rules of Civil Procedure, for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

Defendants, by their attorneys, further move this Honorable Court to grant a motion for summary judgment, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, for the reason that the pleadings and affidavits show that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law.

A statement of points and authorities in support of this motion is filed herewith.

This 17 day of January, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General;
GEORGE MORRIS FAY,
United States Attorney;
VINCENT A. KLEINFELD,
Attorney, Department of Justice,
Attorneys for the Defendants.

1472 FEDERAL SECURITY AGENCY
OFFICE OF THE ADMINISTRATOR

Certificate

I, Oscar R. Ewing, Federal Security Administrator, do hereby certify that the attached

(1) Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite", signed by Robert C. Butz, Medical Officer, Food and Drug Administration, dated September 30, 1948, and the Conclusion signed by C. W. Crawford, Associate Commissioner of Food and Drugs, dated September 30, 1948;

(2) Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated December 2, 1948, and the Conclusion signed by Geo. P. Larrick, Associate Commissioner of Food and Drugs, dated December 2, 1948; and

(3) Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated December 9, 1948, and the Conclusion signed by P. B. Dunbar, Commissioner of Food and Drugs, dated December 9, 1948,

are true copies of official documents on file in the Federal Security Agency and are part of the official records of said Agency.

Done at Washington, D. C.
This 12 day of January, 1949.

OSCAR R. EWING,
Administrator. (Seal.)

1473 FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
Washington 25, D. C.

9-113 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the daily intake the following:

Vitamin A, 25,000 U. S. P. units.
Vitamin B_1, 20 milligrams.

Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U. S. P. units.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Vitamin B_6, 4 milligrams.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams;

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams;

would not be effective in the treatment of low vitality, over-fatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble mindedness, diabetes, hemorrhage, connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, constipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases.

ROBERT C. BUTZ, (signed)
Robert C. Butz, Medical Officer,
Food and Drug Administration.

September 30, 1948.

1474 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

C. W. CRAWFORD, (signed)
Associate Commissioner of Food and Drugs.

For the Administrator September 30, 1948.

1475 Copy

FEDERAL SECURITY AGENCY

FOOD AND DRUG ADMINISTRATION

Washington 25, D. C.

5-610 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U. S. P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U. S. P. units.
Vitamin B_6, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, postassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams.

would not be effective in the treatment of the conditions mentioned directly or by implication in the statements quoted in Exhibit "A" attached.

ROBERT C. BUTZ, (signed)
Robert C. Butz, M. D., Medical Officer,
Food and Drug Administration.

December 2, 1948.

1476. CONCLUSION

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

GEO. P. LARRICK, (signed)
Associate Commissioner of Food and Drugs.

For the Administrator December 2, 1948.

1477 EXHIBIT "A" TO FINDING

(Quoted from booklet entitled "How to Get Well and Stay Well")

HOW TO GET WELL AND STAY WELL

IF your health problem is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well.

Published by MYTINGER & CASSELBERRY, INC. Wholesale Distributors Nutrilite Products * * *

* * * What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

* * *

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. * * *

ARE YOU A VICTIM?
ARE YOU SUFFERING FROM HIDDEN HUNGER?
ARE YOU SLOWLY STARVING TO DEATH?

* * *

* * * Just look around you at the members of your family, at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are *you* enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other

important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who *should* be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have *died* in the last year, prematurely.

* * *

* * * The healthy individual *feels* good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good. * * * The healthy person * * * is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties * * *

Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do *you*? Don't you think the facts point to the need for *something*?

1478 WHAT GOOD HEALTH MEANS TO YOUR BODY

Having seen what good health means to *you*, let's see what good health means to *your body*.

All your senses—sight, taste, touch, hearing, and sense of smell operate *in* your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal cord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

* * * When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chem-

istry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

* * * when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.'

* * * Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody *wants* to be ill. Nobody chooses to have a body wracked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

* * *

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature—and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with
1479 greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

* * *

* * * if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

SOME OBVIOUS CONCLUSIONS

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost *everyone* is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And *it hurts!*

Obviously it is better to *keep* your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to its basic and natural condition of health.

But before we tell you exactly how to do this—let us tell you a story.

* * *

CARL REHNBORG * * *

* * * went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. * * *

* * *

* * * he was convinced that the vitamins, the various minerals, and certain other essential diet factors * * * were present in many raw foods. * * *

* * *

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants—scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

* * *

* * * he grew his own green plants * * *

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected!

* * * he had developed a practical formula for more perfect chemical balance, for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

* * * he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the non-essential cellulose and other parts of the plants, so that much value could be concentrated in small volume * * *

* * *

1480 When Mr. Rehnborg returned to the United States * * * he began a * * * period of intensive study and experimentation, to improve his food supplement. At last, * * * when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it. * * * This all led to further development and

improvement and the creation of the present amazing food supplement * * *

* * *

* * * almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

* * *

So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, YOU MUST PUT INTO YOUR BODY ALL THE FOOD FACTORS REQUIRED BY IT.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty.

* * *

* * * give a little thought to what you put into the bodies of your wife or husband—into the bodies of your children—into your *own* body?

And remember your reward—a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them. * * * REMEMBER THIS. . . . THE AMERICAN DIET IS DEFICIENT IN PROTECTIVE FOOD FACTORS

* * *

* * * the protective food factors—those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, *nutrilites*. That's a technical word you won't find in your dictionary, but it means all the little food factors—not the fats, minerals, carbohydrates and proteins we hear so much about; but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

* * *

* * * no one knows how many vitamins there are. * * * the nutrilites * * * are ALL the little vital food factors, including the familiar vitamins. * * * if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but *all the nutrilites*.

* * *

* * * Diet deficiencies bring on old age. * * *
* * * diet deficiencies bring on aches and pains. * * * Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness * * * and many which are considered incurable, are the result of dietary deficiencies.

1481 * * * simply through changes in diet, you can * * * bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or, when the person is deficient, *feed* him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must contain all the vitamins * * * together with all the nutrilites and minerals so often lacking in our diet.

1482 Copy

FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
Washington 25, D. C.

Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that most common diseases do not result from dietary deficiencies and that a product consisting of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U. S. P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U. S. P. units.
Vitamin B_6, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.

Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams.

would not be effective in preventing or treating most common diseases.

ROBERT C. BUTZ, (signed)
Robert C. Butz, M.D., Medical Officer
Food and Drug Administration.

December 9, 1948.

1483 CONCLUSION.

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

P. B. DUNBAR, (signed)
Commissioner of Food and Drugs.

For the Administrator December 9, 1948.

1484-1529 Exhibit to foregoing omitted. Excerpts from Plaintiff's exhibit No. 3. Printed side page 1819.

1530 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING MOTION TO DISMISS ETC.—Filed January 26, 1949

Upon consideration of Defendants' motion to dismiss and for summary judgment, it is by the Court this 26th day of January, 1949,

Ordered, That the said motion be and it is hereby denied without prejudice.

DAVID A. PINE,
Judge.

Approved as to form:
VINCENT A. KLEINFELD,
Attorney for Defendants.

1531 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS AND FOR SUMMARY JUDGMENT—Filed February 1, 1949

Come now the defendants, by their attorneys, and move this Honorable Court to dismiss this action pursuant to the provisions of Rule 12(b), as amended, of the Federal Rules of Civil Procedure, for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

Defendants, by their attorneys, further move this Honorable Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the reason that the pleadings and affidavits attached thereto, the affidavits heretofore submitted by defendants in support of its motion for summary judgment, and the attached findings of fact and conclusions, made pursuant to the provisions of Section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334(a)) show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

A statement of points and authorities in support of this motion is filed herewith.

This 31st day of January, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General;
GEORGE MORRIS FAY,
United States Attorney;
VINCENT A. KLEINFELD,
Attorney, Department of Justice,
Attorneys for the Defendants.

To: Charles S. Rhyne,
Eugene J. Bradley, Esqs.,
Attorneys for Plaintiff.
730 Jackson Pl., N. W.,
Washington 6, D. C.

Service of the attached papers admitted this 31st day of January, 1949.

CHARLES S. RHYNE per W. W.,
Atty. for Plaintiff.

1532 FEDERAL SECURITY AGENCY

OFFICE OF THE ADMINISTRATOR

Certificate

I, J. Donald Kingsley, Acting Federal Security Administrator, do hereby certify that the attached copies of Findings of Fact to support multiple seizures of the drug "Nutrilite", signed by Robert C. Butz, Medical Officer, Food and Drug Administration, and Conclusions signed by me are true copies of official documents on file in the Federal Security Agency and are part of the official records of said Agency.

Done at Washington, D. C.
This 28th day of January, 1949.

J. DONALD KINGSLEY,
Acting Administrator. (Seal.)

1533 FEDERAL SECURITY AGENCY

FOOD AND DRUG ADMINISTRATION

Washington 25, D. C.

9-113 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the daily intake the following:

Vitamin A, 25,000 U. S. P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U. S. P. units.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Vitamin B_6, 4 milligrams.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams;

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and

pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 762 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams;

would not be effective in the treatment of low vitality, over-fatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble mindedness, diabetes, hemorrhage connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, constipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases."

ROBERT C. BUTZ,
Robert C. Butz, Medical Officer,
Food and Drug Administration.

1534 CONCLUSION.

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Admininstration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect mis-leading to the injury or damage of the purchaser or consumer.

J. DONALD KINGSLEY,
Acting Administrator.

1535 FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION

Washington 25, D.C.

5-610 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U.S.P. units. Vitamin B_1, 20 milligrams. Vitamin B_2, 10 milligrams. Vitamin C, 200 milligrams. Vita-

min D, 2500 U.S.P. units. Vitamin B_{12}, 4 milligrams. Vitamin E, 10 milligrams. Vitamin K, 0.4 milligrams. Inositol, 20 milligrams. Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams. Phosphorus, 562 milligrams. Iron, 10 milligrams. Iodine, 0.4 milligram. Niacin amide, 15 milligrams. Pantothenic acid, 8 milligrams;

would not be effective in the treatment of the conditions mentioned directly or by implication in the statements quoted in Exhibit "A" attached.

ROBERT C. BUTZ, M.D.,
Medical Officer Food and Drug Administration.

1536 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

J. DONALD KINGSLEY,
Acting Administrator.

1537 EXHIBIT "A" TO FINDING

(Quoted from booklet entitled "How to Get Well and Stay Well")

How to get well and stay well.

If your health problem is the result of dietary deficiencies, and If you want to get well and stay well, be sure to read this book. Even If you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. If your health is good read this book and learn how to stay well.

Published by MYTINGER & CASSELBERRY, INC. Wholesale Distributors Nutrilite Products

* * * What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the

customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

* * * * * * * * *

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. * * *

Are you a victim?

Are you suffering from hidden hunger?

Are you slowly starving to death?

* * * * * * * * *

* * * Just look around you at the members of your family, at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are *you* enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth; trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who *should* be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have *died* in the last year, prematurely.

* * * * * * * * *

* * * The healthy individual *feels* good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

* * * The healthy person * * * is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties * * *

Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do *you?* Don't you think the facts point to the need for *something?*

1538 What good health means to your body.

Having seen what good health means to *you*, let's see what good health means to *your body*.

All your senses—sight, taste, touch, hearing, and sense of smell operate *in* your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation; and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal cord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

* * * When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

* * * when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

* * * Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody *wants* to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

* * * * * * * *

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature—and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with
1539 greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

* * * * * * * * * if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

Some obvious conclusions.

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost *everyone* is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And *it hurts!*

Obviously it is better to *keep* your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnosis, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this—let us tell you a story.

* * * * * * * *

Carl Rehnborg * * * * * * went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. * * *

* * * * * * * *

* * * he was convinced that the vitamins, the various minerals, and certain other essential diet factors * * * were present in many raw foods. * * *

* * * * * * * *

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants—scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

* * * * * * * *

* * * he grew his own green plants * * *

And when his plants were harvested, processed, and added to the diet of babies in his clinic, not one failed to respond as expected!

* * * he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

* * * he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the nonessential cellulose and other parts of the plants, so that much value could be concentrated in small volume * * *

* * * * * * *

1540 When Mr. Rehnborg returned to the United States * * * he began a * * * period of intensive study and experimentation, to improve his food supplement. At last, * * * when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it, * * *. This all led to further development and improvement and the creation of the present amazing food supplement * * *

* * * * * * *

* * * almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

* * * * * * *

So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, You Must Put Into Your Body All the Food Factors Required By It.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty.

* * * * * * * *

* * * give a little thought to what you put into the bodies of your wife or husband—into the bodies of your children—into your *own* body?

And remember your reward—a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them. * * * Remember This. The American Diet Is Deficient in Protective Food Factors.

* * * * * * * *

* * * the protective food factors—those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, *nutrilites*. That's a technical word you won't find in your dictionary, but it means all the little food factors—not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

* * * * * * * *

* * * no one knows how many vitamins there are. * * * the nutrilites * * * are All the little vital food factors, including the familiar vitamins. * * * if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but *all the nutrilites*.

* * * * * * * *

* * * Diet deficiencies bring on old age. * * *

* * * diet deficiencies bring on aches and pains. * * * Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness * * * and many which are considered incurable, are the result of dietary deficiencies.

1541 * * * * simply through changes in diet, you can * * * bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or when the person is deficient, *feed* him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must

contain all the vitamins * * * together with all the nutrilites and minerals so often lacking in our diet.

1542 Federal Security Agency, Food and Drug Administration, Washington 25, D. C.

Nutrilite Food Supplement

FINDING OF FACT

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Vitamin C, 200 milligrams.
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Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
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together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

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would not be effective in preventing or treating most common diseases.

ROBERT C. BUTZ.
ROBERT C. BUTZ, M. D.,
Medical Officer, Food and Drug Administration.

1543 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

J. DONALD KINGSLEY,
Acting Administrator.

1544-1590 Exhibit to foregoing, omitted. Excerpts from Plaintiff's Exhibit 3. Printed side page 1819

1591 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDMENTS TO COMPLAINT—Filed February 19, 1949

Now comes Plaintiff and amends its Complaint herein as follows:

1. In paragraph 10 on page 7, strike the words "Seattle, Washington, December 10, 1948", and insert:

Spokane, Washington, December 23, 1948
Seattle Washington, December 30, 1948
Clarkfield, Minnesota, December 31, 1948
St. Petersburg, Florida, January 4, 1949
Chicago, Illinois, January 3 and 4, 1949

2. At the bottom of page 10, insert a new paragraph to be numbered paragraph 13a, to state as follows:

All libels instituted by Defendants after the first libel which was filed in New Jersey as aforesaid and all seizures thereunder are unlawful and void because the Administrator of the Federal Security Agency has not performed the necessary conditions precedent of making a decision of "probable cause" as the basis for the multiple seizures described above and threatened by Defendants, said decision of the Administrator being required by Section 304(a) of the Food, Drug and Cosmetic Act.

3. Insert after Paragraph 13a a new paragraph to be numbered 13b to read as follows:

The Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions described herein and threatened in the future as the United
1592 States District Attorneys who have filed and who will file said actions have acted and will act under his direction. Said actions other than the first libel action described above are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304(a) of the Food, Drug and Cosmetic Act, and in excess of the lawful authority of said Defendants.

4. At the end of page 14 insert the following:

It is further prayed that this Court find and decree all libels and seizures described herein other than the first, illegal and void.

5. On page 15 at the end of said Complaint, insert the following:

WILLIAM S. CASSELBERRY,
President.

Duly sworn to by William S. Casselberry. Jurat omitted in printing.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
Attorneys for Plaintiff,
730 Jackson Place, N. W.,
Washington 6, D. C.

1593 STATE OF WASHINGTON,
County of Spokane, ss:

HARRY H. ROBINSON, M.D., being duly sworn, deposes and says:

That he is a medical doctor, holding the degree of Doctor of Medicine and is duly licensed to practice medicine in the State of Washington, maintaining his office for active practice of said profession in Spokane County; that he is familiar with Nutrilite Food Supplement; that he has used Nutrilite Food Supplement over a period of six months for himself; that he has prescribed Nutrilite Food Supplement for his patients; and that Nutrilite Food Supplement is a multiple-vitamin and mineral product which, in his opinion, is safe and harmless for human consumption.

HARRY H. ROBINSON, M.D.

Subscribed and Sworn to before me this 4th day of January, 1949.

A. O. COLBURN,
Notary Public in and for the State of Washington, Residing at Spokane.

Service of a copy of this affidavit is acknowledged this the 24th day of January, 1949.

VINCENT A. KLEINFELD,
Attorney for Defendants.

1594 CERTIFICATE OF SERVICE

Service of the foregoing Amendments to Complaint and Affidavit was made upon Defendants by delivering a copy thereof to Vincent A. Kleinfeld, Attorney for Defendants, on January 24, 1949.

CHARLES S. RHYNE.

1595 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING ~~MOTION TO DISMISS ETC.~~—Filed March 4, 1949

This cause came on to be heard on defendants' motion to dismiss this action pursuant to the provisions of Rule 12(b), as amended, of the Federal Rules of Civil Procedure, for the reason that the complaint failed to state a claim against defendants upon which relief could be granted, and was argued by counsel for plaintiff and defendants, and on consideration thereof, it is by the Court.

ORDERED and ADJUDGED that the motion of defendants to dismiss be and it hereby is granted with leave to plaintiff to amend.

Dated March 4th, 1949.

DAVID A. PINE,
United States District Judge.

Approved as to form:

CHARLES S. RHYNE,
Attorney for Plaintiff.

1596 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDED COMPLAINT FOR TEMPORARY AND PERMANENT INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed March 4, 1949

1. Plaintiff is a California corporation, having its principal place of business in the City of Long Beach, California, which is located in the jurisdiction of the United States District Court for the Southern District of California, Central Division. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott and George P. Larrick are the Commissioner, Associate Commissioner and Assistant Commissioners, respectively, of the Food and Drug Administration of the Federal Security Agency; and Defendant Tom C. Clark is the Attorney General of the United States; all of the said defendants being officers or agents of the United States Government empowered by the Congress of the United States and by the Federal Security Agency with the due and proper administration of the Federal Food, Drug and Cosmetic Act of 1938, as amended, and having their principal places of business in the District of Columbia.

1597 2. This action arises under the provisions of the Federal Food, Drug and Cosmetic Act of 1938, Title 21, U.S.C. Sections 301-392; the Administration Procedure Act, Title 5, U.S.C., Section's 1001-1011, and the Constitution of the United States, as hereinafter more fully appears.

3. Plaintiff is and has been since September, 1945, the exclusive national distributor for a vitamin and mineral food product known as "Nutrilite Food Supplement" which consists of capsules containing a base of a concentrate of alfalfa, parsley, and watercress, fortified with added vitamins, and tablets containing several food minerals. Sales of Nutrilite Food Supplement are made through Plaintiff's distributors direct to consumers and in connection with said sales a booklet prepared by Plaintiff under the title "How to Get Well and Stay Well" is used. Said booklet contains a general discussion of nutrition, the need for vitamins and minerals in nutrition, and the deficiency conditions which can result from a lack of such factors in the diet. The Plaintiff has also made statements and representations concerning the said Nutrilite Food Supplement in labels upon the bottles containing the same, upon the cartons in which the said bottles are enclosed and in said booklet,

"How to Get Well and Stay Well". The statements contained in and upon the said labels, cartons and booklet have been prepared with care, under scientific and legal direction, and in the utmost of good faith; no representations have been made thereunder which the Plaintiff and its officers and agents did not believe, and have reason to believe, were and are true; and nothing contained therein has been or is false, fraudulent, or in any respect misleading to the injury or damage of any purchaser or consumer.

4. The product "Nutrilite Food Supplement" contains no substance or material or combination of substances or materials harmful or delgterious in any manner whatsoever to human users thereof and in fact does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be helpful to the health of human beings. No claim has at any time been made by any Federal, State or other governmental agency that Nutrilite Food Supplement is adulterated or harmful in any manner whatsoever to the health of human users thereof.

1598 5. Plaintiff distributes Nutrilite Food Supplement in interstate commerce throughout the United States and, through energetic and resourceful techniques, has developed and expanded its distribution business to a point where it has representatives in each of the forty-eight States of the United States and has, through sound and honest business practices, built up a lucrative trade amounting to more than $500,000 a month prior to the filing of the seizure actions hereinafter referred to. Plaintiff further alleges that a very large percentage of its present total volume consists of sales to unsolicited persons to whom Nutrilite Food Supplement has been recommended by users thereof and by other persons not connected directly or indirectly with Plaintiff or its organization. The very nature of Plaintiff's business makes good will its most valuable asset, and Plaintiff states that the good will built up for its products by honest and conscientious effort since their product was first marketed in 1933 makes possible its present success.

6. In the latter part of the year 1946, representatives of the Food and Drug Administration of the Federal Security Agency visited the offices of Plaintiff in the City of Los Angeles, California, and were furnished, at their request, copies of all literature then used by Plaintiff in connection with the sale of said product, including the then current edition of the booklet entitled "How to Get Well and Stay Well", and in addition thereto, requested and were furnished with names and addresses of certain of Plaintiff's distributors of said product in States other than the State of California.

7. In January, 1947, an Inspector of said Food and Drug Administration visited the offices of Plaintiff at Long Beach, Cali-

fornia, and requested and received the names and addresses of additional distributors of Nutrilite Food Supplement, and in particular, distributors to whom shipments of said product had just recently been made and who would therefore most probably have said product on hand at said time and for a number of days thereafter. On the occasion of said visit by said representative of the Food and Drug Administration, additional copies of the booklet "How to Get Well and Stay Well" were voluntarily offered by Plaintiff and without solicitation or request therefor from said representative and at said time Plaintiff requested said representative to advise it if the Food and Drug Administration had any objections to said booklet or the contents thereof. Plaintiff was then and there informed by said representative that so far as he knew, there were no objections thereto and that copies, additional to those previously furnished as alleged in Paragraph 6 hereof, were not needed.

1599

8. In June, 1947, said Food and Drug Administration in Los Angeles, California, addressed a notice to Plaintiff, acting under the provisions of Title 21, Section 335, United States Code, and a hearing pursuant thereto was held in the offices of said Food and Drug Administration in Los Angeles, California in July, 1947. At said hearing it was alleged by representatives of said Food and Drug Administration generally that said booklet "How to Get Well and Stay Well" and certain other literature contained objectionable material which, however, were not specified. Notwithstanding the fact that representatives of said Food and Drug Administration made no specification of any purportedly objectionable matter in said booklet and the other literature, the legal representative of Plaintiff at said hearing advised the representatives of said Food and Drug Administration that the objectionable literature would be immediately discontinued, and that said booklet would be revised in its entirety and revised so as to eliminate any possible objection that might be made by the Food and Drug Administration, and Plaintiff alleges that said Plaintiff did immediately discontinue the use of such literature and took immediate steps toward the revision of said booklet and it was in fact, thereafter republished in the revised form in conformance with the views of the Food and Drug Administration as the same were explained to Plaintiff and its attorney. Instructions were subsequently issued to all of Plaintiff's distributors to destroy the old booklets. At said hearing it was also alleged by representatives of said Food and Drug Administration that one of Plaintiff's products known as "B & E" Nutrilite Food Supplement contained a 40% shortage of Vitamin B_1. Thereupon, Plaintiff obtained from the Food and Drug Administration a portion of the specific sample so alleged to be deficient and secured an analysis thereof from a reputable inde-

pendent laboratory which determined that said deficiency was no more than 5% and could be attributable to the length of time elapsing between the shipment of the tested product and the analysis thereof. Plaintiff alleges in this connection that Vitamin
1600 B_1 is a product the potency of which diminishes with the lapse of time. No further charges or hearings with respect to said alleged deficiency of Vitamin B_1 have been made or had to date hereof. At said hearing, representatives of said Food and Drug Administration also stated that the labels used by Plaintiff on said product did not fully comply in certain particulars with the Federal Food, Drug and Cosmetic Act. Thereupon, Plaintiff immediately revised said labels to meet said objections and said labels have at all times since complied and do now comply with said Act.

9. Following the hearing of July, 1947 referred to in Paragraph 8 hereof, Plaintiff learned that agents of said Food and Drug Administration were interrogating many of Plaintiff's sub-distributors and customers. In order to determine the basis for such interrogations, Plaintiff arranged a meeting with representatives of said Food and Drug Administration in the offices of the latter in Los Angeles, California. At said meeting, the Chief of the Los Angeles station of said Food and Drug Administration was informed by Plaintiff that Plaintiff desired to comply in every respect with every phase of the Federal Food, Drug and Cosmetic Act, and requested said Chief to advise Plaintiff if said investigation and interrogations were prompted by a belief in the minds of representatives of said Administration that any phase of Plaintiff's labels or labeling in any manner or at all violated any provision of law. In reply thereto, said Chief advised Plaintiff that said investigation and interrogations were merely "routine" in nature, and no statement was made by said Chief that any phase of Plaintiff's labels or labeling was suspecting of being in violation of the Federal Food, Drug and Cosmetic Act.

Plaintiff alleges that the term "misbranding" is undefined in any provision of the Federal Food, Drug and Cosmetic Act except in general terms as contained in Section 201(n), 403 and 502 of said Act. (21 U.S.C. §§ 321(n), 343, 352). To the best knowledge of Plaintiff and its attorneys there is no published book or standards which specify with certainty whether labeling or literature is false or misleading. By reason thereof, whether or not criminal or civil proceedings are instituted against any person because of the alleged misbranding of their product depends entirely upon the views, interpretation and policy of said Food and Drug
1601 Administration as the same then exist, with the consequent uncertainty in the minds of the industry, notwithstanding their conscientious efforts to avoid misbranding, as to whether a

product distributed by them will cause said Administration to institute civil or criminal proceedings against them. By reason thereof and with said circumstances in mind, Plaintiff stated to said Chief that should any question arise at any time in the future concerning the alleged misbranding of any product distributed by Plaintiff or in connection with any phase of Plaintiff's business or operations, that said Food and Drug Administration notify Plaintiff thereof immediately, and that upon such notification Plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

10. On September 15, 1948, a secret indictment was returned in the United States District Court for the Southern District of California, Central Division, against Lee S. Mytinger, William S. Casselberry (the two principal stockholders of Plaintiff corporation) and Carl F. Rehnborg, for an alleged violation of the Federal Food, Drug and Cosmetic Act, charging two counts each of misbranding and fraud in connection with two interstate shipments of the aforesaid food product Nutrilite Food Supplement made in January, 1947. The basis for said indictment was certain literature which had been withdrawn from circulation by Plaintiff approximately 14 months prior thereto and the edition of the booklet "How to Get Well and Stay Well" which had been withdrawn from circulation by Plaintiff approximately 5 months prior to the return of said indictment, as more fully set forth in Paragraph 8 hereof, and of which withdrawal the Food and Drug Administration had prior notice as aforesaid.

11. Subsequent to the return of said indictment, the Defendants instituted or caused to be instituted and commenced numerous libel actions against certain of Plaintiff's products, and has made or caused to be made without prior notice to Plaintiff seizures thereof at the following localities and on or about the following dates, in connection with said libel actions:

Belleville, New Jersey, September 30, 1948.
New York City, New York, October 14, 1948.
Buffalo, New York, October 28, 1948.
Hastings, Nebraska, November 24, 1948.
1602 Belleville, New Jersey, December 15, 1948.
Spokane, Washington, December 23, 1948.
Seattle, Washington, December 30, 1948.
Clarkfield, Minnesota, December 31, 1948.
St. Petersburg, Florida, January 4, 1949.
Chicago, Illinois, January 3 and 4, 1949.

Plaintiff has been informed by Defendant George P. Larrick, Assistant Food and Drug Commissioner, that he has approved addi-

tional seizures, and based upon such information alleges that further and additional seizures and libels are being contemplated by Defendants. All of the several libels so already instituted in the several States by seizures as aforesaid, and those which are threatened, contain statements which are in substance identical and allege the misbranding of the said Nutrilite Food Supplement and there are no separate issues of fact or of law which necessitate such numerous libels in the several States and the trial and determination of the several issues involved in any one of the said libels can and will determine the validity of the claims of the Plaintiff in and concerning the said Nutrilite Food Supplement and no necessity exists for harassing the Plaintiff with these numerous filed and threatened seizures and libels.

12. The libels filed as listed above have already directly caused Plaintiff's business to diminish from a gross volume of over $500,000 per month to a volume of approximately $400,000 per month and said libels have caused great and irreparable damage to the good will of Plaintiff's business and have greatly and irreparably damaged the morale and efficiency of Plaintiff's national distribution organization. If said threatened libels are filed and Plaintiff's product seized thereunder Plaintiff's good will and business will be almost completely destroyed and irreparably injured before Plaintiff can obtain a hearing and adjudication of the lawfulness of its said advertising and labeling under said Act.

13. Plaintiff further alleges that the Food and Drug Administration, through its officers and employees, has caused embargoes to be placed on Plaintiff's products in New York, New Jersey, Washington State and Florida and various other localities in the United States by request to state and local health authorities; that such embargoes have generally been instituted prior to the institution of libel for condemnation proceedings; and that such embargoes are unwarranted and deliberately calculated to interfere with and ultimately destroy Plaintiff's business and good will.

1603 14. Plaintiff alleges that the several packages, cartons and bottles of Nutrilite Food Supplement so seized at various times and places by and under the direction and authority of the Food and Drug Administration, all as hereinbefore alleged exclusive of the seized booklets, have a retail value of several thousands of dollars and are being retained by Defendants or under their authority in the several jurisdictions wherein said seizures were made, and none of said property is available for sale by Plaintiff and cannot be sold while said libels are pending. If Defendants proceed with other seizures as they have threatened to do, a very large percentage if not all of Plaintiff's product now

in the hands of its various sub-distributors, numbering approximately 5,000 in all, will be held by Defendants or under their authority for an indefinite period of time. Vitamin products such as those seized as aforesaid are subject to deterioration and loss of potency by the passage of time, and by the time the respective libel actions can be determined said products will be unsaleable and of no value to Plaintiff even if said libel actions are determined in its favor.

15. The business and good-will of the Plaintiff are very valuable and this business and good will are threatened with total destruction by the said arbitrary and illegal action of the several defendants. By reason of the libels which have been brought and the seizures made thereunder, and of the threats of further similar libels and seizures, the business and good will of the Plaintiff is being harassed and destroyed and its property is greatly depreciated.

16. The prosecution of such libels in various courts in widely separated parts of the United States is deliberately calculated by Defendants to be oppressive and it will ruin and destroy the business and good will of the Plaintiff. Plaintiff further alleges that the institution of the various libels by the Defendants herein in widely separated parts of the United States is unreasonably oppressive and causes great and unnecessary expense to Plaintiff in employing counsel to defend such libel proceedings and that the threatened institution of further seizures in connection therewith will put Plaintiff to further and additional expense which will all result in the destruction of and irreparable injury to Plaintiff's business and good will. If such libels be prosecuted in widely separated parts of the United States and in different jurisdictions, the business of the Plaintiff will be wholly broken up and its good will and its property completely destroyed prior to any adjudication of the merits of the claims of the Plaintiff or of the claims of Defendants with respect to Plaintiff's alleged misbranding of its said product. Furthermore, there is no provision of law requiring or permitting said Food and Drug Administration to reimburse Plaintiff for the loss of said product in the event of a determination of said libel actions in favor of Plaintiff, and there is no provision for payment to Plaintiff for damages incurred through destruction of its business and good will by the actions of the Defendants.

17. Title 21, Sec. 334(a), of the United States Code, prohibits the institution of more than one libel for condemnation based upon the same alleged misbranding unless the Administrator has probable cause to believe from facts found without a hearing by him or any officer or employee of the Federal Security Agency that the

alleged misbranded article is dangerous to health or that the labeling thereof is fraudulent or would in a material respect be misleading to the injury or damage of the purchaser or consumer, or unless such alleged misbranding has been the basis of a prior judgment in favor of the United States in a criminal, injunction or libel for condemnation proceeding under said Statute. Plaintiff alleges that there has been no judgment in favor of the United States in any proceedings against Plaintiff, and that its product Nutrilite Food Supplement is not dangerous to health and that the labeling and advertising thereof is not and never has been fraudulent or misleading in any respect to the injury of any person.

18. Plaintiff alleges:

A. That the Administrator of the Federal Security Agency was twice requested to grant it a hearing prior to his determination that there was probable cause to believe that Plaintiff's product was misbranded, which determination, under Section 304(a) of the Federal Food, Drug and Cosmetic Act, is a condition precedent to multiple seizures. In said written requests, Plaintiff stated that if officials or employees of the Food and Drug Administration requested said Administrator to make a determination that the advertising and
1605 labeling of Plaintiff's product were misleading in a material respect to the injury of purchasers or consumers thereof, Plaintiff most respectfully prayed that said Administrator grant it a hearing so that Plaintiff could present to him the full and true facts showing that the labeling of Nutrilite Food Supplement is not misleading in any respect. The Administrator was further advised that the consequences of an erroneous decision on the issue of probable cause would be that Plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by Defendants prior to any possible opportunity Plaintiff might have to defend itself against said erroneous decision. The Administrator twice denied this request for a hearing and made an *ex parte* determination that Plaintiff's labeling for its product, Nutrilite, is misleading. The United States District Court for the District of Columbia has held that the language of Section 304(a) of the Act requires no such hearing by said Administrator prior to said probable cause decision.

B. Plaintiff's product Nutrilite Food Supplement is not dangerous, deleterious or harmful to the Public health or welfare and the experience of thousands of users prove that it is in

fact extremely valuable as a health aid. Plaintiff's advertising and labeling is not in a material respect misleading to the injury or damage of purchasers or consumers thereof, and said *ex parte* decision of probable cause of said Administrator is erroneous in so concluding. There is no emergency requiring summary action against Plaintiff's product and Defendants have had and now have an adequate time within which they can grant Plaintiff a hearing, during which said time no person will be injured in any way. No person would be injured in any way if Defendants are enjoined from instituting further libel actions and from proceeding with other libel actions already filed until the first libel action listed above is finally determined.

C. Because of the failure of Section 304(a) of the Act, as interpreted as aforesaid, to provide for a hearing as a
1606 condition precedent to multiple seizures of its product under the facts set forth in this Complaint Plaintiff further alleges that Section 304(a) of said Act is unconstitutional in that said section as interpreted denies to Plaintiff the due process of law guaranteed by the Fifth Amendment to the Federal Constitution.

D. Plaintiff will be injured as set forth in this Complaint in that its business, good will and property will be irreparably damaged in the particulars set forth herein by the multiple seizures instituted or caused to be instituted by Defendants prior to a hearing in any of the multiple libel actions instituted by Defendants against Plaintiff and prior to any possible adjudication of the question of Plaintiff's compliance with labeling requirements of the Food, Drug and Cosmetic Act of 1938 in said libel actions. The extent of said irreparable injury would be increased many times if Defendants institute the libel actions threatened by Defendants and Plaintiff's business, good will and property will be completely destroyed prior to any possible adjudication in any of the libel actions on the merits of Plaintiff's labeling of its product Nutrilite Food Supplement.

19. Plaintiff further alleges that the Food and Drug Administration, arbitrarily and for no legal, practical or other reason, refuses to stipulate with Plaintiff so as to permit the removal of the existing libels to the United States District Court, Southern District of California as provided for in the Federal Food, Drug and Cosmetic Act, so as to permit Plaintiff to try the issues involved in such libel proceedings at a location where witnesses are available to Plaintiff and where Plaintiff can make a complete defense

to such actions. Plaintiff further alleges that representatives of the United States Department of Justice have expressed their willingness to stipulate to the removal of the existing and pending libel actions to the Southern District of California, which is a District of reasonable proximity to the principal place of business of Plaintiff, to wit: the Southern District of California, but that said United States Department of Justice has refused and will continue to refuse to so stipulate unless and until approval to such stipulation is obtained from the remaining Defendants, and that said remaining Defendants do now refuse and at all times
1607 herein mentioned have refused to authorize such a stipulation by the Defendant Tom C. Clark, Attorney General of the United States, and that said refusal deprives Plaintiff of the opportunity of producing witnesses available to testify to competent, relevant and material facts in said libel proceedings and thereby deprives Plaintiff of its opportunity adequately to defend said libel proceedings and each of them. Plaintiff further alleges that notwithstanding the fact that said libels for condemnation and each of them are as provided by law under the control of the Defendant Tom C. Clark, Attorney General of the United States, and that said representatives of said Attorney General have as aforesaid expressed their willingness to stipulate for the removal of said libel proceedings to the United States District Court, Southern District of California, which is a District of reasonable proximity to Plaintiff's principal place of business, nevertheless, representatives of said Food and Drug Administration unreasonably, arbitrarily and capriciously refuse to consent to such stipulation for such transfer notwithstanding the fact that said representatives of said Food and Drug Administration have admitted to Plaintiff that by reason of the great distances existing between the Districts of the United States District Courts in California and adjoining States, great hardship, inequities and great expense would be thereby thrust upon Plaintiff.

20. Plaintiff further alleges that in addition to the duties and responsibilities of the Defendants with respect to the administration and enforcement of the Federal Food, Drug and Cosmetic Act, Defendants have deliberately and arbitrarily pursued and instituted a course of enforcement against Plaintiff herein which is designed solely toward the harrassment of Plaintiff and the complete and total destruction of their business and good will.

21. Plaintiff further alleges that the Defendants have pursued, are pursuing or have caused to be pursued a course of enforcement of the Federal Food, Drug and Cosmetic Act, over and beyond their prescribed statutory duties, which are designed to harass and to ruin Plaintiff's business and good will prior to any adjudication of the merits of Plaintiff's labels and labeling.

22. Plaintiff alleges that under the provisions of Section
1608 1009(e), Title 5, U. S. C., the Administrative Procedure Act of 1946, it is entitled to have the determination of the Administrator of the Federal Security Agency that the Plaintiff is employing misleading labeling in connection with the sale of its product, judicially reviewed; declared void and set aside because it is arbitrary, capricious, unreasonable and unlawful, because it is not founded upon any proper facts, and because such determination under the facts herein alleged deprives Plaintiff of his property without due process of law in violation of the Fifth Amendment to the United States Constitution.

23. Plaintiff neither desires to delay nor impede any proper administrative or judicial determination of the disputed questions of fact presented in the controversy with the Food and Drug Administration over the labels and labeling of Plaintiff's said products, but is hereby merely seeking to protect its property from multiple seizures and its business and good will from complete destruction until judicial determination of said questions can be had.

24. Plaintiff alleges that it has no plain, adequate or complete remedy at law to prevent the injury and threatened injury complained of herein.

25. All libels instituted by Defendants after the first libel which was filed in New Jersey as aforesaid and all seizures thereunder are unlawful and void because the Administrator of the Federal Security Agency has not lawfully performed the necessary conditions precedent of making a decision of "probable cause" as the basis for the multiple seizures described above and threatened by Defendants, said decision of the Administrator being required by Section 304(a) of the Food, Drug and Cosmetic Act.

26. The Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions described herein and threatened in the future as the United States District Attorneys who have filed and who will file said actions have acted and will act under his direction. Said actions other than the first libel action described above are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304(a) of the Food, Drug and Cosmetic Act and the Fifth Amendment to the Constitution of the United States, and in excess of the lawful authority of said Defendants.

1609 WHEREFORE, Plaintiff prays the Court:

1. That it take jurisdiction of this case, and cause appropriate process to issue against the Defendants and each of them, and require the Defendants to answer this Complaint, as provided by the rules of this Court and the law.

2. That pending hearing herein, this Court forthwith cause to be issued a temporary restraining order in accordance with the rules of this Court and Title 28 United States Code, Section 2284(3), restraining the Defendants and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein.

3. That Defendants and each of them, and their successors in office and all persons acting or claiming to act under their authority, or by their direction, be restrained and enjoined temporarily, pending the final judgment herein, from continuing or causing to be continued the prosecution of any of the pending libel actions referred to in this Complaint, other than the first libel action referred to herein, and from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until the final judgment herein.

4. That it find and decree all libel actions herein described, other than the first said libel action, illegal and void.

5. That it order Defendants to vacate, withdraw and dismiss all libel actions, herein described, other than the first said libel action.

6. That Defendants be enjoined from proceeding in any of the libel actions described herein, other than the first libel action, until there is a final judgment in said first libel action.

7. That Defendants be enjoined from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until there is a final judgment in said first libel action.

8. That the decision of probable cause made as described herein be held and declared to be illegal and void.

9. That upon the final hearing of this cause, this Court find and declare that the multiple seizure provisions of Section 304(a)
1610 of the Federal Food, Drug and Cosmetic Act of 1938, as applied to the Plaintiff under the facts set forth in this Complaint, are unconstitutional in that they deprive the Plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

10. That Plaintiff be granted such other, further and general and special relief as the nature of the case may require and the Court may deem proper and just in the premises.

Respectfully submitted,

WILLIAM S. CASSELBERRY,
William S. Casselberry, President,
Mytinger and Casselberry, Inc.
CHARLES S. RHYNE,
EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
730 Jackson Place, N. W.
Washington, D. C.

LESTER L. LEV,
649 South Olive Street,
Los Angeles, California.

Duly sworn to by William S. Casselberry. Jurat omitted in printing.

I certify that a copy of this amended complaint was served upon the attorney for defendants, Vincent Kleinfeld, this the 4th day of March 1949.

CHARLES S. RHYNE.

1611 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION FOR TEMPORARY INJUNCTION

Filed March 4, 1949

Now comes the Plaintiff in the above entitled cause and moves that the Court grant a temporary injunction herein, pendente lite, as prayed for in the Complaint, and in support of this Motion states:

1. The facts set forth in the Complaint and the affidavits attached thereto show that unless restrained Defendants have done and threaten to do acts which will immediately and irreparably injure Plaintiff by completely destroying Plaintiff's busi-

ness prior to a determination of the merits of the controversy between Defendants and Plaintiff over the labels and labeling of Plaintiff's product.

2. It would be unjust, and inequitable, to allow Defendants to carry out their acts and threatened acts, under the facts set forth in said Complaint and affidavits with the result as aforesaid.

3. Plaintiff has no adequate remedy at law to prevent said immediate and irreparable injury nor can Plaintiff recover damages to compensate for said injury if the merits of the said controversy are finally determined in Plaintiff's favor.

4. The product of Plaintiff, the labels and labeling of which is in controversy, has been proved to be beneficial to human beings and no claim has been made by Defendants in any of their proceedings against Plaintiff that the contents of said product are harmful in any way.

5. All of the questions of facts and law in the controversy between Plaintiff and Defendants over said labels and labeling can be determined in one libel action and all other such actions are therefore purely oppressive and unreasonably insti-
1612 tuted under the facts as set forth in the Complaint and the affidavits attached thereto.

6. The statute under which Defendants purport to act as already construed herein to deny Plaintiff a hearing prior to destruction by Defendants of its business, good will and property, is unconstitutional as applied to Plaintiff under the facts of this case.

Respectfully submitted,

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
730 Jackson Place, N. W.,
Washington 6, D. C.

LESTER L. LEV,
649 South Olive Street,
Los Angeles, California.

I certify that a copy of this motion was served upon Vincent Kleinfeld, attorney for defendants, this the 4th day of March, 1949.

CHARLES S. RHYNE.

1613 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

TEMPORARY RESTRAINING ORDER

Filed March 7, 1949

This cause came on to be heard upon Plaintiff's complaint for a temporary restraining order.

It appearing to the Court that the Defendants have instituted or caused to be instituted libel actions in Spokane, Washington; Belleville, New Jersey; New York City, New York; St. Petersburg, Florida; Hastings, Nebraska; Seattle, Washington; Buffalo, New York; Clarkfield, Minnesota; Chicago, Illinois; and again in Belleville, New Jersey; against Plaintiff's product known as "Nutrilite Food Supplement" for alleged misbranding of said product; and,

It further appearing to the Court that the Defendants have threatened and will, if not restrained, presently institute or cause to be instituted and will continue to institute many further and additional libel for condemnation actions based upon the same alleged misbranding; and

It further appearing to the Court, from Plaintiff's verified complaint and the affidavit of William S. Casselberry, filed herein, that, as a result of the acts of Defendant complained of and sought to be enjoined, Plaintiff's name, business, good will and reputation have been injured and damaged whereby Plaintiff has suffered sales losses to the extent of $100,000 per month which, unless said acts are restrained, Plaintiff will continue to suffer said loss and said loss will increase should further libel actions be instituted; that the loss of the value of the products which have already been seized in the aforesaid ten (10) libel for condemnation proceedings, together with the loss of the value of the products threatened to be seized

1614 by the Defendants in the future constitute and will constitute irreparable injury, loss and damage to Plaintiff in that said vitamin products will deteriorate and become worthless in a short period of time, and in that such widespread libels and seizures will crush the morale and almost completely destroy the efficiency of Plaintiff's distribution organization, and no legal remedy exists whereby such loss could now, or in the future, be recouped by Plaintiff; that the various attorneys' fees and court costs to which Plaintiffs have already been subjected and those to which future libel for condemnation actions will subject Plaintiff, in the defense thereof, has necessarily imposed and will, in the future, impose irreparable injury, loss and damage to Plain-

tiff in that no legal remedy exists whereby such costs can be or could, in the future, be recouped;

It is, therefore, ordered by the Court that the Defendants, their agents, servants, employees, attorneys or others in active concert and participation with them be and they hereby are restrained from instituting or causing to be instituted and from prosecuting any further and additional libel for condemnation actions against Plaintiff's product known as Nutrilite Food Supplement based upon alleged misbranding of said product, provided that the Plaintiff first give security in the amount of Two Hundred Fifty Dollars ($250.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained, such bond to be approved by the Court or by the Clerk of Court.

It is further ordered that this order shall remain in force until revoked by the Court, or until a hearing and determination of Plaintiff's application for an interlocutory injunction can be made by the Court authorized by Title 28, United States Code, Sections 2282 and 2284 of the Judicial Code of the United States to be appointed to hear and determine such matters.

Issued at 4:40 p. m., March 4th, 1949.

EDWARD A. TAMM,
Judge, United States District Court for the District of Columbia.

1615 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

DESIGNATION OF JUDGES TO SERVE ON THREE-JUDGE DISTRICT COURT

Filed March 16, 1949

The Honorable Edward A. Tamm, United States District Judge for the District of Columbia, having notified me that in the above entitled cause an application has been presented to him for an injunction and for convening a three-judge statutory court, now, therefore, pursuant to the provisions of Sec. 2284 of Title 28 of the Code of Laws of the United States, I hereby designate the Honorable Bennett C. Clark, United States Circuit Judge for the District of Columbia Circuit, and the Honorable T. Alan Goldsborough, United States District Judge for the District of Columbia, to serve with the Honorable Edward A. Tamm, United States Dis-

trict Judge, as members of the Court to hear and determine this action.

HAROLD M. STEPHENS,
Chief Judge,
United States Court of Appeals for
the District of Columbia Circuit.

Dated March 15, 1949

1616 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION TO DISMISS

Filed March 17, 1949

Come now the defendants, by their attorneys, and move this Honorable Court to dismiss this action pursuant to the provisions of Rule 12(b), as amended, of the Federal Rules of Civil Procedure, for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

A statement of points and authorities in support of this motion is filed herewith.

This , day of March, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
VINCENT A. KLEINFELD,
Attorney, Department of Justice,
Attorneys for the Defendant.

1617 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

ORDER Filed April 6, 1949

Upon the foregoing complaint and the various prayers for relief, it is by the United States District Court for the District of Columbia, this 6th day of April, 1949,

ADJUDGED, ORDERED and DECREED, that the plaintiff be granted a temporary restraining order in accordance with the rules of this

Court (28 USC 2284(5)), restraining the defendants and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until a hearing can be had on the temporary injunction prayed for herein, and it is further

ADJUDGED, ORDERED and DECREED, that defendants and each of them and their successors in office and all persons acting or claiming to act under their authority, or by their direction, be restrained and enjoined temporarily pending the final judgment herein, from continuing or causing to be continued the prosecution of any of the pending libel actions referred to in the complaint, other than the first libel action referred to therein, and from instituting or causing to be instituted further libel actions against or seizures of Nutrilite Food Supplement until the final judgment herein, provided, that before the issuance of this restraining order, plaintiff file bond of Two Hundred Fifty Dollars ($250) in the usual terms, for protection of the defendant.

BENNETT CHAMP CLARK,
Judge.

T. ALAN GOLDSBOROUGH,
Judge.

EDWARD A. TAMM,

1618 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Filed April 7, 1949

After hearing oral argument in open Court in the above-entitled cause, it is this 6th day of April, 1949.

ORDERED, that the defendant's motion to dismiss be and the same hereby is denied.

BENNETT C. CLARK,
Judge.

T. ALAN GOLDSBOROUGH,
Judge.

EDWARD A. TAMM,
Judge.

1619 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

CIVIL SUBPOENA

To: Paul B. Dunbar, Food and Drug Administration, Federal Security Building, 3rd and Independence Avenue, S. W., Washington, D. C.

You are hereby commanded to appear in (the office of Charles S. Rhyne, Attorney for Plaintiff, 730 Jackson Place, N. W. (2nd Floor), Washington, D. C.) to give testimony in the above-entitled cause on the 19th day of April, 1949, at 10:15 o'clock A. M. and bring with you all correspondence, records, reports and other writings in your possession, custody or control as Commissioner of Food and Drugs, Food and Drug Administration, or in the possession, custody or control of any officials, agents, or employees thereof under your jurisdiction relating to: the product known as Nutrilite Food Supplement, or Nutrilite Products, Inc., or Mytinger and Casselberry, Inc., or Carl F. Rehnborg, or Lee S. Mytinger, or William S. Casselberry, and do not depart without leave.

HARRY M. HULL,
Clerk.
By OSCAR ALTSHULER,
Deputy Clerk.

[SEAL.]

Date, April 14, 1949.
CHARLES S. RHYNE,
Attorney for Plaintiff.

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h.... and tendering to h.... the fees for one day's attendance and mileage allowed by law, on the ..... day of ..... 19.... at .....

Dated 4 15 49. By copy:

W. BRUCE MATTHEWS,
U. S. Marshal.
By E. J. McCLOY,
50¢ J. H. G.,
Deputy.

1620 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

CIVIL SUBPOENA

To: George P. Larrick, Food and Drug Administration, Federal Security Building, 3rd and Independence Avenue, S. W., Washington, D. C.

You are hereby commanded to appear in the office of Charles S. Rhyne, Attorney for Plaintiff, 730 Jackson Place, N. W. (2nd Floor), Washington, D. C.) to give testimony in the above-entitled cause on the 19th day of April, 1949, at 2:00 o'clock P. M. and bring with you all correspondence, records, reports and other writings in your possession, custody or control as Associate Commissioner of Food and Drugs; Food and Drug Administration, or in the possession, custody or control of any officials, agents, or employees thereof under your jurisdiction relating to: the product known as Nutrilite Food Supplement, or Nutrilite Products, Inc., or Mytinger and Casselberry, Inc., or Carl F. Rehnborg, or Lee S. Mytinger, or William S. Casselberry which have not been shown or furnished to Plaintiff by Paul B. Dunbar, and do not depart without leave.

HARRY M. HULL,
Clerk.

By OSCAR ALTSHULER,
Deputy Clerk.

[SEAL.]

Date, April 14, 1949.

CHARLES S. RHYNE,
Attorney for Plaintiff.

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h.... and tendering to h.... the fees for one day's attendance and mileage allowed by law, on the .... day of ....., 19...., at .....

Dated 4/15/49. By copy.

W. BRUCE MATTHEWS,
U. S. Marshal.

By E. J. McCLOY,
Deputy.

50¢ J. H. G.

1621 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

CIVIL SUBPOENA

To: J. Donald Kingsley, Federal Security Agency, Federal Security Building, 3rd and Independence Avenue S. W., Washington, D. C.

You are hereby commanded to appear in the office of Charles S. Rhyne, Attorney for Plaintiff, 730 Jackson Place N. W., 2nd Floor, Washington, D. C., to give testimony in the above-entitled cause on the 20th day of April, 1949 at 2:00 o'clock P. M. and bring with you all correspondence, records, reports and other writings in your possession, custody or control as Acting Administrator in Charge of the Federal Security Agency or in the possession, custody or control of any officials, agents, or employees thereof under your jurisdiction relating to: the product known as Nutrilite Food Supplement, or Nutrilite Products, Inc., or Mytinger and Casselberry, Inc., or Carl F. Behnborg, or Lee S. Mytinger, or William S. Casselberry which have not been shown or furnished to Plaintiff by Paul B. Dunbar, George P. Larrick or Oscar R. Ewing, and do not depart without leave.

HARRY M. HULL,
Clerk

[SEAL.] By OSCAR ALTSHULER,
Deputy Clerk.

Date, April 14, 1949.

CHARLES S. RHYNE,
Attorney for Plaintiff

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h and tendering to h the fees for one day's attendance and mileage allowed by law, on the day of 19 at

Dated 4 15 49. By copy

W. BRUCE MATTHEWS,
U. S. Marshal

By E. J. McCOY,
Deputy

1622 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

[Title omitted]

MOTION TO QUASH SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE

Filed January 13, 1950

Now comes J. Donald Kingsley, Acting Federal Security Administrator, upon whom a subpoena for production of documentary evidence was served in the above-entitled cause on behalf of the plaintiff, on April 15, 1949, and moves the court to quash said subpoena for the following reasons:

1. Because said subpoena is too vague and uncertain in not specifying what correspondence, records, reports or other writings are wanted, or upon what subject matter.

2. Because said subpoena is too broad, and therefore unreasonable and oppressive, in that it purports to require the production of all records of the Federal Security Agency relating to the product known as Nutrilite Food Supplement, or Nutrilite Products, Inc., or Mytinger & Casselberry, Inc., or Lee S. Mytinger, or William S. Casselberry, or Carl E. Reimberg, and would therefore require the production of writings that could have no possible bearing or relation to the matter before this Court.

3. Because the subpoena purports to require the production of records for inspection, and good cause therefor, as required by Rule 34, has not been shown.

1623 4. Because the said subpoena would require the collection of records from many places and put an unreasonable clerical and administrative task upon the Federal Security Agency in making the said records available to the plaintiff.

5. Because the subpoena requires the production of records which are protected from disclosure for reasons of public policy by 21 C. F. R. Cum. Supp. Sec. 196.1.

6. Because the subpoena requires the Acting Federal Security Administrator to give oral testimony and constitutes unauthorized

probing of the Administrator's mental processes in making the determination of probable cause.

A memorandum of points and authorities is attached.

Dated April 19, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
VINCENT A. KLEINFELD,
Attorney, Department of Justice.

1624 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

[Title omitted]

ORDER DENYING MOTION TO QUASH SUBPOENA, ETC.

Filed April 29, 1949

Defendants' Motion to Quash the subpoena directed to J. Donald Kingsley, Acting Federal Security Administrator, for the production of documentary evidence, and for oral testimony, in the above-entitled cause, having come on to be heard, and the Court having heard oral argument by counsel for both the Plaintiff and the Defendants, it is this 29 day of April, 1949,

Ordered, adjudged, and decreed that Defendants' motion to quash be, and it is hereby, denied, and that the defendants produce all correspondence, records, reports or other writings in the possession, custody or control of the Federal Security Agency or of any officials, agents, or employees thereof relating to the product known as Nutrilite Food Supplement or Nutrilite Products, Inc., or Mytinger & Casselberry, Inc., or Carl F. Rehnborg or Lee S. Mytinger or William S. Casselberry, insofar as they relate to the decisions of probable cause made in this case, but excluding the records that relate to the criminal action against Lee S. Mytinger and William S. Casselberry now pending in the United States District Court for the Southern District of California, and it is further

Ordered, adjudged, and decreed that the Defendants shall have a like right to inspect all documents in the possession, custody or control of Nutrilite Products, Inc., Mytinger & Casselberry, Inc., Carl F. Rehnborg, Lee S. Mytinger, William S. Casselberry, or of any officials, agents, or employees thereof, relating to the product known as Nutrilite Food Supplement or Nutrilite Products, Inc.,

This order shall be without prejudice to the right of either
1625 party to make any motion limiting the production of any correspondence, records, reports and other writings upon a proper showing that such production is unreasonably burdensome or oppressive.

BENNETT C. CLARK,
Judge.

Approved as to form:
VINCENT A. KLEINFELD,
Attorney for Defendants.

1626 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

ANSWER TO AMENDED COMPLAINT FOR TEMPORARY AND PERMANENT INJUNCTION

Filed April 21, 1949

First Defense

Defendants without waiving the motion to dismiss previously made and ruled on herein, move to dismiss this suit on the further ground that this court has no jurisdiction over the subject matter defined by this court in the pre-trial conference before Judge Tamm on April 13, 1949, for the reasons that:

1. This court intends to try the fact issue of whether the labeling in question is materially misleading (Transcript of Pre-Trial Conference, Pp. 4, 28, 37), which determination of fact is by statute (21 U. S. C. 334(a)) vested exclusively in the Federal Security Administrator.

2. This court has jurisdiction solely to try the issue of the constitutionality of Section 304(a) of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 334(a)], for the reason that every other issue in this action was considered and disposed of by Judge Pine in an order dismissing the complaint on March 3, 1949 and granting leave to Plaintiff to amend only to raise the issue of constitutionality.

Second Defense

For a second, separate and distinct defense, Defendants move to dismiss on the ground that the court is without jurisdiction to
1627 entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

Third Defense

Each numbered paragraph of this defense corresponds with and is addressed to the averments contained in the like numbered paragraphs of the amended complaint.

1. Defendants admit the allegations of paragraph 1 of the complaint.

2. Defendants deny the allegations of paragraph 2 of the complaint, except that they admit that this suit arises as a consequence of multiple seizure actions taken under Section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334(a)).

3. Defendants admit that Plaintiff has been the exclusive distributor of "Nutrilite" since September, 1945. Defendants admit the composition of Nutrilite, that it is sold in connection with the booklet "How to Get Well and Stay Well", and that statements and representations concerning Nutrilite are made in labels upon the bottle, upon the carton, and in said booklet.

Defendants admit that the booklet contains what purports to be a general discussion of nutrition, the need for vitamins and minerals in nutrition and the deficiency conditions which can result from the lack of such factors in the diet, but Defendants allege that said discussion is incomplete, inaccurate and misleading and that it conveys the erroneous impression that most of the diseases, symptoms, and conditions mentioned therein are caused by dietary deficiencies and that such diseases, symptoms and conditions may be prevented or cured by the use of "Nutrilite Food Supplement" when such is not the case.

Defendants have no information sufficient to form a belief as to whether the statements contained in the booklet were prepared under scientific and legal direction. Defendants deny each and
1628 every other allegation contained in paragraph 3.

4. Defendants admit that the substances or materials or combinations thereof contained in "Nutrilite" are not, in and of themselves, harmful and deleterious to human users. Defendants allege that the use of "Nutrilite" for the diseases, symptoms, and conditions suggested and implied in the labeling may be harmful in that proper medical treatment for these conditions, symptoms, and diseases may be postponed to the detriment of the health of the consumer.

Defendants deny that any scientific tests or experience of users demonstrate that the product "Nutrilite" is helpful to the health of human beings in the treatment of many of the diseases, symptoms and conditions as suggested or implied in the booklet "How to Get Well and Stay Well", and deny the remaining allegations of the paragraph.

5. Defendants admit that Plaintiff distributes "Nutrilite Food Supplement" in interstate commerce, but deny that the business is built upon sound and honest business practices. Defendants deny that the plaintiff has marketed this product since 1933. Defendants deny each of the other allegations contained in paragraph 5.

6. Defendants admit the allegations of paragraph 6 of the complaint except that defendants allege that such visit was made by one inspector on December 5, 1946.

7. Defendants deny each and every allegation contained in paragraph 7.

8. Answering paragraph 8, defendants admit the allegations contained in the first two sentences thereof except that defendants deny that the objections of the Food and Drug Administration to the booklet "How to Get Well and Stay Well" and certain other literature were not specified.

Defendants deny that the plaintiff did immediately discontinue
the use of the booklet after said hearing, but admit that
1629 counsel for the defendants stated that the labeling would be drastically revised to eliminate claims of therapeutic or curative effect and to offer the article for sale as a food.

Defendants further deny that the revised booklet was in a form which conformed to the views of the Food and Drug Administration, and allege that Plaintiff did not submit to the Food and Drug Administration for comment copies of the so-called revised booklet "How to Get Well and Stay Well" prior to its publication and dissemination.

Defendants have no information sufficient to form a belief with respect to Plaintiff's alleged independent analysis of the product "B & E" Nutrilite Food Supplement, but allege that the Food and Drug Administration's analyses showed deficiencies in vitamin content.

Defendants have no information sufficient to form a belief as to whether the labels of the product "B & E Nutrilte Food Supplement" do presently comply with the Federal Food, Drug, and Cosmetic Act.

9. Defendants admit the allegations contained in the first paragraph of paragraph 9, except that defendants deny that the Chief of the Los Angeles station of the Food and Drug Administration stated or implied in any manner that said investigation and interrogations were merely "routine" in nature or that the Plaintiff's labeling was not suspected of being in violation of the Federal Food, Drug, and Cosmetic Act.

Answering the second paragraph of paragraph 9, Defendants deny the allegations contained therein, except that Defendants admit that there is no published book of standards which specify whether labeling is false or misleading as this is an issue of fact to be determined in each case in the Federal Courts. Defendants further

admit that Plaintiff stated to the Chief of the Los Angeles
1630 District of the Food and Drug Administration that Plaintiff should be notified should any question of misbranding arise in the future, and that it would do its utmost to comply with the views of the Administration.

10. Defendants admit the allegations contained in paragraph 10 of the complaint, except that Defendants allege that the partnership of Mytinger & Casselberry, Lee S. Mytinger, William S. Casselberry and Carl F. Rehnborg were the persons indicted, and defendants deny that both interstate shipments were made in January, 1947. Defendants have no information sufficient to form a belief as to whether Plaintiff did in fact withdraw certain literature which was the basis for said indictment from circulation fourteen months prior to the date the indictment was returned; or as to whether the edition of the booklet "How to Get Well and Stay Well", one of the bases of the indictment, was withdrawn from circulation five months prior to said date, but allege that they had probable cause to believe that the present revision of the labeling that is in use is equally offensive to the law as that involved in the criminal action.

11. Answering paragraph 11, Defendants admit the allegations contained in the first paragraph, except that they allege that the libel action at Belleville, New Jersey was brought on October 6, 1948, the action at New York City on October 19, 1948, the case at Hastings, Nebraska, December 1, 1948.

Defendants deny that there was no necessity for the institution of the various libels in the several states, further deny that the libel proceedings harass the plaintiff, and deny that actions other than the ten listed have been threatened.

12. Defendants have no information sufficient to form a belief as to the truth of the allegations of paragraph 12, except that Defendants aver that Plaintiff, under 21 U. S. C. 334 can consolidate the various libel actions for trial and Defendants deny that
1631 Plaintiff's business will be almost completely destroyed or irreparably damaged before a hearing and adjudication can be had on the merits in said consolidated action.

13. Defendants admit that a number of state embargoes were placed on the plaintiff's products at the request of agents of the Food and Drug Administration, but deny that such embargoes are unwarranted and deliberately calculated to interfer with and ultimately destroy plaintiff's business and good will.

14. Defendants deny the allegations of paragraph 14 of the complaint, except that defendants have no information sufficient to form a belief as to the truth of the allegation regarding the retail value of the seized products or regarding the number of Plaintiff's sub-distributors, or whether the products under seizure are subject to deterioration and loss of potency by the passage of time or whether

they will be unsaleable and of no value to Plaintiff even if such libel actions are determined in its favor.

Defendants admit that the products under seizure are not available for sale while said libels are pending.

15. Defendants deny that the Plaintiff is being harassed, its business and good will destroyed and its property depreciated by reason of the several libels instituted and seizures made thereunder. Defendants aver that the institution of the several libel actions and the seizures effected thereunder were made in conformity with Section 304(a) of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 334(a)].

16. Defendants deny the allegations of paragraph 16 of the complaint.

Defendants admit that there is no provision of law permitting reimbursement of Plaintiff for any loss or damage incurred as a result of the institution of said libel actions. Defendants aver that, under 21 U. S. C. 334, Plaintiff may consolidate all of the libel
1632 actions in one district and have an adjudication on the merits of all such actions at one trial.

17. Defendants admit the allegations of paragraph 17, except that Defendants allege that the Federal Security Administrator, in accordance with 21 U. S. C. 334(a), has determined that there is probable cause to believe that the labeling of the product "Nutrilite Food Supplement" is misleading in a material respect to the injury or damage of the purchaser or consumer.

18. Answering paragraph 18, Defendants admit the allegations of subparagraph A.

Defendants deny the allegations of subparagraph B.

Defendants deny the allegations of subparagraph C.

Defendants deny the allegations of subparagraph D.

19. Answering paragraph 19, Defendants deny the allegations contained therein except that Defendants aver that Section 304 of the Act [21 U. S. C. 334(a)] does not contemplate consolidation for trial in the home district of the claimant.

20. Defendants deny each and every allegation of paragraph 20.

21. Defendants deny each and every allegation of paragraph 21.

22. Defendants deny each and every allegation of paragraph 22.

23. Defendants deny each and every allegation of paragraph 23.

24. Defendants deny each and every allegation of paragraph 24.

25. Defendants deny each and every allegation of paragraph 25.

26. Defendants deny each and every allegation of paragraph 26.

Defendants hereby deny each and every allegation contained in paragraphs 1-26 of the complaint not hereinbefore specifically admitted.

Fourth Defense

Defendants aver that every action they have taken has been
1633 in strict conformance with the terms of the Federal Food, Drug, and Cosmetic Act.

WHEREFORE, Defendants pray judgment that the complaint be dismissed.

Dated: April 20, 1949.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
VINCENT A. KLEINFELD,
Attorney, Department of Justice.

Service acknowledged April 21, 1949.
CHARLES S. RHYNE,
By DORIS F. BROWN.

1634 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION FOR PRE-TRIAL ORDER

Filed May 25, 1949

The defendants herein, by their attorneys, respectfully move this Honorable Court to enter a pre-trial order herein, pursuant to Rule 16 of the Federal Rules of Civil Procedure, to specify the issues that are to be tried before this Court.

A statement of points and authorities is attached.

Respectfully submitted,

ALEXANDER M. CAMPBELL,
Assistant Attorney General.
VINCENT A. KLEINFELD,
Attorney, Department of Justice.

A copy of this motion with points and authorities served on counsel for plf. this 25 day of May, 1949.

VINCENT A. KLEINFELD.

1635 U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

[Title omitted]

[File endorsement omitted]

PRETRIAL PROCEEDINGS

Filed June 14, 1949

Statement of Nature of Case:

Plaintiff is a California corporation which has, since 1945, been the national distributor for "Nutrilite Food Supplement", a vitamin, and mineral food product. The defendants are officers or agents of the United States Government charged with the administration of the Food, Drug and Cosmetic Act of 1938. The defendants have instituted, without prior notice to the plaintiff, various libel actions against the plaintiff's product in ten (10) proceedings, seizing thereunder the plaintiff's product in various jurisdictions. All of the libels are, in substance, identical and contain no separate issues of fact or law. The action of the defendants, taken without affording a hearing to the plaintiff, is predicated upon the defendants' contention that the booklet, "How To Get Well And Stay Well", which is circulated by the plaintiff in connection with its business of nationally marketing "Nutrilite Food Supplement", is materially misleading within the definition of the terms of the Food, Drug and Cosmetic Act. The plaintiff, by appropriate proceedings, has caused the convening of a three-judge Court under the provisions of Section 2284 of Title 28 of the United States Code for the purpose of challenging the defendants' action and the three-judge Court has issued a preliminary injunction maintaining the status quo of the parties until adjudication of the case by the three-judge Court.

Issues to Be Tried

1. The constitutionality, under the due process clause of the 5th Amendment to the Constitution as applied to the facts in this case, of that provision of Section 304(a) of the Food, Drug and Cosmetic Act under which the defendants have taken the libel and seizure actions without affording to the plaintiff a hearing for the purpose of establishing that the plaintiff's labelling was not, in a material sense, misleading to the injury or damage of the purchaser or consumer.

2. Whether the defendants, in violation of the 5th amendment to the Constitution, acted arbitrarily, unlawfully, oppressively and capriciously in determining, under Section 304(a) of the Food,

Drug and Cosmetic Act, that the labelling of the plaintiff's product was, in a material respect, misleading to the injury or damage of the purchaser or consumer, without affording the plaintiff a hearing.

Dated: June 14th, 1949.

BENNETT C. CLARK,
T. ALAN GOLDSBOROUGH,
EDWARD A. TAMM,
Members of Three-Judge Court.

1636 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION FOR MODIFICATION OF PRE-TRIAL ORDER

Filed Sept. 20, 1949

The Plaintiff herein, by its attorneys, moves this Honorable Court to modify the pre-trial order entered on June 14, 1949, pursuant to Rule 16 of the Federal Rules of Civil Procedure, by adding thereto, under the issues to be tried, the following:

> "3. Whether the Defendants have, by oppressive, arbitrary, unlawful and capricious action, inflicted irreparable injury upon Plaintiff and threatened further such injury by so planning their actions against Plaintiff as to irreparably injure Plaintiff and threaten further irreparable injury prior to any possible adjudication in any of the libel actions of the merits of the claims made by the Defendants against the pamphlet 'How to Get Well and Stay Well.'"

A statement of points and authorities is attached.

Respectfully submitted,

CHARLES S. RHYNE,
DAVID E. BAMFORD,
Attorneys for Plaintiff.

CHARLES S. RHYNE,
DAVID E. BAMFORD,
730 Jackson Place, N. W.
Washington 6, D. C.
Attorneys for Plaintiff.

1637 Original

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed Dec. 14, 1949

This cause came on to be heard before this specially constituted Court of three judges convened pursuant to the provisions of Section 2284, Title 28, U. S. C. Evidence and briefs having been submitted, oral argument of counsel had and the Court being now duly advised in the premises makes the following Findings of Fact and enters the following Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a California corporation, having its principal place of business in the City of Long Beach, California. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott and George P. Larrick are the Commissioner, Associate Commissioner and Assistant Commissioners, respectively, of the Food and Drug Administration of the Federal Security Agency; and Defendant J. Howard McGrath is the Attorney General of the United States and was substituted as a defendant in place of Tom C. Clark on October 17, 1949. Defendants are all charged by law with the administration and enforcement of the Federal Food, Drug and Cosmetic Act of 1938.

2. This suit arises from administrative action taken by the defendants under that part of Section 304(a) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, 334(a)) which provides that more than one libel for condemnation proceeding may be brought upon the same alleged misbranding "when the Administrator has probable cause to believe from facts found, without

hearing, by him or any officer or employe of the Agency

1638 that . . . the labeling of the misbranded article . . .

would be in a material respect misleading to the injury or damage of the purchaser or consumer"; and under Sections 2282 and 2284 of Title 28 of the United States Code, Judiciary and Judicial Procedure, which provides the procedure by which this court was convened to hear an application to restrain the enforcement, operation, or execution of the Federal Food, Drug and Cosmetic Act

(21 U.S.C. 301 et seq.) for repugnance to the United States Constitution. (Complaint, Par. 2; Answer, Third Defense, Par. 2)

3. The plaintiff is the exclusive national distributor of a food supplement consisting of multiple vitamins and minerals sold under the trade name of "Nutrilite Food Supplement" (hereinafter called Nutrilite) through more than 5,000 distributors throughout the United States.

4. Nutrilite contains certain vitamins and minerals in a balanced proportion and in amounts claimed by some experts in the field as essential in human nutrition, plus extracts from alfalfa, parsley and watercress.

5. Nutrilite contains no substance or material or combination of substances or materials harmful or deleterious in any manner to human users thereof when taken in suggested dosage. No claim has been made by any Federal, State or other governmental agency that Nutrilite is adulterated or harmful in any manner to the health of human users thereof, insofar as the record before the court shows.

6. The label of the package in which Nutrilite was and is sold complies with all requirements of the Food, Drug and Cosmetic Act of 1938.

7. The objection of the defendants to the sale of Nutrilite, which is the basis of this action, is the use by plaintiff of an advertising pamphlet entitled "How to Get Well and Stay Well". Nutrilite is sold directly to users thereof and this pamphlet is used in making about 40% of the initial sales of Nutrilite.

8. The product now sold as Nutrilite was first marketed about 1933; defendants' records show they received information about it in 1939 and had correspondence about it in 1940; plaintiff has been its exclusive national distributor since 1945; defendants
1639 received their first copies of the then current edition of the pamphlet "How to Get Well and Stay Well" on December 5, 1946, together with names and addresses of certain of plaintiff's distributors outside of California.

9. In June 1947, the Food and Drug Administration sent plaintiff a notice of a hearing under Section 305 of the Food, Drug and Cosmetic Act of 1938. This notice and hearing are provided for prior to institution of criminal proceedings under the Act and said notice provided that it related solely to "possible criminal action" and not to action "involving the seizure of the article" in libel cases. At the time of the hearing, July 15, 1947, Nutrilite Products had been in business some 15 years and up to 5 years before the time of said hearing Nutrilite representatives had been bringing Nutrilite labeling to the Los Angeles office of the Food and Drug Administration for comment and there had been no change in the labeling in the preceding five years. Neither the notice nor the statements of the Food and Drug Administration representative at the hearing specified any exact objections to particular language

in the then current edition of the pamphlet "How to Get Well and Stay Well", but plaintiff's attorney advised plaintiff he thought he understood the objections of the Food and Drug Administration and he advised the Food and Drug Administration's representative that the pamphlet would be revised to eliminate these objections.

10. Plaintiff's attorney further advised the Food and Drug Administration on October 4, 1947, that the rewriting of plaintiff's pamphlet had commenced promptly and was progressing as rapidly as possible considering the quantity of the material involved and the corrections required by him and that when finally completed he was sure none of the literature of plaintiff would be objectionable to said Administration.

11. There are three editions of the plaintiff's advertising pamphlet, "How to Get Well and Stay Well", which are involved in the libel seizure cases, hereinafter described: the 58-page edition which was used by plaintiff from January 1948 until a few days after the first seizure in October, 1948, and which is identified in the record as plaintiff's Exhibit #1; the 36-page edi-
1640 tion consisting of the first 36 pages of the 58-page edition, which was used from the time the 58-page edition was discontinued up to about December 1, 1948, and which is identified in the record as plaintiff's Exhibit #2; and the 42-page edition consisting of the 36-page edition changed slightly in non-substantial statements plus 6 additional pages, which has been used from about December 1, 1948 up to the time of the trial herein, and which is identified in the record as plaintiff's Exhibit #3.

12. (a) The three editions of the advertising pamphlet "How to Get Well and Stay Well" which are involved in and form the basis of the seizure actions hereinafter described, were written and prepared chiefly by William S. Casselberry, President of the plaintiff corporation. He has an A.B. degree from the University of California and M.A. and Ph.D. degrees from Stanford University. Prior to writing "How to Get Well and Stay Well" he read some medical and nutritional literature on the subject of vitamins and minerals. In the preparation of the three pamphlets he relied upon some scientific and medical treatises; surveys made by the medical profession with respect to the use of vitamins and minerals; publications of the Federal Government relating to the amount of vitamins and minerals required in the diet of humans and the efficacy of vitamins and minerals in human nutrition; and the findings and statements made by the Food and Drug Administration with respect to the need for and desirability of vitamins and minerals in the human diet.

(b) The rewriting of the pamphlet required a period of approximately five months. During this period Dr. Casselberry checked the various drafts of the pamphlet with his company's attorney, the chemist who discovered and developed Nutrilite's

secret base, and with neighbors to get the reactions of laymen to the pamphlet.

(c) Plaintiff's attorney, who supervised the rewriting, has specialized in the Food and Drug Act field for many years. He has in his library, and has read, a number of books and scientific writings written by medical doctors and others in the field of nutrition, vitamins and minerals. Defendants have stated that he is an experienced attorney in this field. He has approved the final drafts of each edition of the pamphlet before plaintiff
1641 began using them.

(d) The beneficial effects of vitamins and minerals for nutritional deficiencies is a well established medical fact. Many of the statements in the pamphlet about the beneficial effects of particular vitamins and minerals for nutritional deficiencies are confirmed by the admissions of the defendants herein.

(e) The three pamphlets (P's. Exs. #1, 2 and 3), when read as a whole and fairly interpreted, without lifting statements therein out of context, do no more than represent that Nutrilite is a vitamin-mineral food supplement designed and intended to build up the bodies of human users thereof in order that it may aid nature to help the users enjoy better health through better nutrition. Said pamphlets do not represent to the minds of ordinary, reasonable and prudent persons that all of the symptoms, conditions and diseases of the human body necessarily or generally result from dietary deficiencies alone, or that all of the symptoms, conditions and diseases of the human body can be prevented, cured or treated by the use of Nutrilite, and said pamphlets do not represent, suggest, or imply that Nutrilite is a medicine or drug, or that it is efficacious or beneficial in the prevention, treatment, or cure of all diseases.

These pamphlets represent the product only as a food supplement containing vitamins and minerals beneficial to building up health and bodies and in alleviating, in some but not in all instances, symptoms resulting from vitamin and mineral deficiencies in the diet. Purchasers and consumers do not understand from these pamphlets that Nutrilite is a treatment or cure for any disease. The defendants' own survey to determine the impression gained by purchasers and consumers of the representations contained in these pamphlets under customary conditions of purchase and use reveals that the users interviewed uniformly came to these conclusions and understandings of the statements in the pamphlets.

(f) These three pamphlets when read as a whole are not fraudulent, misleading in a material respect to the injury or damage of the purchaser or consumer, or false or misleading in any particular.

Neither Nutrilite nor its labeling has been made the basis of
1642 a prior judgment in favor of the United States in any case or proceedings finding it to be misbranded or adulterated,

nor do these pamphlets misbrand the product Nutrilite Food Supplement within the intent of the provisions of the Food, Drug and Cosmetic Act of 1938. It is therefore found that the plaintiff has been and is acting in good faith in preparing and using these pamphlets.

13. After the plaintiff's rewriting of the pamphlet, and its publication in January, 1948, plaintiff learned that agents of the Food and Drug Administration were interrogating some of plaintiff's distributors and customers. In order to determine the basis for such interrogations, plaintiff arranged a meeting with representatives of the Food and Drug Administration at the Administration's office in Los Angeles. Plaintiff stated to the Chief of said Administration's office that it wished to comply with every phase of the Food, Drug and Cosmetic Act and asked whether the investigation and interrogations were prompted by a belief that any part of plaintiff's label or labeling in any way violated any provision of said Act. The said Chief advised plaintiff that the investigation and interrogations were merely routine in nature and said Chief made no statement implying or suggesting that the Food and Drug Administration had any objection to the pamphlet "How to Get Well and Stay Well".

Plaintiff further stated to said Chief that should any question arise any time in the future concerning the alleged violation of said Act (misbranding) by any product distributed by plaintiff or in connection with any phase of plaintiff's business or operations, that if the Food and Drug Administration would notify the plaintiff thereof immediately when such question arose, plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

14. On September 15, 1948, a secret indictment was returned in Los Angeles against the plaintiff's two principal stockholders, Lee S. Mytinger and William S. Casselberry, based upon allegations of misbranding of Nutrilite by the edition of the pamphlet "How to Get Well and Stay Well" obtained by defendants on December 5, 1946, products shipped by plaintiffs on January 3, 1947 and February 26, 1947, and which were involved in the notice and hearing thereon in July, 1947. The Federal Judge to 1643 whom this indictment was assigned for trial has advised the parties that he considers the trial a waste of Government money due to the discontinuance of the labeling there questioned. This indictment has not yet been set for trial.

15. On October 6, 1948, without prior notice to plaintiffs, the defendants instituted or caused to be instituted and commenced a libel action under which some packages of Nutrilite and some copies of the 58-page pamphlet "How to Get Well and Stay Well" were seized in Belleville, New Jersey. Said libel alleged the misbranding

of Nutrilite through the use of pages 37 through 58 of the 58-page edition of said pamphlet.

16. On September 28, 1948, defendant Crawford had authorized said seizure action of October 6, 1948, in Belleville, New Jersey, without reading pages 1 through 36 of this 58-page pamphlet. A reading of pages 1 through 36 of this pamphlet is hereby found to be essential in fairly interpreting pages 37 through 58.

17. On September 30, 1948 defendant Crawford authorized multiple seizures of Nutrilite in an *ex parte* secret decision holding the 58-page pamphlet would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. This decision was made without reading all of the 58-page pamphlet or rereading pages 37-58, and it is admitted that defendant Crawford had not read all of the 58-page pamphlet prior to January 28, 1949. When this decision was made he had before him no facts showing injury or damage by Nutrilite or the 58-page pamphlet to any purchaser or consumer of Nutrilite and no facts showing that any user, purchaser or consumer of Nutrilite had made any complaint against the product or the 58-page pamphlet. No notice or copy of this decision was given or disclosed to plaintiff, and plaintiff's first knowledge of its existence and contents came on January 17, 1949, when defendants filed a copy thereof in this Court.

Defendant Crawford is not a nutritional expert but claimed he had before him this time (but not on September 28), and relied upon, a so-called finding of fact in writing which purported to be signed by a Dr. Robert C. Butz, an employe of the Food and Drug Administration, and which was dated September 30, 1948.

1614 Dr. Butz was not an employe of the Food and Drug Administration at the time of the trial of this cause.

18. (a) Defendants' actions in initiating and carrying out the multiple seizures of Nutrilite are primarily attributed by them to certain findings of fact on plaintiff's pamphlets entitled "How to Get Well and Stay Well" purportedly by Dr. Robert C. Butz, then an employe of the Food and Drug Administration. The defendants who had made said decisions each testified that they had not discussed said findings with Dr. Butz. These findings were offered in evidence by defendants and received for the limited purpose of proving their existence as a part of the decision made by defendant Crawford and the decisions referred to therein as having been made by defendants Larrick, Dunbar and Mr. Kingsley, in holding said pamphlets to be misleading, and not as proof of the facts contained in said findings. Dr. Butz was not produced as a witness and no evidence was offered that he actually and personally made the findings or that he based them upon plaintiff's products or pamphlets.

(b) The defendants admitted in open Court that they had not contacted Dr. Butz to see if he was available to them as a witness.

offered no proof of his unavailability as a witness, and in fact stated defendants *would not* make any effort to obtain him as a witness. After specifically warning Counsel for the defendants that these circumstances would cause the Court to draw an unfavorable inference against defendants on the qualifications of Dr. Butz, and defendants' right to rely upon him, the Court admitted into evidence a deposition given by Dr. Butz as an adverse witness, under subpoena, of the plaintiff.

(c) In the deposition he repudiated some of the statements in said findings. The deposition indicated he consulted four medical doctors of the Food and Drug Administration on vitamins and minerals in general, but not on Nutrilite in particular. He had seen no assay or analysis of the contents of Nutrilite. He did not read the 58-page pamphlet in connection with the finding of September 30, 1948, but *relied upon excerpts therefrom*. He did not connect or identify the statements in his findings with any representations in the 58, 36 or 42-page pamphlet.

(d) The four medical doctors employed by the Food and Drug Administration whom Dr. Butz named as his consultants did not testify herein. Defendants have never conducted any experiments to determine the effect of Nutrilite upon deficiency diseases or any other ailment.

1645 (e) From the facts herein, the Court finds that the defendants Crawford, Larrick, Dunbar and Mr. Kingsley, when they made their respective decisions described herein acted arbitrarily, capriciously and unreasonably in placing reliance upon any of the so-called findings of Dr. Butz, the circumstances under which the findings were prepared, the contents thereof, the knowledge of those making decisions on plaintiff's said pamphlets, their actual reliance upon Dr. Butz, and the other actions of defendants herein which are claimed to be connected with the purported findings of Dr. Butz. It is further found that defendants' failure to produce or to try to produce Dr. Butz as a witness raises an inference that if he had testified in person his testimony would have been adverse to defendants.

19. On October 11, 1948, plaintiff received a copy of the libel papers filed in the Belleville, New Jersey, case on October 6, 1948, and learned therefrom for the first time that defendants were objecting to pages 37 through 58 of the 58-page pamphlet. Plaintiff immediately, on the same day, sent telegrams to all of its top agents throughout the United States instructing them in part as follows:

> "Inform all agents and distributors in your group immediately that pending court ruling pages 37 through 58 inclusive of customer book . . . . must not be used in selling Nutrilite. Remove pages 37 to 58 by cutting along fold with sharp knife. Wrap, seal and place disputed material in third party's hands

to be held pending final ruling. Books . . . in hands of prospects, junior distributors and customers to be treated in same way. Full explanation will appear with Nutrilite News, but follow above instructions at once."

A bulletin containing a full explanation was then mailed directly to all of plaintiff's agents and distributors to insure that every salesman in plaintiff's organization would get the information on discontinuance of use of pages 37-58 and would follow instructions. This explanation stated that regardless of whether the Food and Drug Administration is right or wrong, the plaintiff wanted to follow that Administration's views.

20. On October 12, 1948, the plaintiff's attorney advised the Food and Drug Administration in Washington, D. C., by letter, that use of pages 37 through 58 of the 58-page pamphlet had been ordered to be discontinued by all of plaintiff's agents and distributors by said telegram and said bulletin immediately upon receipt of said libel papers. He also advised:

1646 "In this connection I want to say that the filing of this libel in New Jersey was the first intimation that we had received that any of the literature we are using at present was objectionable to your office. In the future I will appreciate it if you will advise me if you find anything in our literature that you take exceptions to. Mytinger and Casselberry are a reputable firm, and are desirous of co-operating with your Agency in every way possible. I need not point out that the offense of 'misbranding' is not a well defined one in the light of present day scientific knowledge, and it is very easy for a firm in the nutritional supplement field to make statements in the best of faith which do not 'square' with the views of your offices. In this case a letter from your Agency pointing out your objections would bring about a correction without the necessity of court action.

* * * * * *

"With mutual cooperation, I believe that much trouble and expense can be saved for all parties concerned."

This letter and the facts set forth in paragraph 19 hereof show plaintiff was, in good faith, trying to comply with defendants' interpretations of the Food, Drug and Cosmetic Act of 1938.

21. On October 19, 1948, after failing to answer this said letter of October 12, 1948, the defendants made a second similar seizure in New York City.

22. The libel papers in this said second seizure action and the libel papers in the eight additional seizure actions described hereinafter

contain statements which are in substance identical. There are no separate issues of fact or law necessitating more than one such action, as a decision in the first libel action would settle all said issues with respect to the alleged misbranding of Nutrilite by the use of the three editions of the pamphlet "How to Get Well and Stay Well". These libel seizure actions having been instituted in widely separated jurisdictions in the United States inflicted unnecessary punishment and expense on the plaintiff.

23. The October 19, 1948 seizure and the ten other seizures hereinafter found to have been made and instituted against plaintiff's product Nutrilite, were made under the provisions of Section 334(a) of Title 21 of the United States Code which permits multiple libel seizure actions based upon the same alleged misbranding "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the agency . . . . that the labeling of the misbranded article . . . . .
1647 would be in a material respect misleading to the injury or damage of the purchaser or consumer."

24. On approximately October 18, 1948, plaintiff agreed to the request of the Government that the indictment matter in California be continued to December 5, 1948, upon plaintiff's understanding that the defendants contemplated making no more seizures. However, other seizures were made thereafter.

25. On October 28, 1948, the third said similar seizure was made in Buffalo, New York.

26. In November, 1948, plaintiff requested defendants to agree to consolidation and trial in the United States District Court in Los Angeles, within 25 miles of plaintiff's principal place of business in Long Beach, of the said three libel seizures which had then been filed. Defendants refused said request and informed plaintiff that they would agree to consolidation for trial of the three cases in Phoenix, Arizona, or in San Francisco, California, only. Defendants at the same time advised the plaintiff that they had already approved further seizures and did not promise to withhold said seizures if the first three were consolidated for trial.

27. After plaintiff and its agents and distributors had removed the pages objected to in the first libel action; the remaining 36 pages of the 58-page edition of "How to Get Well and Stay Well" were used for a short period while an epilogue was being written to complete said booklet. This 36-page edition is identical with the first 36 pages of the 58-page edition of said pamphlet which Defendant Crawford had before him in making his decision of September 30, 1948. Subsequently, 6 pages were added to the said 36-page booklet which did not alter or enlarge the sense and meaning of the first 36 pages. The addition of these pages resulted in the so-called 42-page edition of "How to Get Well and Stay Well"

which has been used by plaintiff since approximately December 1, 1948.

28. On December 1, 1948, the fourth said similar seizure was made in Hastings, Nebraska.

1648 29. On December 2, 1948, the defendant Larrick made an *ex parte* decision holding that the 36-page edition of the pamphlet "How to Get Well and Stay Well" would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. Defendant Larrick at the time of his December 2, 1948 decision, knew that defendant Crawford, in his decision of September 30, 1948, had these 36 pages before him and that defendant Crawford had not found these 36 page to be objectionable and that said 36 pages of the said 58-page pamphlet were identical with the 36-page pamphlet before him. He knew of the communication from plaintiff's attorney requesting an opportunity to comply with future objections, as described in paragraph 20 hereof. He had no facts before him at the time of his decision showing that Nutrilite or any of its labeling, including the 36-page pamphlet, had damaged or injured any purchaser or consumer. He is not a nutritional expert and claimed that he relied on a so-called finding of fact purportedly made by Dr. Robert C. Butz, referred to in paragraph 18 hereof and "accepted Dr. Butz' conclusions as to the misleading character of the statements in it". Said decision of defendant Larrick was not disclosed to plaintiff until Jan. 17, 1949, when a copy thereof was filed in the instant case. The findings in said paragraph 18 as to Dr. Butz and defendant Larrick apply here.

30. On December 9, 1948, defendant Dunbar made an *ex parte* decision holding that the 42-page edition of plaintiff's pamphlet "How to Get Well and Stay Well" would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. This matter was brought to him for decision by a Mr. Murray, an employe of the Food and Drug Administration and author of a memorandum indicating that the defendants planned to "keep the pressure" on plaintiff. Mr. Murray informed defendant Dunbar that he (Murray) was considering a number of seizure recommendations against Nutrilite based on the labeling contained in the 42-page pamphlet. Defendant Dunbar read only certain unidentified parts of the pamphlet pointed out to him by Mr. Murray before making his decision that the pamphlet was misleading and relied on oral statements made to him by Mr. Murray. He had before him at the time of his decision no facts showing damage or injury to any purchaser or consumer by Nutrilite or any of plaintiff's labeling, and had not seen nor heard of any complaints
1649 that Nutrilite or its labeling had injured or damaged any person. He did not consider the report on the defendants'

own survey to determine how purchasers and consumers interpreted this pamphlet, although it was then in his files. He, too, testified that he was not a nutritional expert but claimed he relied upon a finding of fact purportedly made by Dr. Butz and the findings in paragraph 18 hereof on Dr. Butz and defendant Dunbar apply here. This decision of defendant Dunbar was not disclosed to plaintiff until January 17, 1949, when a copy there of was filed in the instant case.

31. Through the actions of defendants, additional similar seizures of Nutrilite and said pamphlets were then made in the following places:

Belleville, New Jersey, December 15, 1948.
Spokane, Washington, December 23, 1948.
Seattle, Washington, December 30, 1948.
Clarkfield, Minnesota, December 31, 1948.
St. Petersburg, Florida, January 4, 1949.
Chicago, Illinois, January 3 & 4, 1949.

Finding 22 hereof covers the similarity of issues in these cases. These seizures were made after defendants had made a survey to determine whether plaintiff's said pamphlets were misleading in any particular to consumers and purchasers thereof under customary conditions of purchase and use and after said survey had revealed that said pamphlets were not in fact misleading in any particular to purchasers and consumers.

32. (a) On December 30, 1948, the instant injunction action was filed. At this time it was the intention and plan of the defendants to file many more libel seizure actions and seize Nutrilite throughout the Nation. The Food and Drug inspector knew of this general policy.

(b) It was the plan of defendants to keep a sustained pressure against plaintiff through such seizures until an injunction was granted in the instant action or the indictment case in California based upon the discontinued literature went to trial. This plan of defendants is set forth in writing in a memorandum written by A. G. Murray, an administrative officer of the Food and Drug Administration, and addressed to the Division of Field Operations of the Food and Drug Administration. It was not denied that Mr. Murray was and is under the control of the defendants and that he was present in Court. No effort was made by the
1650 defendants to call Mr. Murray and explain the circumstances under which the memorandum was written and used. Defendant Larrick admitted that said memorandum was an accurate statement of defendants' policy in regard to plaintiff, and that said memorandum was circularized in the offices of the Food and Drug Administration and created a general impression in said offices

highly prejudicial to plaintiff. The Court presumes, from defendants' refusal to call Mr. Murray as a witness, that his testimony, not only in regard to the contents and use of said memorandum, but also in regard to the seizure recommendations presented to defendant Dunbar by him, would have been adverse to the defendants.

(c) Defendants made no effort to secure an early trial in the libel cases and in order to effect seizures more quickly, mimeographed copies of the booklets "How to Get Well and Stay Well" were prepared for transmission to United States Attorneys.

33. On January 17, 1949, defendants filed in the United States District Court for the District of Columbia a motion to dismiss the complaint herein.

34. On January 24, 1949, Judge David A. Pine of the United States District Court for the District of Columbia found that the actions of the defendants in rendering said decisions were "unfair", "drastic", "shocking", and "harsh" and held that the decisions of defendants Crawford, Larrick and Dunbar, described *supra*, were unlawful because the Administrator of the Federal Security Agency did not have the authority to delegate this power to make such decisions to said defendants.

35. (a) On January 28, 1949, at the request of defendant Dunbar, the Acting Administrator of the Federal Security Agency, J. Donald Kingsley, made three decisions identical in language with three decisions of defendants Crawford, Larrick and Dunbar, supra, (paragraphs 17, 29 and 30) respectively. He is not a nutritional expert but claimed he relied upon three so-called findings purportedly made by Dr. Robert C. Butz.

(b) Kingsley did not talk to Dr. Butz or identify the Butz findings contained in defendants' Ex. No. 23 as those upon which he (Kingsley) relied in connection with any particular one of his three decisions. He is uncertain as to which version or
1651 versions of the pamphlet he had before him, and did not read all three pamphlets before making his decision condemning all three as misleading in a material respect to the injury or damage of the purchaser or consumer. Kingsley did not consider the defendants' own investigation and report thereon in his files showing that consumers and purchasers did not receive a misleading impression from reading plaintiff's pamphlets.

(c) Kingsley had no facts before him showing injury or damage to any purchaser or consumer of Nutrilite by the product or its labeling, and had no facts before him showing any complaints of injury or damage from Nutrilite or its labeling.

(d) Kingsley, as Acting Administrator of the Federal Security Agency, twice refused requests of plaintiff that he grant it a hearing prior to making a decision on whether Nutrilite was misbranded by said labeling, the three editions of the pamphlet, "How to Get

Well and Stay Well". Said requests advised him that if officials of the Food and Drug Administration asked him to make a decision that plaintiff's advertising and labeling were misleading in a material respect to the injury or damage of the purchasers or consumers of Nutrilite, plaintiff could present him with the full and true facts showing that the labeling of Nutrilite was not misleading in any respect. He was advised by plaintiff that the consequences of an erroneous decision on this matter by him would be that plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by defendants prior to any possible opportunity plaintiff might have to defend itself against said decision. He twice denied this request for a hearing prior to his decisions, talked only to his own counsel and to defendants Dunbar and Crawford about the decision of Judge Pine, and made an *ex parte* decision that plaintiff's labeling is misleading. The findings in paragraph 18 hereof on Dr. Butz and Mr. Kingsley apply here.

(e) Defendants did not produce Kingsley as a witness or prove that he was unavailable to them as a witness, and his deposition is incomplete. Counsel states therein that the deposition is to be completed at a later date when certain records, which defendants refused to produce at the time of the taking of the deposition, were made available under Court order. The order was made
1652 but the deposition was not completed. Defendants' failure to produce Kingsley as a witness, or to prove his unavailability to them as a witness, warrants an inference that if he had testified his testimony would have been adverse to defendants.

36. On March 3, 1948, Judge David A. Pine granted a motion to dismiss plaintiff's complaint with leave to amend and the Amended Complaint, which is before this Special Three-Judge Court, was then filed. A temporary restraining order was then signed enjoining defendants from making any further seizures of Nutrilite *pendente lite*.

37. On April 5, 1949, plaintiff filed a motion in the Federal District Court in Newark, New Jersey, to consolidate the ten libel actions for trial in Los Angeles, California, which motion defendants opposed. Said motion was argued on Monday, September 19, 1949, at which time it was the defendants' general position that the defendants did not want the libel issues tried in Federal Court in Los Angeles. Three days later, on Thursday, September 22, 1949, however, the defendants filed an injunction action in the very Federal Court in Los Angeles involving identical issues insofar as plaintiff's pamphlet "How to Get Well and Stay Well" is concerned. The defendants' action herein was deliberate and arbitrary to increase the plaintiff's irreparable damage. Defendants knew that plaintiff could consolidate all such actions and that the only accomplishment of

the filing of the numerous seizure actions would be the irreparable injuries set forth in finding 39 herein.

38. The defendants have caused embargoes to be instituted and placed on Nutrilite prior to the institution of libel for condemnation proceedings in New York, New Jersey, Washington State, Florida, and various localities in the United States by requests to State and local health authorities, which embargoes naturally frightened agents, distributors and customers of Nutrilite and had very much the same damaging and injurious effect as the seizures. These embargoes obtained in widely scattered jurisdictions of the United States caused maximum and irreparable injury to plaintiff.

39. The seizure actions caused plaintiff a sales loss of some $100,000 per month from the time of the first seizure until the
1653 instant action was filed, and the defendants were restrained from making further seizures. The seizures had the effect of frightening plaintiff's agents and distributors, so that they worked less, and some resigned, with the net result of loss of morale among agents and distributors, loss in sales volume and loss of personnel. Unfavorable opinions and injurious information with respect to the labeling of plaintiff's product reached many private individuals and organizations. Publicity about the seizure cases initiated by defendants appeared in newspapers and magazines in a way which did injuriously damage plaintiff and this led to loss of customers. Plaintiff was compelled to hire counsel in the ten libel cases and put up bonds and costs in each case. The value of the Nutrilite seized by defendants in the ten libel actions is $6,822.17 and the product so seized will be unsaleable if returned to plaintiff. The nature of plaintiff's business makes good-will of the public one of its most valuable assets and the acts of the defendants in the embargoes and seizure actions in widely separated parts of the United States has caused the plaintiffs injury and damage. Defendants admit injury to plaintiff and that there has been a serious impact on plaintiff's rights by their actions, and that there is no provision of law requiring or permitting defendants to reimburse plaintiff for the damages herein found or for the injury or for destruction of its business and good-will by the actions of the defendants, in the event of a determination of said libel actions in favor of plaintiff. The injury and damage to plaintiff which has occurred and which is threatened by defendants is therefore substantial and irreparable.

40. The defendants have never advised plaintiff of the particulars of plaintiff's literature considered to be objectionable by defendants. The defendants have not provided an opportunity to plaintiff whereby such literature could be corrected, revised and amended in a manner which would conform to the views of and be acceptable to the defendants.

41. That plaintiff would have been subjected to many additional seizures of its product throughout the United States in addition to

the existing 11 seizures of its product, if not enjoined from so doing, is admitted by defendants. It was a general policy and plan of the defendants to make with all possible speed many seizures of
1654 plaintiff's product. Such additional seizures, and the product could be seized by defendants in the hands of more than 5,000 of plaintiff's distributors, would have the effect of destroying plaintiff's business prior to any possible adjudication of the disputed issues on plaintiff's labeling in any of the libel actions already filed or threatened.

42. There was and is no emergency involving injury or damage of any kind to the public or to any purchaser, consumer or user of Nutrilite or in connection with Nutrilite and plaintiff's use of the three pamphlets which constitute defendants' sole objection to Nutrilite's sale. Defendants have not, at any time, indicated or contended that there is an emergency or situation of compelling public necessity with respect to the labeling of plaintiff's product and no such emergency or situation did, in fact, exist at or prior to any of the actions of defendants described herein.

43. The evidence herein on the actions, conduct and course of action of defendants before and after the decisions of Crawford, Larrick, Dunbar and Kingsley described above reveal, as do their decisions and actions in making said decisions, that the defendants in making said decisions acted capriciously, arbitrarily, unreasonably, oppressively and unlawfully.

Conclusions of Law

The Court, upon the basis of the Findings of Fact herein, makes Conclusions of Law as follows:

1. This Court has jurisdiction to hear and determine this case.

2. The following provisions of the Food, Drug and Cosmetic Act of 1938, Section 334, Title 21, United States Code, are unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States: ". . . such limitations shall not apply . . . when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer." The defendants should be permanently enjoined from enforcing this unconstitutional
1655 provision against plaintiff.

3. The provisions just quoted in the second conclusion hereof were intended by the Congress to be and are hereby found to be separable from the remaining provisions of the said Act and said remaining provisions remain in full force and effect.

4. Defendants Crawford, Larrick, Dunbar, Kingsley and Ewing, in instituting multiple libel proceedings against the product Nutrilite

Food Supplement without first affording the plaintiff a hearing on the issue of whether there was probable cause to believe that the labeling of the product was misleading in a material respect, acted arbitrarily, oppressively, and capriciously in violation of the Fifth Amendment to the Constitution.

5. The defendants and all persons acting in concert with them or under their direction, supervision, or control, should be permanently enjoined from instituting or maintaining any action or proceeding raising issues of fact or law that Nutrilite Food Supplement is misbranded under the Food, Drug and Cosmetic Act of 1938, by the plaintiff's pamphlets, Exhibits 1, 2 and 3, herein.

BENNETT C. CLARK,
Circuit Judge.
T. ALAN GOLDSBOROUGH,
District Judge.
EDWARD A. TAMM,
District Judge.

Dated: December 13, 1949.

1656 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY, INC., Plaintiff,

vs.

OSCAR R. EWING, Administrator, et al., Defendants

[File endorsement omitted]

PERMANENT INJUNCTION

Filed December 14, 1949

This cause came on to be tried upon the issues raised in plaintiff's complaint for a permanent injunction as set forth in the Pre-Trial Order herein. After hearing and considering the evidence presented at the trial and upon the Findings of Fact and Conclusions of Law made and filed herein, it is by this Special Three-Judge Statutory United States District Court for the District of Columbia this 14th day of December, 1949,

Adjudged, ordered and decreed that the defendants, and each of them, their successors in office, their agents, servants, employees, attorneys and all persons in active concert and participation with them be and hereby are permanently enjoined from continuing or

causing to be continued the prosecution of any of the libel for condemnation actions now pending against Nutrilite Food Supplement; and it is further

Adjudged, ordered and decreed that the defendants, and each of them, their successors in office, their agents, servants, employees, attorneys, and all persons in active concert and participation with them be and hereby are permanently enjoined from instituting or causing to be instituted any further or additional libel for condemnation actions, or any other actions, against Nutrilite Food Supplement under that part of 21 U. S. C. 334(a) herein held to be unconstitutional, to wit: "such limitations shall not apply . . . when the Administrator has probable cause to believe from the facts found, without hearing, by him or any officer or em-
1657 ployee of the agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer."

BENNETT C. CLARK,
Circuit Judge.
T. ALAN GOLDSBOROUGH,
District Judge.
EDWARD A. TAMM,
District Judge.

1658 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

PETITION FOR APPEAL TO THE UNITED STATES SUPREME COURT

Filed January 9, 1950

To the Honorable BENNETT CHAMP CLARK, T. ALAN GOLDSBOROUGH, and EDWARD A. TAMM, comprising said Court:

The defendants herein, considering themselves aggrieved by the permanent injunction made and entered in this case by the United States District Court for the District of Columbia on December 14, 1949, hereby appeal from said final decree to the United States Supreme Court and pray that said appeal be allowed, for the reasons set forth in the assignment of errors which is filed herewith.

Defendants pray that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon

which the said permanent injunction was based, duly authen-
1659 ticated, be sent to the United States Supreme Court under the rules in such cases made and provided.

PHILIP B. PERLMAN,
Solicitor General;
ROBERT L. STERN,
Special Assistant to the Attorney General;
VINCENT A. KLEINFELD,
Attorney, Department of Justice;
WILLIAM W. GOODRICH,
Attorney, Federal Security Agency,
Attorneys for the Defendants.

1660 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY, a California corporation, Plaintiff

v.

OSCAR R. EWING, Federal Security Administrator; J. HOWARD MCGRATH, Attorney General; PAUL B. DUNBAR, Commissioner of Food and Drugs; CHARLES W. CRAWFORD, Associate Commissioner of Food and Drugs; GEORGE P. LARRICK, Assistant Commissioner of Food and Drugs, and LOUIS D. ELLIOTT, Assistant Commissioner of Food and Drugs, Defendants

ORDER ALLOWING APPEAL—Filed January 10, 1950

It appearing to the Court that the defendants named above have filed a petition for appeal to the Supreme Court of the United States, together with assignment of errors praying reversal of the permanent injunction decree entered December 14, 1949, and also a statement as required by Rule 12 of the Supreme Court Rules, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question,

It is Ordered that the appeal be and is hereby allowed to the Supreme Court of the United States from the judgment rendered in this cause as aforesaid.

EDWARD A. TAMM,
Judge.

January 9th, 1950.

1661 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 9, 1950

The defendants in the above-entitled cause, in connection with their appeal from the final decree of permanent injunction made and entered in this cause on December 14, 1949, by the United States District Court for the District of Columbia, specially constituted under the provisions of 28 U.S.C. 2284, file the following assignments of error upon which they will rely in their prosecution of the said appeal from the said final decree, and say that in the record, proceedings, and decree manifest error has intervened to the prejudice of the defendants as follows:

1. The Court erred in holding unconstitutional under the due process clause of the Fifth Amendment that part of Section 304(a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1044, 21 U.S.C. 301, 334(a), which permits the institution of more

1662 than one libel for condemnation suit based upon the same alleged misbranding

> . . . (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the . . . labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer.

2. The Court erred in holding that it had jurisdiction to try in a *de novo* proceeding the question whether plaintiff's labeling, i.e., booklets entitled "How To Get Well and Stay Well", were false or misleading in any particular.

3. The Court erred in holding that it had jurisdiction to try in a *de novo* proceeding the question whether plaintiff's labeling was misleading in a material respect to the injury or damage of purchasers or consumers.

4. The Court erred in holding that it had jurisdiction to review the administrative decisions as to whether there was probable cause to believe that the labeling of plaintiff's product would be in a material respect misleading to the injury or damage of purchasers or consumers.

5. The Court erred in allowing the plaintiff to probe the mental processes of the administrative officials in reaching their decisions.

6. The Court erred in denying defendants' motion to quash subpoenas duces tecum, served in connection with the oral interro-

gation of the Federal Security Agency defendants before trial, which required the defendants to deliver to plaintiff all records of the Food and Drug Administration relating to plaintiff, its predecessors, and its product, without requiring a showing of good cause under Rule 34 of the Rules of Civil Procedure for the United States District Courts.

1663 7. The Court erred in holding that it had jurisdiction in this case permanently to enjoin, and in enjoining, the prosecution of all pending seizure cases and to enjoin, and in enjoining, the institution of any further seizure cases.

8. The Court erred in holding that the defendants acted arbitrarily, oppressively, and capriciously in recommending the initiation of more than one libel for condemnation suit without affording the plaintiff an opportunity for an administrative hearing on the issue of misbranding.

9. The Court was clearly erroneous in finding that the administrative decisions of Dr. Dunbar, Mr. Crawford, Mr. Larrick, and Mr. Kingsley were made arbitrarily and capriciously.

10. The Court was clearly erroneous in finding that the plaintiff's labeling is not fraudulent, misleading in a material respect to the injury or damage of purchasers or consumers, or false or misleading in any particular.

11. The Court erred in holding that plaintiff's good faith was a material issue in this case.

12. The Court erred in unreasonably curtailing the cross-examination of Dr. John A. Myers, a witness for the plaintiff.

13. The Court erred in unreasonably restricting the cross-examination of William S. Casselberry, a witness for the plaintiff, in rejecting a written "offer of proof", made at the suggestion of the Court after it had refused counsel the right to state orally for the record the particular passages in the labeling on which he wished to ask questions, and in refusing defendants' counsel's request to recall Casselberry, who was then present in court, after rejection of the "offer of proof."

14. The Court erred in finding that evidence as to acts of the defendants and subordinate officials of the Food and Drug
1664 Administration before and after these defendants made their administrative decisions was relevant to show that the decisions were arbitrarily and capriciously made.

15. The Court erred in permitting the witness Casselberry, over the defendants' objections, to testify as a qualified expert in the field of nutrition that there are no claims in the labeling that are untrue (Tr. 104-106).

16. The Court erred in permitting Dr. Casselberry, a psychologist, on direct examination and over the defendants' objections, to testify as an expert in the field of nutrition that certain excerpts

from medical and popular writings represented a good cross-section of medical opinion on questions of nutrition (Tr. 101).

17. The Court erred in admitting in evidence an exhibit offered by plaintiff which contained excerpts from medical and popular publications to prove medical opinions in the field of nutrition (Pl. Ex. 5-6).

18. The Court erred in rejecting a scientific article offered by the defendants as to the prevalence of dietary deficiency diseases even though the author, an outstanding man of science, was present for cross-examination (Tr. 863-864).

19. The Court erred in permitting Dr. Casselberry to testify, over defendants' objections, as to statements made to him by his attorney, Lee J. Myers (Tr. 72-73, 77-78).

20. The Court erred in admitting into evidence, over defendants' objections, memoranda of interviews with five persons prepared by an inspector of the Food and Drug Administration (Pl. Ex. 4, 79-95).

21. The Court erred in permitting Dr. John A. Myers, a medical doctor, to testify, over the defendants' objection, to his under-
1665 standing of what the labeling claimed for Nutrilite, and, upon his understanding of the labeling, that the said labeling did not represent that Nutrilite would cure all cases of dietary deficiency diseases or all cases of common diseases (Tr. 172-174).

22. The Court erred in permitting Dr. Myers, over defendants' objections, to testify that he found nothing in the labeling that was false or misleading, the said question requiring not only his expert opinions as a medical man but also an evaluation by him as to what the labeling would convey to the persons to whom it was directed (Tr. 171, 173).

23. The Court erred in permitting Lee J. Myers, an attorney and witness for the plaintiff, to testify, over defendants' objections, that the statements in the labeling conformed to the consensus of informed medical opinion (Tr. 522).

24. The Court erred in permitting Lee J. Myers, over the defendants' objections, to testify that the labeling was not false or misleading, misbranded or fraudulent, and would not cause injury or damage to the purchaser or consumer (Tr. 520, 522-523), the said questions requiring expert medical testimony, legal conclusions, and an evaluation of what the labeling would convey to the persons to whom directed.

25. The Court erred in ruling that objections could not be taken at the trial to testimony in Lee J. Myers' deposition unless the objection was saved when the deposition was taken (Tr. 513, 517).

26. The Court erred in refusing to permit Dr. E. M. Nelson, a witness for the defendants, to make comparisons between the daily dosage of Nutrilite and minimum daily requirements for the sev-

eral vitamins and minerals contained therein as estab-
1666-1704 lished pursuant to law by the Federal Security Administrator (Tr. 302).

27. The Court erred in rejecting an official government publication which contained the vital statistics of the United States showing the major causes of death by age groups, which said publication was offered by defendants to disprove the labeling claims that dietary deficiency diseases were the common diseases most responsible for death from illness.

Wherefore, defendants pray that the decree of permanent injunction be reversed, that the District Court be directed to dismiss the case, and that costs be assessed against the plaintiff.

PHILIP B. PERLMAN,
Solicitor General,
VINCENT A. KLEINFELD,
Attorney, Department of Justice,
WILLIAM W. GOODRICH,
Attorney, Federal Security Agency,
Attorneys for the Defendants.

1705 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO AUTHORIZE CLERK TO TRANSMIT ORIGINAL RECORD TO THE SUPREME COURT OF THE UNITED STATES—Filed January 10, 1950

Now come the defendants in the above-entitled cause and move that this Court authorize the Clerk to transmit the original papers in lieu of copies in this cause to the Supreme Court of the United States for use in connection with the appeal taken to that Court.

VINCENT A. KLEINFELD,
WILLIAM W. GOODRICH,
Attorneys for Defendants.

So Ordered:

EDWARD A. TAMM,
United States District Judge.

January 9th, 1950.

1706 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRAECIPE FOR RECORD ON APPEAL—Filed January 13, 1950

To the Clerk of the United States District Court for the District of Columbia:

Your are hereby requested to prepare a transcript of record in the above-entitled cause to be filed in the United States Supreme Court pursuant to an appeal allowed herein, and to include in such transcript the following: *

1. Complaint for temporary and permanent injunction and temporary restraining order (December 30, 1948).

2. Motion to Dismiss and for Summary Judgment (January 19, 1949).

3. Findings of Fact and Conclusions by Charles W. Crawford (September 30, 1948) George P. Larrick (December 2, 1948) and Paul B. Dunbar (December 9, 1948), and Exhibits Attached (January 19, 1949).

1707 4. Transcript of Hearing Before Judge Pine on Defendants' Motion to Dismiss on January 24, 1949 (January 28, 1949).

5. Order of Judge David A. Pine Denying Without Prejudice Defendants' Motion to Dismiss and for Summary Judgment (January 26, 1949).

6. Motion to Dismiss and for Summary Judgment (February 1, 1949).

7. Finding of Fact and Conclusion by J. Donald Kingsley and Exhibits Attached Thereto (February 1, 1949).

8. Amendments to Complaint (February 19, 1949).

9. Transcript of Hearing on Renewal of Defendants' Motion to Dismiss before Judge Pine on March 3, 1949 (March 9, 1949).

10. Order of Judge David A. Pine Granting Defendants' Motion to Dismiss with Leave to Plaintiff to Amend (March 4, 1949).

11. Amended Complaint for Temporary and Permanent Injunction and Temporary Restraining Order (March 4, 1949).

12. Motion for Temporary Injunction (March 4, 1949).

13. Temporary Restraining Order (March 7, 1949).

14. Designation of Judges to Serve on Three-Judge District Court (March 16, 1949).

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* The dates referred to in parentheses are those on which the documents were filed with the clerk.

15. Defendants' Motion to Dismiss (March 17, 1949).

16. Certified Record of Hearing on Defendants' Motion to Dismiss, Proceedings Before a Three-Judge Court on April 6, 1949 (May 3, 1949).

1708 17. Temporary Injunction Signed by Judges Clark, Goldsborough, and Tamm (April 6, 1949).

18. Order Denying Defendants' Motion to Dismiss Signed by Judges Clark, Goldsborough, and Tamm (April 7, 1949).

19. Certified Record of Official Court Reporter, Proceedings Before Judge Tamm on April 13, 1949 (April 14, 1949).

20. Subpoenas Served on Paul B. Dunbar, George P. Larrick, J. Donald Kingsley (April 14, 1949).

21. Motion to Quash Subpoena.

22. Transcript of Argument on Motion to Quash Subpoena Before Judge Clark on April 19, 1949 (April 29, 1949).

23. Order Denying Defendants' Motion to Quash Subpoena Signed by Judge Clark (April 29, 1949).

24. Answer to Amended Complaint for Temporary and Permanent Injunction (April 21, 1949).

25. Defendants' Motion for a Pre-Trial Order (April 25, 1949).

26. Pre-Trial Order Signed by Judges Clark, Goldsborough and Tamm (June 14, 1949).

27. Plaintiff's Motion for Modification of Pre-Trial Order (September 20, 1949).

28. Transcript of Trial Before Judges Clark, Goldsborough and Tamm and Plaintiff's and Defendants' Exhibits Introduced at Trial.

1709 29. Findings of Fact and Conclusions of Law (December 14, 1949).

30. Decree of Permanent Injunction (December 14, 1949).

31. Petition for Appeal to the United States Supreme Court (January 9, 1950)

32. Order Allowing Appeal (January 10, 1950).

33. Assignment of Errors (January 9, 1950).

34. Statement as to Jurisdiction with attached Findings and Decree (January 9, 1950).

35. Citation (January 10, 1950).

36. Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (January 10, 1950).

37. Proof of Service of

(1) petition for appeal
(2) order allowing appeal
(3) assignment of errors
(4) statement of jurisdiction
(5) citation

(6) statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the United States Supreme Court (January 10, 1950).

38. Praecipe for Record with Proof of Service of Praecipe for Record.

VINCENT A. KLEINFELD,
WILLIAM W. GOODRICH,
Attorneys for the Defendants-Appellants.

1710 Service of the foregoing praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 13th day of January, 1950.

CHARLES S. RHYNE,
Attorney for Plaintiff-Appellee.

1711 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL—Filed January 23, 1950

To the Clerk of the United States District Court for the District of Columbia:

Pursuant to Rule 10(2) of the Revised Rules of the Supreme Court of the United States, Mytinger and Casselberry, Inc., Plaintiff-Appellee, hereby designates the following to be added to the transcript of record in the above-entitled cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed herein:

1. Transcript of Hearing on Plaintiff's Motion for Modification of Pre-Trial Order before Judge Goldsborough on September 21, 1949.

Plaintiff-Appellee respectfully takes this opportunity to indicate that Defendants-Appellants, in their praecipe for record on appeal, have erroneously labeled the order extending the original temporary restraining order issued April 6, 1949, under the
1712 signatures of Judges Clark, Goldsborough and Tamm as a "Temporary Injunction." (Defendants-Appellants Praecipe for Record on Appeal, #17.) The aforesaid order signed by Judges Clark, Goldsborough and Tamm does not bear the heading "Temporary Injunction" as indicated by Defendants-Appel-

lants but rather is specifically referred to as a "temporary restraining order" within the order itself.

Respectfully submitted,

CHARLES S. RHYNE,
EUGENE J. BRADLEY,
LESTER L. LEV,
Attorneys for Plaintiff-Appellee.

Service of the foregoing designation of additional portion of the record was had by mailing a copy thereof to Vincent A. Kleinfeld, Attorney for Defendants-Appellants, Department of Justice, 10th and Pennsylvania Avenue, Northwest, Washington, D. C. on January 23, 1950.

CHARLES S. RHYNE,
Attorney for Plaintiff-Appellee.

1713-1716 Citation in usual form, filed Jan. 30, 1950, omitted in printing.

1717-1718 Clerk's Certificate to foregoing transcript omitted in printing.

VOLUME II

Vol. II

TRANSCRIPT OF RECORD

(Pages 783–1565)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS,

vs.

MYTINGER & CASSELBERRY, A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED JANUARY 30, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS,

vs.

MYTINGER & CASSELBERRY, A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VOL. II

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2. "How to Get Well and Stay Well"—36 page edition	1780	844
3. "How to Get Well and Stay Well"—42 page edition	1819	883
4. Inspector's Memoranda of Interviews with Nutrilite Users	1864	929
5. "Facts You Should Know About Vitamins"—Better Business Bureau	1876	941
6. Quoted Extracts from Medical Treatises	1892	957
7. Federal Register, Nov. 22, 1941, "Amendment to General Regulations", "Findings of Fact and Regulations"	1953	1000
8. Box and Label of Nutrilite		
9. Notice of Hearing Addressed to Mytinger and Casselberry, June 18, 1947	1959	1018
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12. Paper Entitled "Material Taken Out of Customer Book"	1969	1025
13. Letter from Lee J. Myers dated October 12, 1948	1970	1026
14. Comparative Sales Volume Figures from August, 1948 to August, 1949	1975	1029
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16. Office Memorandum by A. G. Murray on March 31, 1949	1977	1030a
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22. Article Entitled "Third of W.A.C. Applicants Fail to Pass Physical Test" from Los Angeles Times, Saturday, June 30, 1945	2036	1058

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1. Small Chart Listing Diseases	2037	1058a
3. Large Chart Listing Diseases	2038	1058c
4. Photostat of page 20, New York Times, June 30, 1945	2039	1059
5. "Causes of Rejection and Incidence of Defects," Medical Statistics Bulletin No. 2, 1943, Selective Service System	2040	1061
7. 1947 Edition of "How to Get Well and Stay Well"	2082a	1104
8. Letter of Charles S. Rhyne to Oscar R. Ewing, January 28, 1949	2160	1163
9. Letter of J. Donald Kingsley to Charles S. Rhyne, February 11, 1949	2161	1164
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15. Certified copy of Findings of Fact by Robert C. Butz, M. D., and Conclusions by Geo. P. Larrick, December 2, 1948	2259	1216
17. Pennsylvania State College Bulletin, "A Contribution to the Study of Nutritional Status in Rural and Urban Populations," Part I—Resume of Human Nutrition Studies from 1935 to 1941	2267	1225
18. Tear Sheet, "Malnutrition Affects 999 Persons out of 1000"	2328	1249
19. "Physical Examinations of Selective Service Registrants During Wartime," Medical Statistics Bulletin No. 3, 1944, Selective Service System	2329	1250
20. "Physical Examinations of Selective Service Registrants in the Final Months of the War," Medical Statistics Bulletin No. 4, Selective Service System	2470	1391
21. Deposition of Dr. Elmer M. Nelson, April 15, 1949	2576	1495
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PLAINTIFF'S EXHIBIT #1

How to Get Well and Stay Well



IF your health problem is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well.

For Further Information
Contact the Following Distributor

PUBLISHED BY
MYTINGER & CASSELBERRY INC.
WHOLESALE DISTRIBUTORS NUTRILITE PRODUCTS
1724 SANTA FE AVENUE LONG BEACH 13 CALIF

PRINTED IN THE U.S.A.

©

FIRST EDITION
35,000 copies

SECOND EDITION
47,000 copies

THIRD EDITION
20,000 copies

FOURTH EDITION
First printing 20,000 copies

FOREWORD

One of the most difficult accomplishments in writing is to use words, phrases, clauses and sentences in such a way that the reader gets ~~exactly~~ the impressions and understanding the writer is trying to convey.

We have done our best to include only truthful and factual statements in this book. As statements that might be misunderstood or misconstrued are brought to our attention, they are changed. These changes are made monthly, as a new printing of this book comes off the presses every thirty days.

On the other hand a certain obligation also rests with the reader. This requires him to take what is written and do his best to grasp the author's meaning without reading into it ideas and notions not expressed or intended.

Consider, for example, our title -- HOW TO GET WELL AND STAY WELL. From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

Another example: When you read the title of this book do you assume that we are going to show you how to stay well, in spite of everything you do to the contrary? If so, it is also a wrong conclusion. You can follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet, such as proteins or carbohydrates.

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. We have done our best to be strictly truthful, and we simply ask you not to read into our words any ideas or meanings that are not there.

ARE YOU A VICTIM?

ARE YOU SUFFERING FROM HIDDEN HUNGER?

ARE YOU SLOWLY STARVING TO DEATH?

"Preposterous," you say. "I'm an American citizen. I'm not a war casualty living on a sub-standard ration, nor a victim of famine in China. I'm an American citizen, and I live in the best-fed nation in the world!"

Our message is important to you for the very reason that you do live in the United States, and because you do eat our modern American diet! Why? Just look around you at the members of your family, at your neighbors, friends and relatives -- at yourself. Can you find even three or four who are absolutely and completely well? Are you enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who should be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely.

Now, having thought about yourself and the members of your family, you probably feel that although some of the members of the family may be in poor health the rest are in good health.

So it might be interesting to check yourself, relatives and friends against the following requirements for health:

First -- appearance. The healthy person is good looking. His features may be irregular and far from the usual classic model, nevertheless the inner condition of health shows in a good complexion and clear skin (even for the teen agers), in sparkling eyes, a ready smile and a general air of alertness and life.

Second -- odors. The healthy person smells good. Most of the really unpleasant human odors come from a sick body.

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Third -- energy. The healthy person is energetic and active. Lazy people are usually sick people. The healthy man or woman carries on his customary daily activities without fatigue. Should he be a little tired at the end of the day, the fatigue passes away by the time he has finished dinner, and no artificial stimulant or relaxer is needed. At the end of his regular day's work, the healthy person is soon ready for an active evening, carrying on his hobbies or social life. At bed time he is comfortably sleepy. He falls asleep at once, and enjoys a good night's sleep, without interruption from his body, and with no, or almost no, dreams. The healthy person awakens in the morning, eager for another active and interesting day. And during the day or evening, at any time, the healthy person is physically ready and able to put on a comfortable pair of walking shoes, and take a long hike, with pleasure.

Fourth -- feelings. The healthy individual feels good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

Fifth -- happiness. The healthy person is happy. He is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties, enables him to earn a satisfactory living. Being healthy, he is not easily upset or disturbed. He has a good disposition. The healthy individual, whether child or adult, is easy to live with and he has fewer social problems.

Now -- what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?

WHAT GOOD HEALTH MEANS TO YOUR BODY

Having seen what good health means to you, let's see what good health means to your body.

All your senses -- sight, taste, touch, hearing, and sense of smell operate in your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

Your heart is, to put it mildly, one of your most useful organs. While the body is resting it pumps approximately one and one-half gallons of blood through your arteries and veins every minute. When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

Glands are nice to have, too, in good working order. Some endocrinologists say that our glands determine our personalities. Certainly it is true that when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

Teeth, also, are useful. Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody wants to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

Here is an extract from a clipping in the New York Times, printed June 29, 1945. "The record of 33 per cent rejections for women (applying for admission in the WACS) indicates an even more serious health situation

for women than the 40 per cent rejection rate does for men," said Dorothy La Salle, in charge of the girls. "It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.," she said. "I am sure that if we could have a complete cross-section of the women between the ages of 20 and 50, a much higher rejection rate would be found."

That's interesting, isn't it? It means that you can think you don't need additional amounts of the protective health factors -- and yet be wrong.

A survey made by a large eastern college shows that out of 2511 people studied in Pennsylvania, 2509 lacked the proper nutrition. Only 2 persons out of 2,511 were receiving the vitamins, minerals and proteins they needed! Further, this same survey shows that, in all communities studied, regardless of economic status, the average diets of the children were far below the required daily intake levels recommended by the National Research council.

Along these lines is an interesting article in the American Magazine for October, 1947, titled "We Feed Our Hogs Better Than Our Children," in which it is pointed out that one-third of the population actually suffers from hunger -- from lack of nutrition -- and that we are much farther advanced in animal nutrition than we are in the science of human nutrition.

Here are some more facts --

790.

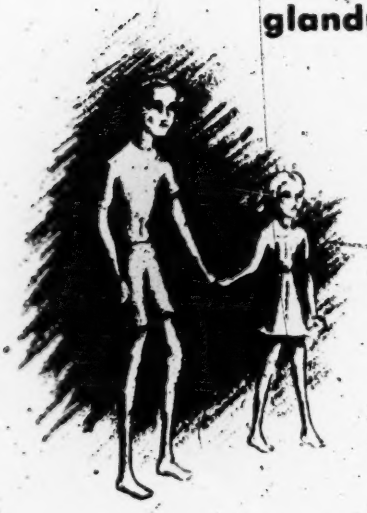
22 MILLION Children

NEED CORRECTIVE TREATMENT — U.S. CHILDCLINIC

10 MILLION
have bad teeth

6 MILLION
are suffering from a glandular disturbance





4 MILLION
are improperly nourished in other ways

1 MILLION
have tuberculosis

1 MILLION
have spinal curvatures

WHAT'S WRONG?

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature -- and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

In the First World War, we rejected 20 to 25 per cent of the men and women eligible for service. Twenty-five years later, in the Second World War, we rejected about 32 per cent -- considerably more. Fifty-two and one half per cent of those called up for service had some disability.

And remember, your 4-F was, in almost every case, a 4-F when he was eight years old -- not suddenly when he was eighteen or twenty-eight. This means that if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

SOME OBVIOUS CONCLUSIONS

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost <u>everyone</u> is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And <u>it hurts</u>!

Obviously it is better to <u>keep</u> your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this -- let us tell you a story.

The Story of a REMARKABLE DISCOVERY



植物的生命就是人類的生命

Nearly Thirty Years Ago,

CARL REHNBORG, a young man of Swedish descent, majored in biochemistry in an eastern university, and in time became associated with one of the largest manufacturers of American canned milk. He was selected by this company as their representative in China -- to introduce this product to the mothers of Chinese babies. But he soon learned that this was a very difficult assignment.

He tried to convince these mothers that his company's famous product would make their babies fat and well, but everywhere he turned he came up against the stone wall of Chinese indifference. The Chinese had never used dairy products -- babies had always been nursed.

Finally, although he was not a medical man, he decided to establish a demonstration clinic. He went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. Here desperate mothers, frantic to the point where they were willing to grasp at any promise of hope for their starving, ailing infants, placed them in his care.

Mr. Rehnborg's belief in his company's product was genuine. Yet weeks of feeding one of the most highly advertised and recommended American canned milk products to these sick Chinese babies brought disappointing results. The milk was being carefully formulated, but apparently milk was not the whole answer.

Having specialized in the chemistry of foods, and having taken part in some of the early vitamin research experiments, he was convinced that the vitamins, the various minerals, and certain other essential diet factors as yet unidentified, were present in many raw foods. But apparently they were absent or deficient in most cooked foods. It was not even certain that cow's milk contained the best concentrations of all of them -- at least for human infants.

He believed these essential food factors were most highly concentrated in green plants, from which the milk-givers and all other animals finally secured them. The therapeutic food value of green growing plants had been further indicated to many observers by the fact that even the meat-eaters among the animals, including man's own dogs and cats, almost invariably exhibited a tendency to eat grass as a conditioner, especially when ill.

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants -- scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

Almost at once some of his little charges began to show improvement. Some of the babies in the clinic, by now expanded to several times its original size, began to take on weight at a more normal rate. They became more active and commenced to throw off the visible symptoms of the various illnesses with which they had been afflicted.

But not all of them. Some still failed to show the hoped-for reaction.

But the man who held their future life and health in his hands was convinced that now he was on the right track. He suspected that the chemically worn-out soil of China was deficient, so that plants grown in it could not supply the consumer with all the required minerals, and probably did not even contain the normal quantities of vitamins and other essential organic substances they should produce. So he subjected samples of the soil to chemical analysis. When this theory was verified by the test tube he leased ground of his own, and plowed the minerals, which were lacking, into the soil. Thus he grew his own green plants, containing a full complement of essential food factors as he recognized them.

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected!

The visible results from having fed these Chinese babies on a diet rich in all the vitamins and minerals then recognized as essential, (plus other food factors which he assumed were equally essential to health because

they were normal components of normal plants, although their essential character was not then proved), convinced him that he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

Therefore, he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the nonessential cellulose and other parts of the plants, so that much value could be concentrated in small volume, and then tried the supplement formula on adults.

It is well-known that life in the Orient has always had a deteriorating effect on members of the white race. The big companies which sent men to China to represent them never kept these representatives on the job for more than about three years at a time. They were then given six months furloughs to return to their own countries. The reason for this was that by the end of two or three years, most Americans and other "foreigners" had reached a run-down condition which only a long vacation in their native country could mend. The climate in China was presumed to be the basic cause of the foreigners' bad health! Having discovered the vitamin and mineral deficiency in Chinese-grown food, our chemist reasoned that this deficiency, rather than climate, probably was the cause of much of the ill health among Americans in the Orient.

True enough, Americans fed on his specially prepared supplement were better able to withstand the deteriorating effects of life in China. These men returned to the United States in as good health as when they left.

When Mr. Rehnborg returned to the United States in 1927, he began a six year period of intensive study and experimentation, to improve his food supplement. At last, in 1933, when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it, on a small scale, in Balboa, California. This all led to further development and improvement and the creation of the present amazing food supplement, designed to supply the elements lacking in the standard American diet.

"All very interesting," you say, "But what does this have to do with me? I still think I eat a good diet. I certainly pay enough for it!"

HERE IS AN EASY CHECK ON YOUR DIET

What are some of the mistakes we make in feeding ourselves, and in feeding our families?

You probably eat white flour products, and the members of your family eat white flour products -- white bread, cake, pie, doughnuts, macaroni, spaghetti, soda crackers and refined breakfast foods. But you wouldn't feed your race horse or other prize animals on grain from which various important items had been removed!

You eat your food, grown on any old kind of soil, and you likely give it little thought. But if you owned valuable race horses, you would want your hay shipped from the blue grass region of Kentucky, or grown on re-mineralized soil.

Now why do we do our best to put the proper materials in our automobiles, and why do we make a scientific study of the feeding of prize animals and stock, while at the same time we feed our families, our children, and ourselves in a thoughtless and haphazard manner, and then wonder why our children, our wives and husbands, and we ourselves become ill?

Here is the answer. We have simply failed to carry over to our own feeding, the scientific knowledge we have learned in the raising of stock, the developing of prize animals, as well as in laboratory nutritional experiments with rats and other laboratory animals. And we have not learned that the body operates like an automobile inasmuch as neither will run efficiently if we put defective materials into them. The result is that almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

Why have we failed to extend our rational feeding to include ourselves and our families? One reason is that we become accustomed to certain food, we like the taste of it, and we don't want to change. Another reason is that most people simply don't know how to get the foods which contain the essential elements even if they are willing to change. Another reason is that to get the necessary elements into our daily diet requires a little effort, and it costs some money, whereas to drift along is easier and cheaper now, even though eventually there may be pain, incapacity, doctors' bills, hospitalization, or death.

So the purpose of this book -- and the objective of the person who lent you this book -- is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, YOU MUST PUT INTO YOUR BODY ALL THE FOOD FACTORS REQUIRED BY IT.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine -- why some people get sick so easily, and get well with such difficulty.

We give you the true and correct answer, and it makes sense to anyone who has owned an automobile or who has raised stock, for automobiles which are repaired with new parts as fast as they begin to wear, run forever, and stock which receive a full supply of vital food substances are healthy animals. Albert Howard, for instance, in his book, THE SOIL AND HEALTH, tells about oxen properly and scientifically fed, resisting the hoof and mouth disease of oxen in adjoining fields, even when their faces were licked by the afflicted animals, reaching through the fence!

You wouldn't feed a $50,000 race horse on third grade grain grown in sections of the United States where the soil is known to be particularly deficient in minerals. You wouldn't feed a $5,000 prize-winning dog on table scraps. You wouldn't feed your chinchillas or your foxes, which you are raising for their fur, on just any old kind of food picked up here and there at bargain prices.

Doesn't it seem reasonable to give a little thought to what you put into the bodies of your wife or husband -- into the bodies of your children -- into your own body?

And remember your reward -- a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them.

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THE FORMULA OF TOMORROW

for the World of today



Remember this... THE AMERICAN DIET IS DEFICIENT IN PROTECTIVE FOOD FACTORS

In the foregoing illustration we find noted the six fundamentals of health, namely: sunshine, fresh air, pure water, proper exercise, sufficient sleep, and protective foods. Pure water, fresh air and sunshine we don't worry about in most parts of the United States. We have an abundance of all of them. If we lived in many other parts of the globe, the water question would be something to worry about. But we take those things for granted in our own communities. The need for proper exercise and sufficient sleep is known to every intelligent person.

Now consider the protective food factors -- those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, nutrilites. That's a technical word you won't find in your dictionary, but it means all the little food factors -- not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

Formerly we thought that all we had to worry about was the bulk food we could see on our plates -- the fats, carbohydrates, and proteins. Now we are learning about the vitamins and other nutrilites, and the history of their discovery is interesting.

There was a Swiss bio-chemist, whose name was Lunin, who was intrigued by the consideration that there would come a time when the growing population of the world would be so great that the ground available for growing foods would be insufficient to support them, and he conceived the idea that it might be possible to feed human beings, as it was possible to feed animals, on substances which were not commonly recognized as a food. To determine that this was a sound theory, he fed experimental animals on synthetic diets made up of the substances that science then thought were contained in foods. These experimental animals were fed pure carbohydrate in the form of corn starch, pure refined fats, and protein secured from milk and leached with ether until nothing but protein was left. To this mixture he added all the minerals that analysis showed were in the body, and then fed this diet to animals. In theory they should have been able to maintain life, but they all very promptly died. And successive experiments of similar character all failed, unless small quantities of natural green materials or milk were added to the diets. Lunin concluded that there were substances not yet discovered in foods which were essential to life.

By some strange indifference there was no further recorded investigation along those lines for another twenty-five or thirty years. At that time there was a Dutch physician in charge of a prison hospital in Java. The patients in his hospital were mostly suffering from an oriental disease called beriberi, which is a Malay slang word meaning "no can do," because

the men who have it are incapacitated. They are weak, suffer much pain and finally die.

The Dutch physician, Doctor Eikjman, noticed also that the pigeons around the prison yard seemed to have a similar disease. Their heads were drawn back and their wings and legs were partially paralyzed and they died. He also noticed that what they ate was chiefly the white grains of rice that fell from the chow bowls of the prisoners as they ate their meals. Because it was polished rice, as an experiment he fed the birds unpolished rice -- and they recovered. He then fed unpolished rice to the men, and they also recovered. But, Eikjman, being a physician, not a nutritionist, and dealing with a totally new effect, concluded that there was a toxic substance in the white grain of rice for which the antitoxin was in the rice hulls.

About the same time a Japanese physician was trying to stamp out the same disease in the Japanese Navy. He knew that the staple diet of the Navy men was white rice, and he concluded that the reason a diet composed chiefly of white rice causes beriberi was because white rice did not contain sufficient protein. So, picking a training ship, he arranged that the diet of the cadets on the training ship throughout the cruise should include beans, rather than rice, as a staple food. On the trip there was no beriberi whatever, and he felt this confirmed his theory that the reason for the beriberi was the lack of protein.

An American bio-chemist, Dr. Williams, who was then in the Philippines following these conclusions, advanced the completely new idea that the reason for the sickness was not something the sufferer had eaten, but was because there were factors, normally present in natural foods, the lack of which caused the disease. In other words, the sickness resulted from something not eaten. All that is known of these factors, which we now call vitamins, or nutrilites, has been discovered in the past forty years.

Very early in this investigation it was discovered that one of the principles involved was contained in butter fat and dissolved in fats generally. It was called "fat soluble principle A." Another principle, the lack of which was responsible for beriberi, was found to be water soluble and was called "water soluble principle B." Sometime around 1912 a scientist named Funk believed from his investigations that he had proved that the substances in question were amines; so, he proposed the name vitamines, or amines vital to (vita) life -- vita-amines. Later it was discovered that they were not amines and the final "e" was dropped and they were called vitamins. Fat soluble principle A became Vitamin A. Water soluble principle B became Vitamin B. Presently -- about 1919 -- we knew of Vitamin C and Vitamin D. Later it was discovered that Vitamin B was not simple, but composed of at least two factors, and when this separation had been established, it was discovered that the second of these factors was extremely complex. It is

now known to comprise not less than fourteen distinct values, and for convenience it is called the "B-complex."

From 1920 until 1930 the knowledge of the vitamin factors grew until there were about ten known. In the next ten years perhaps thirty more were discovered or postulated, and most of the first ten were made in crystalline form.

The idea that vitamins have specific action -- that A is good for this and B good for that -- is natural but incorrect. It started with the first discoveries that C was more or less specific for scurvy, B for beriberi, and D for rickets, and the general medical idea that diseases have antidotes.

Actually, each cell of the body needs most of the factors, both the vitamins and the minerals, and their action is general, rather than specific.

The deficiency diseases for the most part are secondary effects, like having your lawn dry out and die because your water supply failed, or like being stuck ten miles from any habitation because you ran out of gas. Vitamin B_1, for example, enables the body to dispose of the waste products produced in burning fuels in the body. If it is deficient, the "clinkers" accumulate, they have a toxic effect on the cortex of nerve fibers, and pain, paralysis, and beriberi result.

In considering the following statements about the effects of individual vitamins, it should be remembered that these are only partial statements -- just as saying that an automobile is good for taking the family on a picnic is only a partial statement of what can be done with a car.

Also, we must realize that the activities of these few vitamins are no more spectacular nor more important in the body chemistry than are the activities of all the other vitamins not so well known, all the other nutrilites, or all the minerals, the amino acids, carbohydrates and fats. On the contrary, Dr. Quigley in his NATIONAL MALNUTRITION, says, "A millionth of a miligram of biotin may be as important in the daily diet as three miligrams of thiamin." Thiamin is Vitamin B_1.

So when you read about the importance of these few vitamins we list below, remember it is just as though we told you how important it is to put water in the battery of your car. You would agree, but at the same time you would be thinking, "Sure, but it is also important that I put in oil, gas, water in the radiator, and keep the tires inflated." So when you read about the importance of these few vitamins, say to yourself, "Certainly, these well-known vitamins listed here are important, but I must also remember to put into my body an ample supply of all food factors. We simply talk about these micro-food factors here because they are the better known nutrilites, and because most people eat a diet deficient in nutrilites."

In reading about these better known vitamins, we should warn you that you may run into a few technical terms. This is because this description is supplied by Mr. Rehnborg, and whenever he explains things to us, he always goes technical. So if you come upon a tongue-twister like "cocarboxylase," don't be surprised. Actually there aren't many tough words, and it is easy reading between them. But if you aren't interested at all in the behavior of these vitamins in the body chemistry, just skip over to page 19, to WHAT DOCTORS SAY ABOUT VITAMINS.

Vitamin A. Vitamin A raises the body's resistance to infections, especially infections of the respiratory tract, aids in correcting night blindness, and promotes growth in children. It preserves the integrity of the epithelial linings of the body -- the linings of the eye sockets, the mucous membranes that line the body cavities (nose, mouth, lungs, stomach, intestines, etc.), and the linings of glandular cavities. If there is too little A, these membranes "keratinize" -- that is, become scaly and horny instead of smooth and moist with their own secretions, and, among other things, they lose their capacity for normal function and they become more subject to invasions of bacteria. The outside skin tends also to become scaly and the eyes develop a conjunctivitis. The production of visual purple in the eyes is affected, and one is less able to see in dim light.

Vitamin A has an interesting link-up with Vitamin E in fertility, partly due to the keratinization of the epithelial linings of the sexual glands when it is deficient, but also in other ways connected with the development of cells, because it is an essential part of the nuclei of all cells.

Vitamin B_1. Vitamin B_1 is a typical example of the general fact that the action of the vitamins in the body is enzymatic -- that is, they form parts of enzyme systems which are to the chemical reactions of the body what a catalyst is to a reaction in commercial processes; for example, such elements as nickel and platinum, which cause chemical reactions to occur more readily and rapidly, without themselves being concerned in the reaction or used up in the reaction.

In a general sort of way, a vitamin-enzyme causes a reaction to occur, and the reaction in turn is part of the sequence by which another enzyme system is formed, which produces another reaction in the chain, which sets off the formation of another enzyme system, which produces yet another reaction, and so on forever. In the end the vitamin is still there, substantially unchanged, and is eventually excreted by way of the kidneys, so that the vitamins have to flow through the body in a constant stream.

When absorbed into the body, Vitamin B_1 and a phosphate radicle and a protein molecule unite to form a sort of super-molecule, which is an enzyme (in this case called cocarboxylase). Meanwhile sugar which is eaten is hydrolyzed in the stomach (by the action of other enzymes which

were added to it in the mouth as it was eaten) into "simple" sugar, glucose. This is absorbed and immediately converted in the liver to glycogen, or animal starch, and stored for use.

When insulin and thyroxin call out these stores for use as energy, the liver releases some reconverted glucose, the Vitamin B_1 enzyme causes it to be converted into glucose phosphate, and as such it is burned in the muscles for energy and the muscles move, while the released heat maintains the temperature of the body. The product of this burning is in part lactic acid, which the body may reconvert into glycogen and again store in the liver, but which is mostly broken down (degraded again with the help of Vitamin B_1) into its simpler constituents, ending after several steps in carbon dioxide and water, which the body gets rid of -- the carbon dioxide through the lungs and the water through the kidneys.

The sugar was originally made in a plant from carbon dioxide and water by the action of certain wave-lengths of light in the presence of the enzyme or catalyst, chlorophyll. The energy used in this conversion was stored as chemical energy in the sugar. Burning it in the muscles released the energy, and with the discarding of the carbon dioxide and water by the body we are back where we started, and the discarded carbon dioxide and water may be used by another plant to make sugar all over again. All the body has used is the energy of sunlight stored in the sugar molecule.

If there is too little Vitamin B_1, this process of degrading and getting rid of the waste is interfered with, and some of the intermediate products formed in the process of degradation, notably such compounds as methyl glyoxal and pyruvic acid, accumulate in the blood and body fluids and are poisonous in excess to many tissues, but particularly to the cortex (gray active surface layer) of the nerve system, brain and nerves. The ability of these tissues to function is lowered, pain and paralysis result, and we say the individual has neuritis, shingles, beriberi, sprue or celiac disease. If the situation is not corrected, in time the individual dies, having suffered considerable pain in the process.

Vitamin B_2. The chief function of Vitamin B_2 seems to be in the formation of what are called "oxidation-reduction enzymes," by which it has to do with cell respiration. A cell picks up oxygen from the hemoglobin in the blood stream, but what actually happens is that the Vitamin B_2 enzyme associated with the cell does the picking up. It is like the mail hook at the station that grabs the mail bag from the train as it speeds past.

Vitamin C. Vitamin C is, among other things, the "cement" which holds the cells of organs and tissues together as a functioning group. When in scurvy there are hemorrhages in the capillaries under the skin, for example, it is because the capillary walls have lost this integration and do not hold the blood in its course, but allow it to escape among the surrounding cells.

The capillary wall is not a tube but merely a passage between cells from the point where the tiniest artery ends to the point where the smallest vein begins, so the weakness of the walls is a sort of flabbiness of the cells of the tissue being fed by the flowing blood. Another evidence of this flabbiness is that when you press down on the flesh of a sufferer from scurvy and then remove your hand, the depression remains and the flesh does not show any elasticity in springing back into place as healthy flesh does.

Vitamin C also appears to be the chief defense of the body against infections. A person with a fever, for example, uses from three to ten times as much of the vitamin as a person without a fever. This is why lemon juice is a favored drink for a fever patient. It has been known for generations that a fever patient craves acid fruits to drink, but lemon juice is not the best answer. Orange juice or grapefruit juice or tomatoes or Vitamin C tablets would be better. The patient can't drink enough lemon juice to get enough vitamins for his requirements.

Vitamin D. Vitamin D has to do with the metabolism (the chemical changes by which a living organism utilizes nutrients) of minerals. When it is effective in rickets it is because it enables the body to utilize calcium and phosphorus, but its effects also extend to all other minerals. The exact mechanism by which Vitamin D does this is still obscure.

Vitamin E. Vitamin E is called the "fertility vitamin." This is an accurate if indirect characterization, just as it is to call water a "thirst quencher." In some way not known, Vitamin E is essential to the maturation or ripening of new cells, and it therefore has its chief function where many new cells are ripening -- in a woman, the foetus of a new individual; in a man, the tubules of the testes where spermatozoa are forming.

If there is a deficiency of the vitamin, the woman is sterile because the foetus dies and is aborted, or is aborted before it has died because the placenta is developing inadequately. This "sterility" is not permanent.

In a man, the mechanism by which the sperms evolve from the protean cells of the tubules in the testes is interfered with, and they are incomplete and inactive. If it is of long duration, the deficiency for Vitamin E will result in permanent sterility.

Probably new cells form in muscle tissues. At any rate, in a Vitamin E deficiency there is a progressive paralysis of muscle tissues, especially, as might be expected, in a growing child, but also in adults.

Finally, Vitamin E seems to play some vital part in proper function of the brain cells, because in even partial Vitamin E deficiency there is a marked deterioration of mental vigor and the ability to think clearly or for long periods.

Vitamin B_6 has something to do with the integrity of cartilages.

Pantothenic Acid in some way is concerned in the metabolism of fats.

Niacin deficiency produces pellagra, with nervous, mental, muscular, skin, and digestive upsets, some of which may be partly due to other lacks.

This is a very partial list of "vitamin functions," and drives home the first statement, that vitamins are not specific but general in their action, and the "deficiency effects" which are listed are secondary and not primary effects.

WHAT DOCTORS SAY ABOUT VITAMINS

You will find many doctors who "prescribe" vitamins. You will find many doctors who recommend the use of various vitamin preparations you can buy in drug stores. You will also find doctors who recommend NUTRILITE.

But there are still many doctors who are antagonistic to the whole idea of health developed in a non-medical manner. To understand this attitude we need a little orientation in the field.

First, we must realize that many illnesses are caused by something foreign getting into the body (germs and poisons, for example) and that in these cases a recovery comes as a result of the use of something that will either throw out the foreign matter, counteract it, or accustom the body to it. The material used to overcome or cast out the foreign elements is usually called a "medicine."

That is the "medical" approach. It is used by medical doctors, and since much illness lies in this field, medical doctors are important and necessary.

Until recently it was thought that all, or almost all diseases were caused in this way, by the entrance into the body of some toxic matter or by germs. In fact, we have been accustomed to this explanation of disease for so long that it is only with great difficulty that we are able to think about any other possibility. For example, you remember that Eikjman, the Dutch physician studying the prisoners afflicted with beriberi, concluded that the white rice contained a toxic substance not contained in the unpolished rice. Had we been in his place, it is equally unlikely that we would have guessed that the prisoners and the pigeons became ill because of a lack of a micro-food factor.

But, as we have already learned, in the last forty years new discoveries have been made -- the vitamins and various other nutrilites. The old facts, mentioned above, are still the same, but new and important facts have been

added. The new facts are that many physical ailments and diseases are not the result of the penetration of the body by something foreign, but THE FAILURE TO PUT INTO THE BODY needed factors and materials, resulting in nutritional deficiencies.

In the mechanical world, it is the difference between a breakdown in your automobile occurring because dirt got into your carburetor, and one occurring because you failed to put in a new set of wrist pins when the old ones wore out.

With your pet dog it is the difference between its death due to poison administered by a neighbor, and failure on your part to feed the dog enough of the right kind of building material and regulating items.

With yourself, in the same way, it is the difference between fighting a particular disease with medicine to throw out the intruders, or forgetting all about the symptoms and their medical names, and putting back into the body the materials the body needs for health. In this way, you are not fighting any foreign element in the body, or trying to cure anything. You are adjusting your diet so your body can restore itself to normal. If, as a result, you find yourself without some deficiency disease you suffered with previously, that is very gratifying, but only a secondary result. The rebuilding of your whole body through the provision of necessary materials, is your primary purpose.

What complicates the whole picture is the fact that the two viewpoints (medical versus health through diet) are, in many cases, interrelated. A house may burn down, for example, because someone threw a lighted match in the window. And, you can also say in the same case that the devastating fire was due to the fact that the water supply was shut off.

In the same way, you can say the man's illness is due to the germs which entered his body. You can also say it is due to failure to feed his body properly, since a healthy body tends to resist germ invasions.

Actually, then, when a person has an ache or pain, a weakness, wasting, unsatisfactory feeling, a lesion, a symptom, or loss of physical capacity--in short, when he is ill, there are three courses of action open to him.

(1) He can reason that since his body needs all necessary building and regulating materials anyway, whether ill or well, he must make sure his body is getting all these essential items for proper rebuilding and regulating, and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs.

(2) If his physical ailment seems to be acute, he can IMMEDIATELY UPON BEGINNING HIS BODY BUILDING THROUGH FOOD AND THE MICRO-FOOD FACTORS, consult a physician to determine whether or not his condition

might be due to poisons in his system or to germ invasion. If so, WHILE HE CONTINUES TO BUILD HIS BODY THROUGH FOOD AND THE NUTRILITES, he can have medical treatment.

(3) If his belief or his ailment indicates to him the need for spiritual, psychological, psychiatric or religious assistance, he can WHILE HE CONTINUES TO SUPPLY HIS BODY WITH ALL NECESSARY BUILDING AND REGULATING MATERIAL, have whatever psychological, mental or religious assistance he wishes.

This procedure should be acceptable to all concerned. First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ailment has likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse. Second, if the ailment is acute, in addition to the physical rebuilding through food and nutrilites, medical aid is solicited. Should the trouble prove to be of such a nature as to require medicine, the presence in the patient's body of building and regulating materials can only aid the medical treatment. Any physician who is interested in getting his patient well (and naturally the physician is interested in this) will want his patient as well nourished as possible, and he would no more think of objecting to a good diet supplement for his patient than he would think of putting all his patients on a 30 day fast. Third, no matter how well nourished the body may be, we all need to think correctly, and certainly, no practitioner, psychologist, psychiatrist or mental healer could object to a person being well nourished while the process of right thinking is developed.

And so when we supply our bodies with all the necessary building and regulating materials we have everything to gain and nothing to lose. If we get well in step 1 (use of full nutritional supply) we save a lot of money otherwise spent for examinations and treatment. In step 2, the medical treatment required is more effective in the well fed body. And in step 3, any mental reeducation is facilitated when the brain and nervous system are properly nourished.

So we find -- and this is very important -- you do not have to make a far reaching and momentous decision between diet and drugs, between physical methods and mental methods or between nutritional science and Christian Science. To the extent that you need them or want them, you can have them all. As a matter of fact, "mens sana in corpore sano" is a good goal. We all need a sound mind in a sound body. And we need a sound body without any foreign elements. If you have germs -- get rid of them. If there are poisons in your body -- get rid of them. If you are afflicted with wrong thoughts -- get rid of them. But at the same time, down underneath, you need a body which is constantly being supplied with its vital building and regulating materials.

* * * * * * * *

Now we have made a little study of the history of vitamins, we have seen what happens when certain of the well-known vitamins are omitted from our diet, we know something of the attitude of the medical doctors toward this subject and we know just how to proceed when we experience any physical or mental ailmen' of any kind.

In concluding this section we should point out that no one knows how many vitamins there are. There may even be twice as many as are known, or assumed to exist. But they have one character in common -- they all originate in plant material. And the nutrilites, you remember, are ALL the little vital food factors, includir.g the familiar vitamins. So if you want to be really stylish and up-to-date, you should talk about the nutrilites, and not just the vitamins. And if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but all the nutrilites.

Now, be sure to remember this: the American diet is deficient in nutrilites, the protective food factors. Why is this true? Why are we sick and ailing in this land of plenty? Why don't we get all the vitamins and minerals we need?



Enemies of HEALTH

- DEPLETED SOIL
- IMPROPER COOKING
- PROCESSING; STORAGE & SHIPPING DELAYS

Resulting in : devitalized, demineralized and denatured foods!

★ An Ex-Secretary of Agriculture says:

"50% of the people in the United States do not get enough in the way of protective foods (containing vitamins and minerals) to enable them to enjoy full vigor and health."

★ Lela E. Booher, Chief of Foods & Nutrition Div., U. S. Bureau of Home Economics informs us:

"The chief fault of many American diets is that they provide too little of the essential minerals and vitamins.

★ English Academy of Medicine, LANCET, states:

"99% of common illnesses are due to or are superimposed on vitamin deficiencies."

OUR ARMED FORCES KNOW • They supplement the diets of our fighting men with vitamin concentrates.

On the previous page you just read the answer. You are probably not getting the elements you need, because depleted soil, improper cooking, processing, storage and shipping delays produce devitalized, demineralized and denatured food.

As to storage and shipping, consider an orange. An orange stored thirty days loses some of its vitamin value. Cold storage preserves food, but not one hundred per cent. Therefore, your friend and my friend in Chicago or New York gets his fruits and vegetables with a lowered value. Shippers are planning, in the future, to stop shipping fresh fruits and vegetables in railroad cars. Instead, we will put them on a plane tonight and twelve hours later they will be in New York.

As a matter of fact, possibly you saw that clipping in the Los Angeles Daily News about the 6th of July, 1945. An American Airlines C-39 giant four-motored airfreighter carried fruit and vegetables from Salinas, the "Salad Bowl," to Cleveland. The plane loaded the produce, picked early Wednesday morning, left at 9 A.M., and the fruits and vegetables were being carried home from the Cleveland markets the next morning. Contrast that twenty-four hours with twelve times that and you will know what it means to have fresh fruit in Cleveland.

Now consider the matter of processing. The beriberi which afflicts the Orientals, who eat a lot of polished rice, is the result of processing. In this country we eat polished rice, and also white flour. Do you know why they give us white flour and why it is so hard to get whole wheat flour, and good whole wheat bread? Because millers discovered that white flour would store well without getting rancid, and that weevils would not get into the processed flour. Either the weevils had more sense, or they didn't find enough nourishment in the white flour. Anyway, that's the reason for white flour. And just as the weevils can't live on it, we can't either. It's what we don't eat that makes us sick.

Sugar is another item which is highly processed. The negroes of the tropics who chew the sugar cane get sugar and minerals and vitamins, but we who eat the refined sugar from the cane, do not. And further, the white sugar actually draws on the body's stores of certain nutrilites necessary for the chemical processes as the sugar is converted into energy, so that white sugar not only doesn't give us the nutrilites we need, but it takes from us some that we already have. A double loss.

Most of us like meat, potatoes and gravy. We are not good vegetable eaters, but even if we were, would we get the nourishment we need? In the preparation of cabbage, as an illustration, you put a nice green head of cabbage in the pot and it comes out something between tan and brown. The chlorophyll is gone as well as the vitamins and minerals which are quite soluble in the cooking water. Even if the cabbage was as good as it should

be to start with, which is not always true under modern cultivation, storage, and transportation, it certainly is not as good as it should be when it is finally cooked and served. The drain pipe gets most of the good food and you and I get what is left.

The greatest enemy of all is depleted soil. We have known that for a hundred years, but we have done very little about it. 'Way back in the days of Thomas Jefferson it was recognized that the soil in Virginia was being depleted, because the quality of the tobacco crop was falling off. So Thomas Jefferson bought most of the rest of the United States for some ten million dollars: He had to have more rich, fertile soil to grow good tobacco. Now, today, the government, both state and national, is trying to sell the farmer the idea of remineralizing the soil.

As time goes on we shall see more and more remineralization of the soil, but now it is being rapidly demineralized. You have often passed some field, I'm sure, where vegetables are grown. You see them take off one yield after another, with just enough remineralization and fertilization to grow a good looking crop. The farmer doesn't care anything about the mineral content of his plants -- just their appearance and taste, for you buy according to looks and taste. So the food grown in that soil can't have as much food value as it should. It is impossible to take out, over and over, putting very little back, and have good food.

On the other hand, here is an example of what happens when the soil is properly mineralized with respect to only one of the essential elements. In Deaf Smith County, Texas, a dentist moved in to start his practice. But business was poor, and when he investigated, he found that practically nobody had any decayed teeth. The residents of Deaf Smith County didn't need a dentist because fluorine, in addition to other elements, was present in the vegetables and in the drinking water leached through that soil in quantities great enough to produce perfect teeth. So right now, they are starting to import water from Deaf Smith County into other states, in ten thousand gallon lots. But, unfortunately, there isn't enough water in Smith County to go around. Although it is a fine example of the protective value of minerals, it doesn't solve our own health problems.

Why are we having so many common health problems nowadays, whereas a hundred, or two hundred years ago they were not nearly so general?

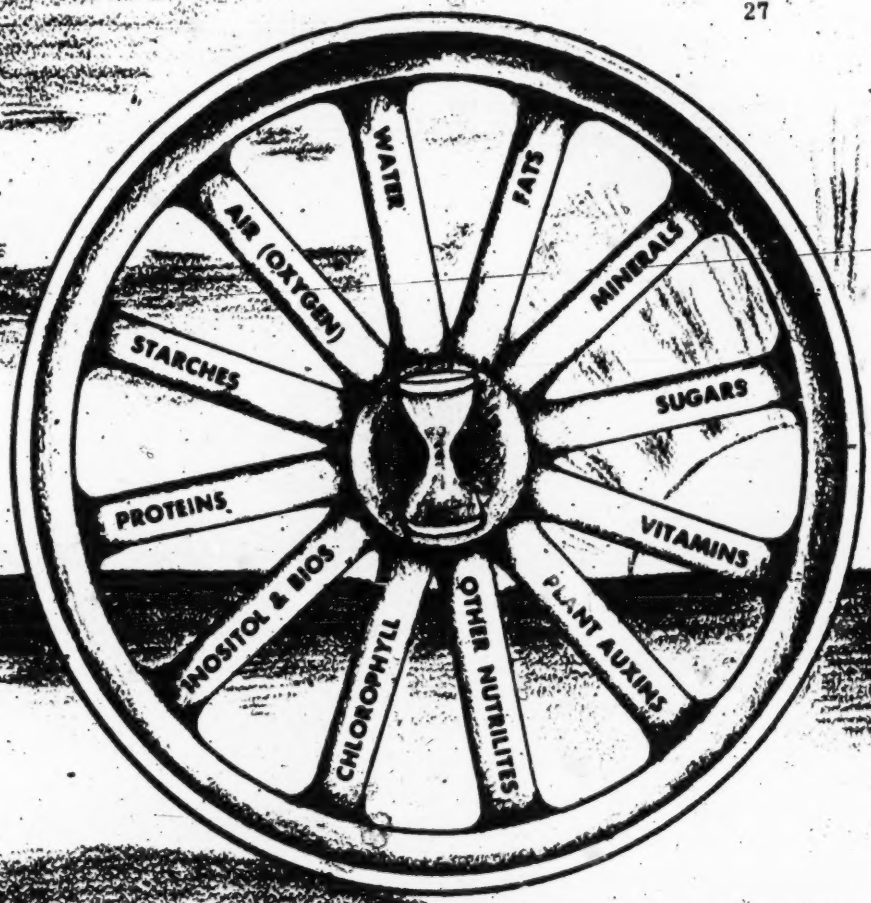
Great-grandpa used to take the grain to the mill and bring back the whole flour for bread and cereals. Today the grain is shipped to the mill where all of the bran and germ is taken from it, then a chemical is used to bleach it. Most bakers use other chemicals to make it rise when making bread and cakes. Result -- you and I do not get what our great-grandparents used to get in the old days.

Then remember too, great-grandma's vegetables were likely grown in virgin or at least good soil, while today much of civilization's soil has been used so often and so intensively that it has become demineralized.

What does all this mean? It means that in order to compensate for the losses caused by refining and processing, storage, canning and cooking, and also due to the lack of minerals in the soil, we eat two and three times as much food as would otherwise be necessary.

This results in overloading our stomachs, overworking our livers and kidneys, and eventually a break-down of one or more of these vital organs. And in addition, we are spending more than we should for food, because we have to eat so much -- and even then our bodies are not properly nourished.

The wheel of life is only as strong as the weakest spoke of which it is composed.



WHEEL OF LIFE

like any wheel designed to bear a burden, is only as strong as the spokes of which it is formed. Should any of its supporting substances be missing or fail, the wheel is weakened and, as time goes on, it may break down unless these vital elements are restored.

The body must have all the proteins, sugars and starches, nutrilites, and minerals which make the spokes strong. Just deny the body any of them and what happens? You have a flat wheel. Deny yourself air and water and you know what will happen; again, a flat wheel.

Your body will do its best to live on any food you give it. This has been demonstrated by the people in the concentration camps. They lived on potato peelings and polished rice. They didn't live well, they lost weight, they lost their teeth, and many of them lost their minds, and a lot of them have flat wheels they can never overcome. Your body, too, develops a flat wheel when your diet does not contain the elements needed.

The flat wheel you develop as the result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's, whereas we should live in good health and vigor, and with full possession of our faculties, to the age of 90 or 100.

But long before the deficiencies show outwardly in the adverse physical conditions with all the medical names, there is the evidence of the deficiency showing itself in changes and upsets in the body chemistry.

Chemical and biological sciences have established the fact of the chemical nature of the life process and that living things of all kinds must be in chemical balance to be normal. Most of the ills and diseases of human beings are unnecessary -- they are the result of chemical starvation of our bodies for substances vitally necessary to life.

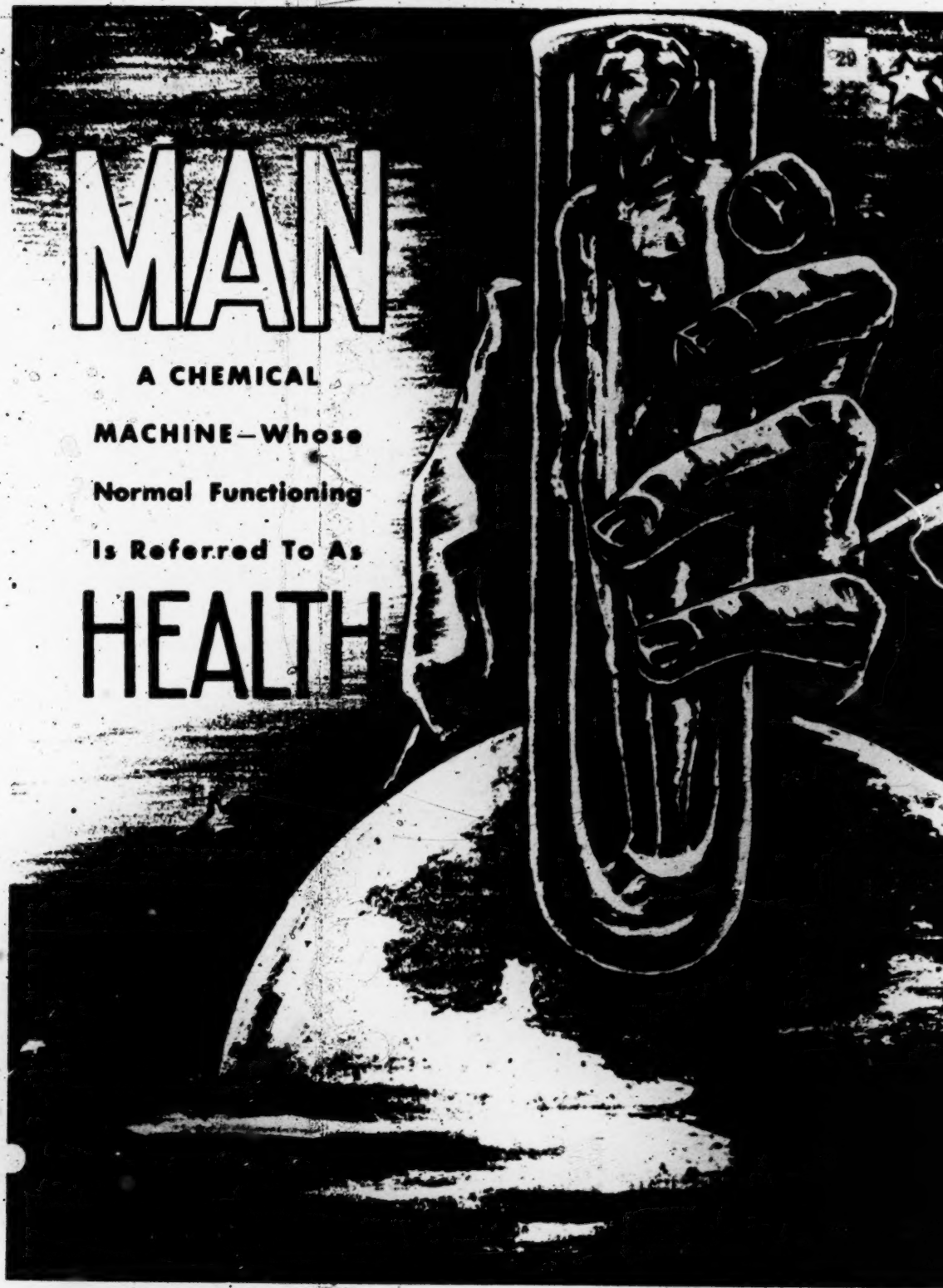
So much of the operation of the body is chemical in nature that Man is often referred to as a chemical machine. How this is possible is partially explained as follows. You can take some cold nitric acid and some cold copper, put the copper in the acid, and soon both the acid and the metal are hot. That is a chemical reaction. And in the same way, when you put cold food into your body, and the body converts it into heat to keep you warm -- that, too, is a chemical reaction. Thousands and thousands of chemical reactions take place in your body every second of every day, and you don't know anything about what is going on.

This is not a fad but the opening of a door to a new way of life and living for all mankind. It has to do with the accessory food factors so small in bulk that although they have always existed in foods they have only recently been recognized.

MAN

A CHEMICAL MACHINE—Whose Normal Functioning Is Referred To As

HEALTH



How simply man could have health if he could be placed in a test tube, where his chemical reactions, metabolism, and general aches and pains could be studied. But while he can't be studied that way, modern nutritional science has been intensively studying him for the past forty years.

There are two words doctors use that often confuse us. One is the word metabolism. "Your metabolism is out of balance," they say, or "Your basal metabolism is way too low." Now this word "metabolism" -- what does it mean? Few people know. But the doctor doesn't use the word to confuse you. It's just his scientific way of expressing himself. He refers to the chemical changes in living cells by which the energy is provided for the vital processes and activities, and by which new material is assimilated to repair the waste. If your basal metabolism is low, it means that this chemical process is not very productive of energy and new material.

Another word the doctor uses is "allergy." He will tell you you are allergic. We heard a doctor say recently that almost everything wrong with us was due to some sort of allergy. He means the body has become so sensitive, that a certain something, otherwise harmless, will cause trouble. One little girl we know is allergic to feathers. When feathers are near her she breaks out in a sort of rash. Some people are allergic to pollens of weeds, or flowers. Some are allergic to cats. A doctor told me recently of a man allergic to sunlight. Allergies seem so popular, it's a wonder someone doesn't say he is allergic to his wife, and claim a divorce.

Now it may be perfectly true that your body is sensitive to certain things, and that you really do have an allergy. But this is the big question -- why is your body so sensitive? It isn't enough to know your allergies, and then try to avoid the irritants. The real need is to get your body so adjusted that you won't be so sensitive -- so you won't have the allergies. And here is what the doctors will likely be saying 25 years from now. "There is something wrong with your body chemistry if you have an allergy, and the allergy can be eliminated by your own body, automatically, if you will just give your body all the material it needs to restore its chemical balance."

Your body is a chemical machine, and always the chemical balance must be maintained. When your body gets out of chemical balance, you are ill. When you get into chemical balance and stay there, you are well. That's health in a nut shell, and that's what we find when we put man in a test tube and study him.

Now -- what keeps our body in chemical balance? In other words, what makes us well, and what keeps us well? Here is the story.

all of the factors

31

REQUIRED *in* HUMAN NUTRITION



come from

PLANT MATERIAL

therefore:

MAN

is dependent upon the

PLANT KINGDOM

for **HEALTH**

1752

Once a man had a little calf. It was a cute little brown calf with a white face. The man took the calf out to his pasture -- one of those ideal pastures in a beautiful valley, so all year round the calf could find plenty of food, and water from the stream.

The man left the calf there, with some salt, and took a trip around the world. He was gone a year. When he returned to his calf he found, as we would naturally expect, that it wasn't a calf any more at all -- it was a cow. It was a great big cow, with horns and hooves and a long tail.

As the man stood there by the fence and gazed at his cow, he began to wonder where all the material came from that wasn't there when he left. What made the horns, and the hair on the tail, and the hard material of the hooves?

Obviously, it all came from the grass, since that is all the calf had to eat, with a few leaves, possibly, which it may have nibbled from a young tree.

Now, believe it or not, where the material came from, to make the cow, is important to all of us, for we too grow up in the same way. We too start as a very small animal, and we finish as adults with hair, teeth, bones, finger nails, inner organs and muscles not possessed at first. (Of course, some of us don't have any hair or any teeth when we're grown up, but that's all part of the story too.) As we grow up the hair and teeth grow -- they have to be made of something. Where does the material come from?

You say, it's in the food we eat. It's in all the stuff we put into our bodies -- in the meat, potatoes, milk, bread, candy, coffee, ice cream, pancakes and fruit, vegetables and nuts. Anyway, we hope it is.

It's much like building a house. Suppose you build a brick house, but while it is being built, the bricklayers substitute a lot of wooden boxes, made to look like bricks, for the real bricks. Obviously in an earthquake or big storm, you would lose part of your house. Or a wall might come tumbling down at almost any time. So you call some more bricklayers and they put in a lot more of the imitation bricks along with the good bricks. Everything looks all right, and you think you have done a good job in taking care of your house, but actually your house is still weak, ready to fall apart, and it will stay weak until you get every imitation brick replaced with a good brick.

How many imitation bricks do you suppose you have in your body? It's pretty hard to tell, of course, but here are some facts and figures that will give us an idea of the condition of the bodies of us Americans.

Children die every year in this country from malnutrition. Notice it is not in Europe -- not in Japan -- not in China during a famine -- but

right here in this country. According to the Bureau of Education, 50 per cent or more of our children in schools need medical attention of some kind. Four million of the boys drafted for army service were rejected for physical defects and inability to serve.

According to a recent study made by a large and well-known eastern college, only one in a thousand is not suffering from deficiency -- from malnutrition. This means that no one can safely say: "I am perfectly healthy and my body is sound and well nourished."

Think of our population, and think of all the common ailments. Pick up any newspaper and you read of prominent citizens dying in early middle age of the various diseases that claim the lives of so many. Think of the people you know who are ill right now, and suffering, without relief.

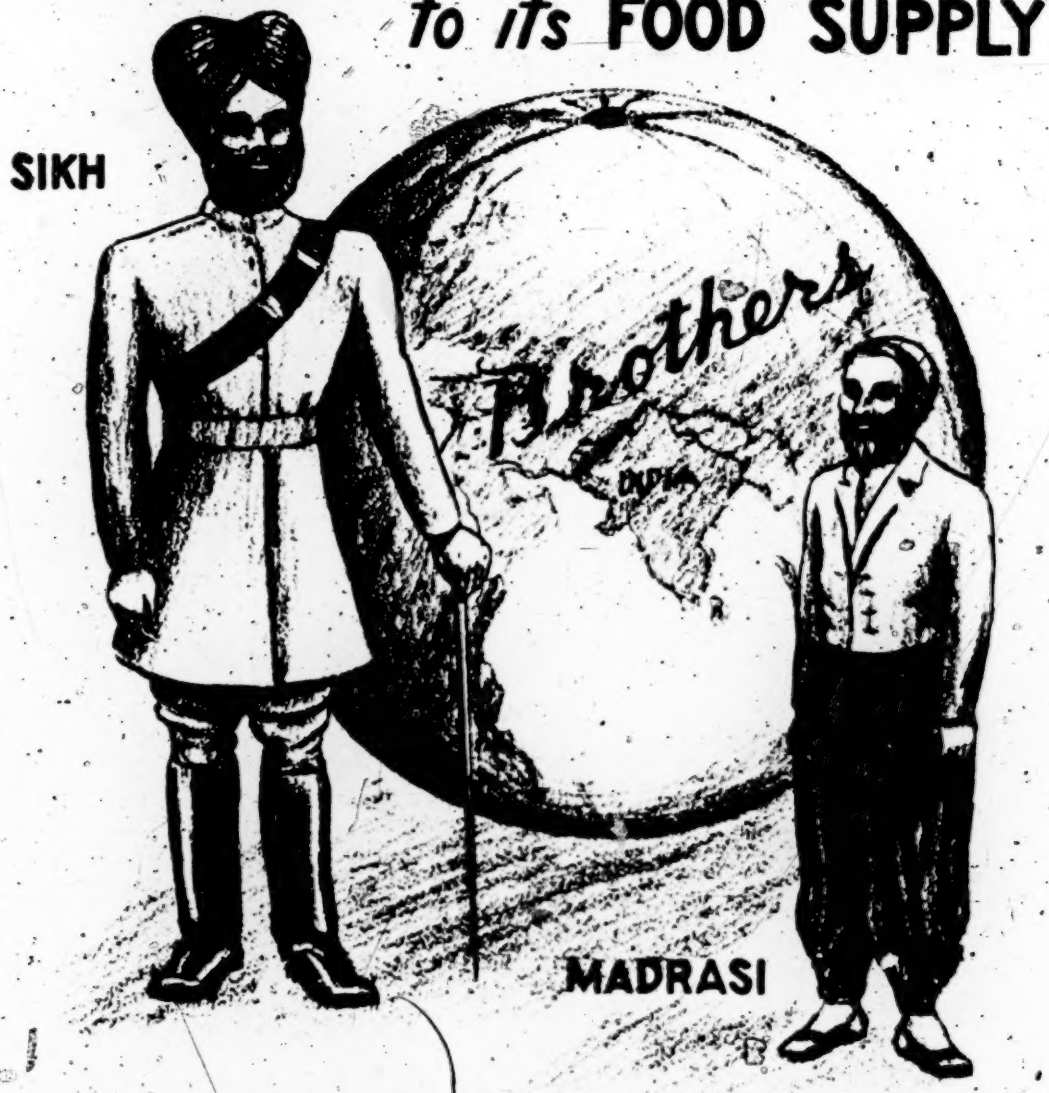
This would certainly make it look as though each of us might have a body containing many imitation bricks, so that we look reasonably well, we can get around and do some work, but either we are now experiencing some deficiency disease, or we are ready to come down with one.

If this is the case however, if our diet is so deficient and we have so many imitation bricks in our bodies, how does it happen that we continue to live and get along even in an unsatisfactory manner?

The answer lies in the constant attempt being made by the body to adapt itself to its food.

34

THE HUMAN BODY *adjusts itself to its* FOOD SUPPLY



COMPARE the Sikh—huge, powerful fighting man—and the Madrasi—weak, puny, ailing. Blood brothers of the same ancient race, *nutrition* has made them what they are in the 20th Century. Living cramped in areas where the soil has been devitalized through centuries of cultivation, the Madrasi weighs under 100 pounds and his statistical (average) life span is less than 20 years. But the Sikh, living in the hills, cultivating only virgin soil, grows well over six feet and is proud of his 250 pounds of bone and brawn.

The two men pictured are blood brothers. The difference in size between these two groups -- the Sikh and the Madrasi -- is the result of diet. And right here at home we find that the Japanese reared in the United States are seven per cent larger, in general, than Japanese reared in Japan. The lack of vital food elements stunts growth, and a full supply of the vital food elements promotes growth.

A good illustration of the effect of food in plant life is the hydrangea. Normally an hydrangea has an orchid-pink bloom. Sometimes you will see one an orchid-pink and another a pale blue. Why? All in diet. There are some blue herons in Florida. The herons in the zoo in New York are white. For a long time they thought there was a basic difference, until they captured some of the Florida herons and took them to New York to the zoo. In a year's time, there was no difference -- just another white heron.

Here is another illustration of what diet does. Diet deficiencies bring on old age. And the diet deficiencies can bring about all the evidences of old age when the person is still in his teens! We are all acquainted with the evidence furnished by the German and Japanese prison camps, as well as the concentration camps for civilians, and we have seen the pictures of the emaciated people. On the extremely deficient prison camp diets, young people showed all the symptoms of old age, and middle aged people died with all the appearances of old age.

We know that diet deficiencies bring on aches and pains. If you don't believe that, just try living on white bread and water for a few months. Further proof, of course, comes from the laboratories where the experiments with rats show the close relationship between diet and health.* Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies.

And so we find that, simply through changes in diet, you can change the size of a race of people, change the color of a flower or bird, alter the coat of an animal, bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or, when the person is deficient, feed him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must contain all the vitamins, including those which cannot be bought in the drug store, together with all the nutrilites and minerals so often lacking in our diet.

*See Hygeia for September, 1947, pp. 684 ff.

The whole question is this -- do you want to be on top of the heap, feeling fine, thinking clearly and accomplishing things, or do you want to be on the bottom of the heap, ill, ineffective, suffering?



ON TOP — BUT NOT ON TOP?

Low vitality—over-fatigue—insomnia—poor appetite—gastro-intestinal distress—recurrent vague aches and pains—weak eyes—defective teeth—all of these may be caused by the lack of the "Little Things" in the diet.

Is there a Solution? THERE IS!

WHAT IS THE SOLUTION?

How can you tell when you are really "on top of the world"?. Most people think they are healthy if they can walk around and not fall flat on their faces. Few people really know what it means to be really healthy, and well.

When you are really well -- on top of the world! -- you experience an inner joy of living. By this we mean it is a pleasure just to be conscious of your general state of being It feels good to be alive! You wake up in the morning ready for breakfast. You enjoy your food, and after you eat it you forget about it until you begin to get hungry for your next meal, unless you stop to enjoy your feeling of the satisfactory processes of digestion and hunger-satisfaction.

As you go about your morning activities you are cheerful and energetic, but relaxed (not nervous).

After a satisfactory lunch you continue your afternoon's activities, with a continuation of your feeling of well-being. It feels good to move around and you move all parts of your body without pain of any kind. At the end of your afternoon's activities you may be slightly fatigued, but only comfortably so. And by the time you have enjoyed your dinner, all sign of fatigue has passed, and you are eager to start the evening's activities, whether it entails going out, or activities in your home.

Bedtime finally finds you a little sleepy perhaps, and ready for eight hours of sound and practically dreamless sleep, from which you awaken eager for another happy day of activity.

At any time, day or night, you can be handed a pair of comfortable hiking shoes and you are ready for a long hike. And furthermore, you can take the long hike with enjoyment.

If you are able to meet the above requirements right now, with never an ache or pain, you are really and truly "on top of the world." If you cannot meet these requirements, you should be using NUTRILITE regularly, and doing whatever else is necessary to bring yourself to this condition of physical well-being as soon as possible.

And be sure to remember that it isn't just the extreme and well-pronounced ailment that proves your need for NUTRILITE. G. G. Duncan, in Medical Clinics of North America, page 30:349, March, 1946, says, "Clinicians too often have their sights set on anatomical changes as indications of deficiencies. This is a late stage and is the result of prolonged deficiencies." Early vitamin deficiencies do not show themselves as pronounced physical diseases, and consequently, it is useless to look for extreme physical changes or definite and diagnosable conditions in the structure of the body in these early stages.

Vitamin and mineral deficiencies show themselves as follows:

FIRST: the chemistry of the body is upset.

SECOND: functional changes appear. These are the changes in the operation of the body, including changes in thinking and feeling, as well as the upset of bodily actions and unsatisfactory operation of the various organs of the body.

THIRD: and much later, actual lesions and breakdown of the physical structure appear.

This brings us to the consideration of a fact you have already, quite possibly, noted. The healthy individual, whose day's activity we traced a moment ago, is not only healthy and full of well-being, but he is free from pronounced psychological disturbances as well.

Many psychological troubles show themselves in Duncan's second stage, above, at which time the examining physician is unable to find any physical pathology, or physical cause for the psychological disturbance.

People can have two kinds of psychological troubles. The first type is a matter of bad habits. Examples are: wrong habits of thinking, poor methods of solving problems, habits of introversion, submission, dependence and tantrums, inferiority feelings, procrastination, the habit of rush and hurry, tension, and poor social or business habits. For these the person should have training with a good consulting psychologist or psychiatrist skilled along these lines.

Along with these bad habits, and aggravating the condition, are the so-called "psychological" or "functional" troubles. These stem from the physical condition. We all experience this when we are irritable due to hunger, fatigue or illness. In this group are mental depression, lack of ambition, difficulty in concentrating, nervousness, worry over little inconsequential things, insomnia, hysterical tendencies, hypersensitiveness, restlessness, poor memory, chronic fatigue, feeling of apprehension and uneasiness and anxiety, and general weakness. Since these are usually symptoms of a deficient physical condition, they tend to improve or disappear entirely when the person provides his body the adequate nourishment. Many people report the greatest satisfaction from throwing off these "psychological" troubles, and becoming normal, happy human beings.

This is all confirmed by a psychiatrist in New York, Dr. Cowles, who says it is not enough to treat a person just through psychiatry -- getting him to change his thinking -- he says you must build up his body at the same time. Psychiatrists and psychologists are realizing this more and more.

So you can be down either physically or psychologically, or both, and in any case you need to get "on top of the world" as quickly as possible.

The following are accounts of people who used NUTRILITE to build their bodies. You will note that in each case we have carefully avoided the use of the appropriate medical term to describe the set of symptoms. Here are the reasons. (1) The medical tag fastened to the group of symptoms can be wrong. Maybe the person assigned the name himself, and he made a mistake. Possibly a neighbor suggested the name. Even a doctor could have made a mistake in diagnosis. (2) When you call a set of symptoms by a high-sounding name, you tend to consider the group of symptoms as something -- as an entity -- as something real -- whereas the aches, sneezes, pains, twitches, itches, sniffles, sores, wheezes, limps, squints, burps, coughs, cramps, weakness, twinges, prickles and spasms may be only the outer indication of an inner condition that needs correcting, just as the noise coming from an engine indicates something loose or broken inside. (3) To one person a medical tag may mean one thing, and to another person it may suggest an entirely different set of symptoms. This leads to misunderstanding. (4) It is often difficult to interpret a medical term without a dictionary. For example, do you know just what is meant by phlebitis or psoriasis or filariasis or ichthyosis? And even with the medical dictionary to help you, you might not be sure you were dealing with one of these cases when you saw it. And finally (5) WE DON'T CARE what the medical term or name is, anyway, for that is entirely out of our field. We are dealing with food, and its relationship to the health and well-being of the body. In all cases of deficiency, THE ELIMINATION OF THE SYMPTOMS IS SIMPLY A MEASURE OF THE EFFECTIVENESS OF THE IMPROVED NUTRITION.

So when we tell you about these cases where a set of symptoms disappears after NUTRILITE is used for a period of time, please remember that never should you consider the symptoms eliminated or a disease cured, by NUTRILITE. Remember that NUTRILITE never cures anything. NUTRILITE provides the body with needed nutrilites and other vital micro-food factors. The body takes these and rebuilds. In the process of rebuilding, the inner cause of the deficiency ailment disappears, and consequently the symptoms cease to bother. Then the person is well, and he got well through the use of NUTRILITE, but nothing was cured. This may seem like a fine distinction, but it is important because on this basic understanding depends your method of seeking health and maintaining health.

NUTRILITE does not cure anything. And in addition, nobody can be sure when he starts the use of NUTRILITE that, as his body takes the material supplied and rebuilds, it will throw off any one set of symptoms first. You may be most interested in one set of symptoms, but your body may so rebuild that other symptoms take precedence.

Also, it should be recognized clearly that the set of symptoms in which you are most interested may never disappear following the use of NUTRILITE Food Supplement. The sun has risen every morning for millions of years, but this does not prove that it will rise again tomorrow morning. So NUTRILITE may supply 100 bodies in succession with the materials they need to rebuild and eliminate a certain condition, but this does not prove beyond doubt that the 101st person will derive the same benefit. Sometimes the only way to find out is by adequate trial.

Each of these cases is backed by a sworn statement in writing, on file at our home office, and scores of NUTRILITE users, in all parts of the country would be glad to provide similar statements, covering the elimination of even a wider variety of unsatisfactory conditions.

This story is told by a NUTRILITE Distributor: "The first time I called upon this man he was propped up in a chair with his feet on an ottoman. He was very weak, and spent all his time either on the chair or in bed. He had been ill for a year, had gone from doctor to doctor for relief, and had spent thousands of dollars.

"His case had been pronounced hopeless, and his wife had expected to make arrangements with a hospital to have one foot amputated as that, they said, would be the only way to relieve the burning.

"The following is a record of his blood count after beginning the use of NUTRILITE:

Date	White	Red
May 20	30,000	4,125,000
June 9	20,000	5,420,000
July 8	21,000	5,210,000
Aug 6	19,400	4,530,000
Sept 10	20,300	4,650,000
Oct 10	19,600	5,010,000
Nov 11	8,400	5,210,000
Dec 11	7,800	4,460,000

(5,000 to 10,000 white corpuscle count is normal)

"The fact that he went back to work the first of July might account for the increase to 21,000 white corpuscle count. He has been working ever since."

Another NUTRILITE Distributor reports: "One of my customers learned about NUTRILITE about a year ago. At that time he was afflicted with a variety of complications, and had been under the care of three doctors.

"Receiving no particular encouragement from the doctors, he tried various drugstore remedies, and bought several vitamin and mineral supplementary foods at the health food stores. He improved for a time and then began to slip back again.

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"It was at this time that he learned of NUTRILITE Food Supplement, and ordered a supply. The day before it arrived he had a violent attack accompanied by severe abdominal pains and splitting headache. This attack lasted from about nine in the morning until midnight and several times the heart 'catches' were so intense he expected his heart beat to discontinue at any second.

"The following day he began the use of NUTRILITE, and since that day he has had, he says, but one attack, which was light. Within three months he was back at his job and able to work as he had five years previously.

"He reports that out of the 19 disorders he experienced the day he began the use of NUTRILITE but three remain, and these only slightly. No one of those three is heart difficulty."

Here is a record of one lady's experience with NUTRILITE as she writes it: "I began using NUTRILITE Food Supplement more than one and a half years ago, and since that time I have enjoyed better health than I ever did before. When I was a child our family physician despaired of my living long enough to reach maturity.

"I used to live in Colorado, and a number of years ago was forced to move to a lower altitude for health reasons. Six months after beginning the use of NUTRILITE I was able to tell your representative that I was feeling better than I had for years. After completing the first year's program I told him that my NUTRILITE was the last thing I would ever take out of my personal budget.

"Several years ago, before I heard of NUTRILITE, I took a trip to Colorado and became so ill while there that I had to return to a lower altitude before I had finished my visit. Last summer we took another vacation trip there, where I was at altitudes up to more than 13,000 feet above sea level. This time I got along fine and was able to enjoy the trip.

"The NUTRILITE Food Supplement is a regular part of my daily diet, and I plan to continue its use indefinitely."

Another lady had terrific pains in her joints and through her hips. She had been having treatments for a number of years. After two months' use of NUTRILITE, she reports that all the pains have completely disappeared, and she looks much better.

These cases may seem somewhat spectacular, but they are not exceptional. Any NUTRILITE Food Supplement Distributor, in any part of the world, who has been providing this product to the people of his community for a year or more can tell you about many cases in his own town or city which are even more spectacular, but just as natural. If these results seem somewhat extraordinary, it is only because the average person is accustomed to going about the elimination of deficiency conditions in the wrong way.

It is as though we were in the habit of taking old automobiles from the junk yard, and entirely through the adjustment, regulation and stimulation of the machines expecting them to run like new. Naturally, the cars would not run like new, and many of them would not run at all. Many would still be junk.

Now suppose a mechanic takes one of the junked cars, and puts in a complete set of new parts where needed. Every worn or broken part is replaced with a new part. Naturally, the car now runs perfectly. It is virtually a new car. Would we be amazed to see what was formerly a junked car roll merrily down the highway? Not at all. It is just what we would expect.

In the same way it is neither remarkable nor strange that a person's body will rebuild, relieve itself of aches and pains, and perform adequately when all the needed materials are supplied in such a form that they can be converted readily into new cells, and the body chemistry corrected.

When a mechanic works on your broken down auto, replaces worn parts and makes the necessary adjustments, you do not say he "cured" your car. And when you add NUTRILITE Food Supplement to your daily diet, and your body takes this much-needed supplementary material and rebuilds itself to a condition of health, you must not think that NUTRILITE "cured" the ailments. NUTRILITE simply provides the body with the needed materials. The body does its own rebuilding, and as a result, the symptoms tend to disappear.

"This is my own case," reports a lady. "I am 60 years old, and for several years I was unable to go up and down stairs except one step at a time, and in addition, had to pull myself up with the railing, or be helped by someone. I had aches and pains in my elbows, hand, and thumb, in addition to my legs. Also I wore strong bifocals -- had for 20 years -- the glasses getting stronger and stronger each year.

"I am now just finishing the first six months of my year course of NUTRILITE and for the past six weeks I have been going up and down stairs as I did when a young woman. The aches I have had for many years in my left elbow, hand and thumb are now almost negligible. And last week the optician changed my bifocals to a less strong lens. I don't know what it is to be tired any more, and I have such a wonderful feeling of well-being -- it's hard to describe except that I feel 'swell.' As I run around now I'm not conscious that I have a body -- it just comes along with me."

A man reports as follows: "For more years than I care to remember, I have suffered continual (almost continuous) discomfort and pain in my stomach. For years I have grasped at every suggested remedy -- over the past fifteen years I have tried at least forty, including the Sippy Treatment. For years I haven't slept the whole night through. For years I have dreaded eating ordinary foods. One month ago I was sure I was due for another operation. Believe me, I could say much more.

"How grateful I am that one month ago today I began adding NUTRILITE Food Supplement to my meals. I felt better all around in less than two weeks, and for the past two weeks have enjoyed undisturbed sleep every night, with only one exception. Abdominal pains are entirely gone, and gas disturbance is noticeably less.

"My family can scarcely believe it! But -- there stands, untouched for two weeks now, my shelf of former 'remedies'"!

Here is another case. Two years ago if this man of 55 did five and sometimes only three hours work in a day he would be so tired he had to lie down for the rest of the day. There were only three or four articles of diet he could eat, and he was living principally on vegetable juices. His stomach was sore and everything "kicked back." He had attacks when breathing would be difficult, and he coughed a great deal. He had pains in his right side, and was taking a strong laxative almost daily. He had colds constantly.

He reports that he began to get results immediately upon starting the use of NUTRILITE Food Supplement. The improvement was both particular and general. He experienced less fatigue and soon was working a full day. Now, two years later, he works all day and many evenings. He reports no severe cold since starting with NUTRILITE. His other ailments are now either gone or practically so, and he states that he is carrying on activities he used to indulge in 25 years ago, but which he had to discontinue during his period of illness.

A lady tells us about her experience with NUTRILITE. Due to an operation she had trouble with her ankle. After being on her feet all day, her ankle would swell to a size half again as large as normal. There was no particular pain, but a stiffness, as if she could hardly bend her ankle. The doctors said an operation might help, but it was so expensive it was not recommended. Otherwise, there seemed to be no relief. After using NUTRILITE Food Supplement for nine months she reports that the swelling gradually disappeared, and now, even after being on her feet all day long, there is never more than a small amount of swelling, which is not noticeable.

A Distributor reports concerning the daughter of a NUTRILITE user. This young woman, although 30 years old, had just been brought home from an institution for the feeble minded. She was unable to talk coherently and has not been able to go places alone. Other people had to care for her. She acted as a child, and slept poorly at night. After two week's use of NUTRILITE she talked coherently to the Distributor, saying, "You know what I want to be? I want to be a saleslady like you." In addition, she was sleeping well.

A World War II veteran of 26 had severe headaches almost continuously. "After three months on NUTRILITE I was only bothered with these headaches at five or seven day intervals. After six months I was able to go at least three or four weeks without their occurrence. There was little change from this point on until I had been on NUTRILITE for twenty months. By the end of two years I am almost completely free from all headaches."

Please remember that in all these cases the prompt or gradual disappearance of the symptoms is merely the measure of the degree of improvement in the body chemistry and physical condition. It is like the situation where the mechanic turns a screw in your carburetor, while he listens to the chug of the engine. He uses the changes in sound as a guide, but neither he nor you thinks he is "curing" a bad sound. You both know he is improving the adjustment of the machinery. In the same way, NUTRILITE improves the body chemistry, enables the body to rebuild, and helps the body to a better use of your proteins, carbohydrates and fats. The gradual elimination of symptoms is the index of the success of the basic building and regulating process carried on by NUTRILITE.

Here is another example of this process. A young man states that in November, 1946, he weighed 137 pounds and ate a restricted diet as to carbohydrates, proteins and fats. His insulin consumption was 62 units per day, taken in three separate injections, at each major meal -- a rather inconvenient arrangement.

He then started the use of NUTRILITE Food Supplement, and in December his physician was able to reduce his insulin consumption to 54 units per day taken in one injection. Also his diet was substantially increased. Now his weight was 138 pounds and his diet 1859 calories.

Before the end of December his insulin consumption was further reduced to 48 units per day, and at the same time his diet was materially increased. He continued to improve, and on July 1, 1947, his weight was 142, with a diet of 1895 calories. At this time his insulin consumption was only 30 units per day.

At this time he went on a vacation, taking enough NUTRILITE for his planned stay, but unexpectedly his visit was extended two weeks. During

these two weeks without NUTRILITE his condition deteriorated, and he dropped to 136 pounds in weight, with an increase to 48 units of insulin per day.

Returning home he immediately started the use of NUTRILITE again, with again an increase in weight and decrease in insulin intake.

On November 4, 1947 his weight is 143 pounds, diet 1895 calories, and insulin consumption 30 units per day.

Whereas when he started the use of NUTRILITE he was able to work only about half a day, he now works all day long. He reports that he feels better, enjoys life more, has a lot more fun and gives better service in his work.

Here is a case concerning a lady, who, when she first learned of NUTRILITE, was ill in bed, to which she had been confined off and on for 11 years, experiencing hemorrhages appearing in connection with the menopause. She had had an operation, which gave her no relief. Almost all of 1946 was spent in bed, where she was attended by a variety of doctors. She took shots over a period of years. She suffered with gas and sour stomach constantly, and was on a diet.

She reports that after using NUTRILITE Food Supplement for three months her trouble digesting food left her. Now she has been using NUTRILITE for ten months, and reports that she eats what she wishes, and has regained the weight she lost while ill. In all other ways she reports marked improvement, and in a short time she expects to be completely well.

A young man had, since childhood, been afflicted with periodic spells of sneezing and weeping. These spells would often last for days at a time. Needless to say all suggested remedies of all kinds were tried, but to no avail. He started the use of NUTRILITE during one of these particularly severe attacks, and in the height of the "season." In a few weeks he experienced decided relief, and after a few months the symptoms had entirely disappeared, except that in the same room with a cat he might sneeze a few times, whereas before the use of NUTRILITE, such an exposure would have started two or three days of his affliction.

A girl, 18, was confined to her bed. She was weak and pale, and her doctor had said that unless improvement were shown in ten days, a blood transfusion would be necessary. Learning of NUTRILITE Food Supplement her mother started her on this product. In a few days she showed a marked improvement, with color returning to her face. In 10 days she was out of bed and working. Needless to say, the transfusion was not necessary. She is now working steadily and feeling fine.

A friend of the writer, 52 years old, had an affliction carried over from the first World War. He would go along with only minor pains in his back, when suddenly, without warning, he would find himself bent over and unable to straighten out his back and stand erect. He would be taken in his bent condition to an Osteopath, who would straighten him out. A board of army doctors told him there was no cure except an operation, which was not recommended.

Four months after beginning the use of NUTRILITE the "doubled up condition" failed to return, and he continued to use his back in a normal manner, even lifting and handling heavy objects.

One of our distributors used NUTRILITE while in a Navy hospital, and although his trouble had been pronounced hopeless from the medical standpoint, in a few months he was out of the hospital, and pronounced well.

A woman who had taken thyroid, iron and B, along with mineral oil for seven and one-half years without getting rid of her disagreeable symptoms, reports that after using NUTRILITE for two months her sinus had cleared up. Former remedies went into the trash can.

Now, after using NUTRILITE for two years, she has no need for laxatives and her eyes, which were weak and bothered her a great deal, are much stronger and give her none of the former troubles.

The other day the stove man came to adjust our gas range. The burners were all burning yellow. On his back, under the stove, the repair man prepared to make his adjustments, while I watched the flame. The man worked on the stove. "The flame shows a little bluer," I said. He grunted and cussed, worked, and again the flame changed. This continued -- the man working on the stove and I watching the flame -- until the flame was the healthy blue which accompanies the proper mixture.

Did the gas man under the stove cure the yellow flame? Of course not. He got the right mixture of air and gas (improved the stove's chemistry, we might say) and automatically the flame was right. The change in the color of the flame was simply an indication of his success in adjusting the mixture.

Remember it is the same with these cases we are reporting. NUTRILITE does not cure any disease. It simply enables the body to adjust its chemistry and to rebuild. Then the symptoms of the various deficiency conditions tend to disappear.

NUTRILITE Food Supplement supplies the body with needed materials for building and regulating. Since this is true, it is only normal and natural for the evidences of deficiency conditions to disappear. Consequently these cases of recovery, and thousands of others all over the country, simply prove that (1) the natural condition of the body is that of health, and the body tends to return to health when adequately supplied with the necessary building and regulating materials, and (2) NUTRILITE Food Supplement supplies enough of these needed materials to aid a body ill from a deficiency of the micro-food factors, in its recovery.

How much any one particular body can use of this material, how long the recovery requires, and the extent of the recovery, all depend upon the condition of the body when the use of NUTRILITE is begun. NUTRILITE is a food, and it feeds the body. Consequently any recovery is a normal, natural process, usually requiring a reasonable period of time.

Here is additional evidence of the fact that NUTRILITE supplies the body with necessary building and regulating material. This NUTRILITE user reports as follows: "Before I started using NUTRILITE my average weight has always been between 115 and 120 -- way too low. In the almost two years since I started using NUTRILITE my weight has risen to an average of 135 pounds. This weight I have been able to maintain for almost a year and a hal'. I now feel better than I can remember having felt for years. My weight is steady, my color and complexion are better, and a rough, dry, itching skin condition has almost completely disappeared. At the time of starting with NUTRILITE I was almost continually bothered with small canker sores in my mouth, new ones starting almost as soon as the old ones were healed. These have been almost completely eliminated. In the last year I don't believe I have had over two or three of them, and it has been comparatively easy to heal them, whereas in the past it's been necessary, at times, to have them burned or cauterized with silver nitrate or with some other similar caustic.

"My tendency towards colds has greatly reduced. Two or three years ago I would have colds quite frequently, nearly every cold running from 10 days to two or three weeks before I would be relieved of the symptoms and sometimes they would carry through from one cold to the next. In the last year I have had almost no colds and most of the few that I have had have lasted not more than two or three days. I have been in the house with other people who have had colds and not caught the cold myself, which is extremely unusual for me.

"One son, who is three and one-half years old at the present time started using NUTRILITE when he was a year and a half old. At that time he had cut three teeth and with each tooth as he started to cut it he ran a fever of 100 to 103. He was cross and quite ill during this period of time. He cut another tooth shortly after we started him on NUTRILITE. He ran no fever

with this tooth and didn't seem to be having nearly as much difficulty as he had with the others. Today he has a mouth full of teeth, and except for the ones he cut before he started with NUTRILITE, he has had no fever with any of them. In most cases he has not even shown the disposition symptoms that would let us know that he was cutting a tooth, and with several of them we would have had no idea that he was cutting a tooth if his mother hadn't looked in his mouth.

"My wife has probably received the most noticeable benefit from the use of NUTRILITE. For years she has had spells where her whole left side would be sore and extremely touchy. At times she could hardly stand it even to have her clothes touch her skin. The pain was very severe and none of the usual pain killers seemed to have any effect. She had used various medical preparations to try to get relief. Some of them seemed to help some, but none of them completely eliminated the symptoms. The best thing up to the time of NUTRILITE was a preparation of Vitamins A, B, D and G. But even with these it was only a matter of relief rather than complete absence of the symptoms. When she started with NUTRILITE it was almost like turning off the light on the undesirable symptoms which she had been having. In the two years of use of the product there was only one time when she thought she might have another attack, at which time the skin of her face was a little touchy or sensitive. But at this time she had cleaned house and done a washing on the same day, also doing a little work in the yard. After a good night's rest the symptoms were completely gone. She, too, has shown marked improvement in her lack of susceptibility to colds. She still has an occasional cold or sore throat but nothing like she used to have. In recent years, each time she has had her eyes checked she has needed new glasses with a larger correction. This time, however, the oculist was pleasantly surprised to find that rather than a lens with greater correction she was able to use a new lens with half a diopter less correction. The doctor seemed very gratified at this improvement in her eyes.

"My other two children have been using NUTRILITE now for two years and while they had no particularly undesirable health symptoms at the time they started using the product, they are in good health today and both are honor scholarship members. NUTRILITE may or may not be entitled to the credit for this. However, in the light of Bruce Bliven's article in the December, 1947 issue of the Ladies' Home Journal, there is reason to believe that adequate nutrition has played an important part in giving them the ability to grasp more readily their school subjects.

"A year ago another son received a head injury at the swimming pool and for about two weeks there was some question whether he would live. It was apparently a combination concussion and sun stroke and the attending physician stated that the recovery he made was very gratifying. Since,

several years before, he had shown evidence of rather marked calcium deficiency, and at the present time this seems to have been largely eliminated, we believe that quite probably NUTRILITE played an important part in his recovery."

In another case, a little girl four years old had colds all the time, her eyes were sunken, she had a poor complexion and was extremely irritable. She seemed always sick and always crying.

Her mother reports that in three months after beginning the use of NUTRILITE her daughter was so improved she was becoming a nuisance. She didn't know what she was going to do with her, the girl was so full of vigor and vim. Now the mother goes among her friends, and when they complain of physical infirmities, she always says, "NUTRILITE for you." Through her recommendations, 15 people are now NUTRILITE users.

Here is a letter written by a lady to a NUTRILITE Distributor.

"I wish to take this opportunity to express my gratitude for all that NUTRILITE has done for me and my little girl, Patricia.

"Ten months ago, as you will recall, I was in an extremely run-down condition, running a daily temperature and suffering from extreme fatigue and nervousness. I also had gas on my stomach constantly, dizziness and headache. I had gone to four different doctors who, after tests of all kinds, did not seem to know what was wrong with me. I also had an X-ray made of my lungs and was given a different interpretation by each doctor; one going so far as to tell me I was on the verge of tuberculosis. About this time I was thoroughly discouraged and was willing to try anything.

"I will always feel it was a godsend the day you came to my door and told me of NUTRILITE. I admit I started taking NUTRILITE with a great deal of pessimism. This pessimism vanished, however, as the days went by and I felt myself growing stronger. In fact, I felt considerably better the very first month and by the fourth month my fever and former symptoms of illness left me completely. Today, I am able to take care of a six-room house and three children without outside help and I still have considerable energy left at the end of the day. This is something I never had before in my life.

"My little girl, Patricia, was also in a run-down condition and I was always having to take her to the doctor. She was under weight and small for her age and had no appetite. Finally, I put Patricia on a child's course of NUTRILITE. Today, as anyone can see, she has gained weight and is a happy active little girl from morning until night.

"Patricia and I are both grateful for NUTRILITE and will continue taking it as long as we possibly can. I feel I would rather pay for my NUTRILITE and stay well and enjoy life than be sick and have to spend money anyway on doctor bills.

"I would like to say in closing that because of the excellent results we have obtained that many of my friends and relatives are now taking NUTRILITE and are receiving the same wonderful results. If you care to, you have my permission to use this letter so that others may benefit from it."

Another NUTRILITE user reported that her eight year old son was a frail child who had an irregular heart with a slight murmur and was unable to eat any food containing wheat or wheat products. Each winter he had sores around his waist and scars were carried from year to year.

Six weeks after starting the use of NUTRILITE Food Supplement all but one of the sores had gone, and within three months that one had disappeared. Now, after using NUTRILITE for two years, his heart is normal and he can eat anything that he pleases. Within the last three months he has grown an inch and a half and his weight has increased from 49 to 58 pounds.

Another lady reports as follows: "For many years I had been plagued with headaches of all types, including attacks severe enough to cause dizziness and vomiting, requiring hospitalization in several instances.

"For 10 years I had also gone to physicians for treatment due to continuous drainage from the nasal passage which always caused severe throat irritation and hacking cough during the winter months. After using NUTRILITE for seven months I had no need for the doctor's treatment as the drainage was almost completely eliminated. Also, at that time I began to have fewer and fewer headaches, and I noticed that they were becoming less intense. At the present time I have been using NUTRILITE for 20 months, and I can say that I have about 80% fewer headaches than before.

"I expect to use NUTRILITE the rest of my life because I know that a high level of nutrition is necessary for optimum health."

A lady, whose age is about 58, has been using NUTRILITE now for about a year. At the time she started she was subject to colds and sore throat, also had quite frequent dizzy spells. She had occasional headaches and considerable gas and other stomach and intestinal disorders. About two or three months ago she and a friend were shopping at a department store. Descending a long flight of stairs that leads from the main floor to the basement, when about halfway down the lady stopped, turned to her friend and said, "You know, Irene, about a year ago I came down here and when I got about down to this point I was so dizzy I wasn't sure whether I was going to be able to go the rest of the way or not and I knew I couldn't go back up. Today I feel as though I could almost run either way. I feel so much better than I have at any time since I can remember." She then began to make an inventory of the changes in her condition since she started using NUTRILITE.

It is hard to hear of these people, benefited by NUTRILITE, without thinking, "Hmm, looks like some sort of a cure-all. How can one product do all that?"

This is only a natural question if you are still hampered by the antiquated belief that all illness is caused by something getting into the body that shouldn't be there, and that there should be a separate and distinct remedy for each individual set of symptoms. But if you have read this book carefully, and if you have absorbed the facts and followed the argument, you should realize that most of our present illnesses are due to dietary deficiencies, that these deficiencies show themselves in different ways in different people (and in the same person) and that relief from all deficiency diseases lies simply in putting back into the body the basic factors needed for vital health, many of which are at least partially lost in the preparation of our American diet.

Having read this book carefully, you should now realize that what most of us need is adequate supplementary feeding, and that when we get this adequate nourishment (which must be such as to make up also for past deficiencies and which cannot be obtained in our normal diet) the symptoms which indicated the lack of the vital micro-food factors simply disappear, because the deficiency no longer exists.

NUTRILITE Food Supplement supplies the micro-food factors (nutrilites) necessary for health, but when these factors are supplied by NUTRILITE and the ill person becomes free from the unpleasant or painful symptoms of his deficiency ailments, be sure to remember that NUTRILITE did NOT CURE THE AILMENT. NUTRILITE supplies necessary micro-food factors, the body uses these and rebuilds. In this process the symptoms simply disappear and the person is well again.

It should also be remembered that the cases described above were selected to show what happens when there is an extreme nutritional deficiency. But this does not mean that a person must be at death's door in order to profit from the use of NUTRILITE, any more than you must have a complete breakdown before you take your car to the garage for repair. An odd sound in the engine or a minor rattle is enough to send the careful automobile owner to the garage, because he wants to avoid inconvenient and costly repairs. And any of the "little" evidences of deficiency, such as decaying teeth, or any of the minor aches and pains, is enough to start a person in the use of NUTRILITE if he is interested in maintaining his body in good condition, and in avoiding costly illnesses, hospitalization, doctors' bills and the pain and suffering that accompany the pronounced deficiencies.

It costs money to maintain your health, just as it costs money to maintain your auto, and you have the same choice of paying a little each month as you go along, thus maintaining your health or your car, or you

can neglect them both, and spend a lot of money (often more than the maintenance cost) for their repair when they break down.

If you are ill with any deficiency disease, your NUTRILITE Distributor is ready to show you the way to better health. If you are already in reasonably good health, your Distributor is prepared to show you how to stay that way. But in either case you must realize that you must decide which path you will follow and act accordingly.

CONCLUSION

It is noteworthy that the babies in China did not improve as they should until the plant extract or concentrate, developed by Mr. Rehnborg, was added to their diet.

This same plant concentrate, when added to the diet of the adult Europeans in the Orient, helped them to health and to withstand the deteriorating effects of living in China.

In 1933, when NUTRILITE was first sold in the United States, it consisted entirely of the plant concentrate. In preparing this concentrate plants known to contain the highest percentage of all the various food factors required by all animal life, are grown in specially prepared soil. The leaves are harvested and dehydrated, yielding 300 pounds of dried leaf to each ton of fresh plants. These dried leaves are then subjected to a variety of solvents which extract from them the nutrilites, leaving behind a residue of cellulose which has no food value. Less than six pounds of this concentrate of nutrilites are secured from each ton of fresh plants, and it is this concentrate which contains the important micro-food factors which cannot be purchased in the drug store.

This concentrate was added to the diets of people in California, where the product was first introduced into the United States, and the symptoms of their deficiency conditions were eliminated in case after case.

It was Mr. Rehnborg's plan to continue to produce just this concentrate. But at this time the crystalline vitamins were being developed and used with beneficial results, so it was argued that NUTRILITE, good as it was, would be even better if the concentrate had added to it the crystalline vitamins in high potency and in proper proportions. The concentrated vitamins were added, the product was improved, and NUTRILITE Food Supplement is the result.

The advantage of the natural concentrate is that it contains the various vitamin complexes, whereas a crystalline vitamin (the kind you buy in the drug store) is usually one single factor of the complex.

Dr. Quigley, famous Omaha dietitian, in his book THE NATIONAL MAL-NUTRITION, says:

"In the selection of a concentrate, it is important to remember, first, that the original deficiency is invariably multiple in origin. The diet has usually been deficient in not one or two, but in many or all of the vitamins. This is being further established every day, in both the research laboratory and in clinical practice.

"It is essential that the concentrate contain all of the vitamins, both known and unknown. Undoubtedly many of the vitamins essential in human nutrition have not as yet been identified or synthetically reproduced. For this reason no synthetic preparation can completely replace the vitamins in which the average persons may be deficient."

It is consequently the plant concentrate in NUTRILITE which sets it apart from all other diet supplements which have come to our attention. This is the component which is difficult and expensive to make. All the benefits people derive from the crystalline vitamins in NUTRILITE can be secured also from the same vitamins in the same potency purchased in any corner drug store. But we doubt that in any drug store in the world you can buy all the nutrilites contained in the plant concentrate of NUTRILITE.

The sufferer with dietary deficiencies and deficiency ailments has the problem of getting into his body all the basic food factors which either were never in his food to start with or which have been partially removed in some way. If you are such a sufferer, how can these basic food factors be added to your food in order that you may improve in health and strength? NUTRILITE Food Supplement is the answer.

The man, woman or child who is reasonably well, and who wishes to stay that way and if possible improve, has also the problem of keeping his body supplied with all the vital food factors. If you are in this group you too have a problem, in this civilized age of devitalized and imitation food. And here again the answer is -- NUTRILITE Food Supplement.

A word to the wise is sufficient!

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EPILOGUE

In preparing this book for your reading, our primary purpose is to cause you to realize that the average or better than average civilized diet does not provide you with complete and adequate nourishment. We define a "civilized diet" as the usual diet of civilized man -- one which includes so-called "food" made of white flour products, pasteurized milk, polished rice, refined sugar and including vegetables and fruits which are grown in partially depleted soil, then shipped, stored and cooked or canned in such a way as to lose vital elements. The civilized diet also includes meat from animals fed grass or hay and grain grown in depleted or partially depleted soil, the meat then being stored, and finally cooked in such a way as to lose some of its important but easily destroyed food factors.

The above statements are all facts, and we have tried, in this book, to show you that they are facts.

Since these are facts, it is obvious that if you eat our modern civilized diet only, you are not putting into your body those items or factors which our modern civilized diet lacks.

Common sense would then suggest that, if you want to have your diet include those factors which your civilized diet lacks, you will have to do one or the other of two things -- either (1) find and eat food which contains all the items which are found in unrefined, unprocessed, fresh, uncooked plants, grains, vegetables and fruits grown in the equivalent of virgin soil, and meat from animals which have been fed on such grass, hay and grain, and which meat in turn is so handled and prepared as to preserve its vital food factors; or (2) add to your present civilized diet those factors which either have been removed from your food, or which never were in it in the first place. The former is expensive and time consuming. The latter method is less expensive and saves valuable time. So in this book we recommend the latter method, whether you use our particular product or not.

In our effort to convey the facts and our recommendations to you, however, we are forced to use words, and to combine them into sentences. And these words and sentences, as we explained at first, may not always convey to you the exact meaning intended. With your indulgence, therefore, we would like to check up a bit.

1. Do you conclude that because in this book we talk about getting well and recovering from deficiency ailments and feeling better, we are advocating the use of a medicine? Since we talk about people experiencing relief from a wide variety of symptoms, do you think we are talking about a cure-all, in the usual medical sense? Accustomed as we are to thinking of medicine

as the only road to recovery, it is easy to make this mistake. But please be sure to remember that we are talking about nutrition and food, and NUTRILITE Food Supplement IS A FOOD AND ONLY A FOOD.

2. Since we tell about the recovery of many different people experiencing many types of symptoms, do you conclude that a person must have a name for his condition (must have a diagnosis) before he begins to build up his body through the use of a food supplement? This is also a wrong conclusion, and calls for a rereading of the book.

3. Because we tell about many people, with many different sets of symptoms, who have been helped through the use of our food supplement, do you conclude that some sort of prescription would be necessary -- that we would have to stipulate exactly what part of our food supplement would be suggested, for example, and in what particular way for the specific trouble? This again would be a fairly logical assumption, accustomed as we are to the medical approach to health. But as applied to a well-rounded food supplement, it is entirely erroneous. You don't use NUTRILITE Food Supplement for any other purpose than to supply the body with needed materials for building and regulating. And for this purpose you would naturally use all of the food supplement, along with the best general diet you can get.

4. We tell about children helped, but we do not say in this book, and please do not jump to the conclusion, that NUTRILITE Food Supplement will, if added to the diet of any particular child, keep him from becoming ill, or necessarily restore his health if he is ill. There are children on their death beds, children ill with diseases now considered incurable, children suffering from actual starvation due to lack of even the deficient American diet, and children ill from non-nutritional causes. Please do not conclude that in these cases all you have to do is give the children NUTRILITE, and immediately they will be well. NUTRILITE Food Supplement can only help when the child is ill due to a nutritional deficiency.

5. After reading this book, what are your conclusions concerning the average American diet? Do you consider it entirely adequate? Or do you conclude that our civilized diet is inadequate?

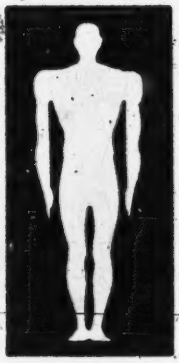
Various surveys give conflicting reports as to the extent of deficiencies in the American diet, but all surveys show the standard American diet to be deficient.

6. On page 16, where we tell about the vitamins, we say, "Vitamin A raises the body's resistance to infections, etc." When you read this do you conclude that always, in every case, no matter how much Vitamin A is now being included in a person's diet, the addition of Vitamin A will increase that individual's resistance to infections? If so, this is a mistake. If we said, "Gas, exploding in the cylinders, makes the automobile engine run,"

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PLAINTIFF'S EXHIBIT 2

How to Get Well and Stay Well



IF your health problem is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well.

For Further Information
Contact the Following Distributor

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would you think we meant that any gallon of gas would make any car engine run? This would be wrong, for you might have an automobile with the tank absolutely full of gas. Then a gallon of gas in a can by the car could not affect that engine at that time, since the additional gallon, poured into the tank, would simply run over onto the ground. What we mean here is, "In general -- gas makes your engine run." And in the same way, we obviously mean that in general Vitamin A raises the body's resistance to infections. But naturally, if a body already contains sufficient Vitamin A, an additional amount of the vitamin will not contribute to the body's ability to resist infections.

You see what we mean when we say it is difficult to write in such a way that absolutely no wrong interpretation can be placed on a statement? Please help us by drawing the obvious meaning.

7. On page 28, paragraph three, we state that "We should live in good health and vigor to the age of 90 or 100." Authorities like McCollum and Sherman rather agree that the life span of man can be extended possibly ten years, by proper food. What do you think? We must remember that, as far as we know, neither McCollum nor Sherman has experimented with NUTRILITE Food Supplement.

We still think that really adequate nourishment of the mother for a year or so before the baby is born, and then the completely adequate nourishment of the child all its life, should result in a good chance to reach the age of 90 or 100, assuming normal heredity, no accidents, and proper observance of other health rules such as exercise, rest and so on. Anyway, since this is simply a matter of a guess as to what should occur, although we still think the well-nourished person should normally live to be 90 or 100 we'll settle for 10 years added. What is your guess?

8. When you read about the people who have been helped through the use of NUTRILITE Food Supplement, do you conclude that everyone, with similar symptoms, will be helped in the same way by the use of NUTRILITE? If so you might be right. Here is a quotation from the Journal of the American Medical Association, Vol. 132, No. 10, page 561 -- under ABSTRACT OF DISCUSSION, Dr. Charles F. Nelson, Beverly Hills, California: "For the past ten years our research department has been making a study with photomicrographs showing the results of the different deficiencies on most of the tissues of the body -- the bone, the retinas, the teeth, all the different glands and all the organs. My associates and I have come to the conclusion that practically every difficulty with the human race has to do with nutrition as it is related to cell chemistry." (The underscoring is ours.)

On the other hand, the conclusion that everyone with similar symptoms would be helped through the use of NUTRILITE Food Supplement is patently erroneous.

These reports are offered simply to show what results people have obtained from a food supplement which provides the materials in which his body is deficient. One man could have a sore and swollen joint, for example, and be relieved entirely through the use of a food supplement, while another person with a sore and swollen joint might receive no obvious benefit at all. The sore and swollen joint in the second case might be the result of stopping a baseball with his finger. In this instance, if the man were deficient in items needed to repair the injury, the food supplement could be of benefit, but nobody would expect a food supplement to provide any material benefit otherwise, in such a case. Where the sore and swollen joint is due to a deficiency, however, any person could reasonably expect benefit from the use of a good food supplement.

9. When you read this book do you conclude that because NUTRILITE Food Supplement provides your body with items in which our civilized diet is deficient, and consequently provides your body with needed material for rebuilding and regulating, that all medication would have to stop when NUTRILITE is added to your diet? If so, you are wrong. Just as you would continue to take any needed medicine even if you added an extra beefsteak or piece of whole wheat bread to your diet, so you continue the use of any needed medicine when you add NUTRILITE Food Supplement to your diet.

This book is not a necessity in our work. But it is a help to the thousands of interested people, our customers as well as our Distributors, in all parts of continental United States and in Hawaii, Alaska, Panama Canal Zone, China and the Phillipine Islands, who are enthusiastically telling other people about the benefits derived from food supplementation. It proves helpful because it saves their time, and it enables a person to learn about diet, nutrition and food supplementation in the quiet of his own home, and at his leisure. But it is a help only if it conveys ideas of truth and fact because NUTRILITE Food Supplement is designed to meet a real need -- a need made obvious by the truths and facts of our present civilized diet.

FIRST EDITION
35,000 copies

SECOND EDITION
47,000 copies

THIRD EDITION
20,000 copies

FOURTH EDITION
First printing. . . . 20,000 copies
Second printing . . 20,000 copies

FOREWORD

One of the most difficult accomplishments in writing is to use words, phrases, clauses and sentences in such a way that the reader gets exactly the impressions and understanding the writer is trying to convey.

We have done our best to include only truthful and factual statements in this book. As statements that might be misunderstood or misconstrued are brought to our attention, they are changed. These changes are made monthly, as a new printing of this book comes off the presses every thirty days.

On the other hand a certain obligation also rests with the reader. This requires him to take what is written and do his best to grasp the author's meaning without reading into it ideas and notions not expressed or intended.

Consider, for example, our title -- HOW TO GET WELL AND STAY WELL. From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of t' phoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

Another example: When you read the title of this book do you assume that we are going to show you how to stay well, in spite of everything you do to the contrary? If so, it is also a wrong conclusion. You can follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet, such as proteins or carbohydrates.

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. We have done our best to be strictly truthful, and we simply ask you not to read into our words any ideas or meanings that are not there.

ARE YOU A VICTIM?

ARE YOU SUFFERING FROM HIDDEN HUNGER?

ARE YOU SLOWLY STARVING TO DEATH?

"Preposterous," you say. "I'm an American citizen. I'm not a war casualty living on a sub-standard ration, nor a victim of famine in China. I'm an American citizen, and I live in the best-fed nation in the world!"

Our message is important to you for the very reason that you do live in the United States, and because you do eat our modern American diet! Why? Just look around you at the members of your family, at your neighbors, friends and relatives -- at yourself Can you find even three or four who are absolutely and completely well? Are you enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who should be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely.

Now, having thought about yourself and the members of your family, you probably feel that although some of the members of the family may be in poor health the rest are in good health.

So it might be interesting to check yourself, relatives and friends against the following requirements for health:

First -- appearance. The healthy person is good looking. His features may be irregular and far from the usual classic model, nevertheless the inner condition of health shows in a good complexion and clear skin (even for the teen agers), in sparkling eyes, a ready smile and a general air of alertness and life.

Second -- odors. The healthy person smells good. Most of the really unpleasant human odors come from a sick body.

Third -- energy. The healthy person is energetic and active. Lazy people are usually sick people. The healthy man or woman carries on his customary daily activities without fatigue. Should he be a little tired at the end of the day, the fatigue passes away by the time he has finished dinner, and no artificial stimulant or relaxer is needed. At the end of his regular day's work, the healthy person is soon ready for an active evening, carrying on his hobbies or social life. At bed time he is comfortably sleepy. He falls asleep at once, and enjoys a good night's sleep, without interruption from his body, and with no, or almost no, dreams. The healthy person awakens in the morning, eager for another active and interesting day. And during the day or evening, at any time, the healthy person is physically ready and able to put on a comfortable pair of walking shoes, and take a long hike, with pleasure.

Fourth -- feelings. The healthy individual feels good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

Fifth -- happiness. The healthy person is happy. He is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties, enables him to earn a satisfactory living. Being healthy, he is not easily upset or disturbed. He has a good disposition. The healthy individual, whether child or adult, is easy to live with and he has fewer social problems.

Now -- what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?

WHAT GOOD HEALTH MEANS TO YOUR BODY

Having seen what good health means to you, let's see what good health means to your body.

All your senses -- sight, taste, touch, hearing, and sense of smell operate in your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

Your heart is, to put it mildly, one of your most useful organs. While the body is resting it pumps approximately one and one-half gallons of blood through your arteries and veins every minute. When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

Glands are nice to have, too, in good working order. Some endocrinologists say that our glands determine our personalities. Certainly it is true that when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

Teeth, also, are useful. Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody wants to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

Here is an extract from a clipping in the New York Times, printed June 29, 1945. "The record of 33 per cent rejections for women (applying for admission in the WACS) indicates an even more serious health situation

for women than the 40 per cent rejection rate does for men," said Dorothy La Salle, in charge of the girls. "It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.," she said. "I am sure that if we could have a complete cross-section of the women between the ages of 20 and 50, a much higher rejection rate would be found."

That's interesting, isn't it? It means that you can think you don't need additional amounts of the protective health factors -- and yet be wrong.

A survey made by a large eastern college shows that out of 2511 people studied in Pennsylvania, 2509 lacked the proper nutrition. Only 2 persons out of 2,511 were receiving the vitamins, minerals and proteins they needed! Further, this same survey shows that, in all communities studied, regardless of economic status, the average diets of the children were far below the required daily intake levels recommended by the National Research council.

Along these lines is an interesting article in the American Magazine for October, 1947, titled "We Feed Our Hogs Better Than Our Children," in which it is pointed out that one-third of the population actually suffers from hunger -- from lack of nutrition -- and that we are much farther advanced in animal nutrition than we are in the science of human nutrition.

Here are some more facts --

22 MILLION Children

NEED CORRECTIVE TREATMENT — U.S. CHILDCLINIC

10 MILLION
have bad teeth



6 MILLION
are suffering from a glandular disturbance



4 MILLION
are improperly nourished in other ways

1 MILLION
have tuberculosis

1 MILLION
have spinal curvatures

WHAT'S WRONG?

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature -- and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

In the First World War, we rejected 20 to 25 per cent of the men and women eligible for service. Twenty-five years later, in the Second World War, we rejected about 32 per cent -- considerably more. Fifty-two and one half per cent of those called up for service had some disability.

And remember, your 4-F was, in almost every case, a 4-F when he was eight years old -- not suddenly when he was eighteen or twenty-eight. This means that if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

SOME OBVIOUS CONCLUSIONS

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost <u>everyone</u> is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And <u>it hurts</u>!

Obviously it is better to <u>keep</u> your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this -- let us tell you a story.



The Story of a REMARKABLE DISCOVERY

Nearly Thirty Years Ago,

CARL REHNBORG, a young man of Swedish descent, majored in biochemistry in an eastern university, and in time became associated with one of the largest manufacturers of American canned milk. He was selected by this company as their representative in China -- to introduce this product to the mothers of Chinese babies. But he soon learned that this was a very difficult assignment.

He tried to convince these mothers that his company's famous product would make their babies fat and well, but everywhere he turned he came up against the stone wall of Chinese indifference. The Chinese had never used dairy products -- babies had always been nursed.

Finally, although he was not a medical man, he decided to establish a demonstration clinic. He went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. Here desperate mothers, frantic to the point where they were willing to grasp at any promise of hope for their starving, ailing infants, placed them in his care.

Mr. Rehnborg's belief in his company's product was genuine. Yet weeks of feeding one of the most highly advertised and recommended American canned milk products to these sick Chinese babies brought disappointing results. The milk was being carefully formulated, but apparently milk was not the whole answer.

植物的生命就是人類的生命

Having specialized in the chemistry of foods, and having taken part in some of the early vitamin research experiments, he was convinced that the vitamins, the various minerals, and certain other essential diet factors as yet unidentified, were present in many raw foods. But apparently they were absent or deficient in most cooked foods. It was not even certain that cow's milk contained the best concentrations of all of them -- at least for human infants.

He believed these essential food factors were most highly concentrated in green plants, from which the milk-givers and all other animals finally secured them. The therapeutic food value of green growing plants had been further indicated to many observers by the fact that even the meat-eaters among the animals, including man's own dogs and cats, almost invariably exhibited a tendency to eat grass as a conditioner, especially when ill.

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants -- scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

Almost at once some of his little charges began to show improvement. Some of the babies in the clinic, by now expanded to several times its original size, began to take on weight at a more normal rate. They became more active and commenced to throw off the visible symptoms of the various illnesses with which they had been afflicted.

But not all of them. Some still failed to show the hoped-for reaction.

But the man who held their future life and health in his hands was convinced that now he was on the right track. He suspected that the chemically worn-out soil of China was deficient, so that plants grown in it could not supply the consumer with all the required minerals, and probably did not even contain the normal quantities of vitamins and other essential organic substances they should produce. So he subjected samples of the soil to chemical analysis. When this theory was verified by the test tube he leased ground of his own, and plowed the minerals, which were lacking, into the soil. Thus he grew his own green plants, containing a full complement of essential food factors as he recognized them.

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected!

The visible results from having fed these Chinese babies on a diet rich in all the vitamins and minerals then recognized as essential, (plus other food factors which he assumed were equally essential to health because

they were normal components of normal plants, although their essential character was not then proved), convinced him that he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

Therefore, he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the nonessential cellulose and other parts of the plants, so that much value could be concentrated in small volume, and then tried the supplement formula on adults.

It is well-known that life in the Orient has always had a deteriorating effect on members of the white race. The big companies which sent men to China to represent them never kept these representatives on the job for more than about three years at a time. They were then given six months furloughs to return to their own countries. The reason for this was that by the end of two or three years, most Americans and other "foreigners" had reached a run-down condition which only a long vacation in their native country could mend. The climate in China was presumed to be the basic cause of the foreigners' bad health! Having discovered the vitamin and mineral deficiency in Chinese-grown food, our chemist reasoned that this deficiency, rather than climate, probably was the cause of much of the ill health among Americans in the Orient.

True enough, Americans fed on his specially prepared supplement were better able to withstand the deteriorating effects of life in China. These men returned to the United States in as good health as when they left.

When Mr. Rehnborg returned to the United States in 1927, he began a six year period of intensive study and experimentation, to improve his food supplement. At last, in 1933, when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it, on a small scale, in Balboa, California. This all led to further development and improvement and the creation of the present amazing food supplement, designed to supply the elements lacking in the standard American diet.

"All very interesting," you say, "But what does this have to do with me? I still think I eat a good diet. I certainly pay enough for it!"

HERE IS AN EASY CHECK ON YOUR DIET

What are some of the mistakes we make in feeding ourselves, and in feeding our families?

You probably eat white flour products, and the members of your family eat white flour products -- white bread, cake, pie, doughnuts, macaroni, spaghetti, soda crackers and refined breakfast foods. But you wouldn't feed your race horse or other prize animals on grain from which various important items had been removed.

You eat your food, grown on any old kind of soil, and you likely give it little thought. But if you owned valuable race horses, you would want your hay shipped from the blue grass region of Kentucky, or grown on re-mineralized soil.

Now why do we do our best to put the proper materials in our automobiles, and why do we make a scientific study of the feeding of prize animals and stock, while at the same time we feed our families, our children, and ourselves in a thoughtless and haphazard manner, and then wonder why our children, our wives and husbands, and we ourselves become ill?

Here is the answer. We have simply failed to carry over to our own feeding, the scientific knowledge we have learned in the raising of stock, the developing of prize animals, as well as in laboratory nutritional experiments with rats and other laboratory animals. And we have not learned that the body operates like an automobile inasmuch as neither will run efficiently if we put defective materials into them. The result is that almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

Why have we failed to extend our rational feeding to include ourselves and our families? One reason is that we become accustomed to certain food, we like the taste of it, and we don't want to change. Another reason is that most people simply don't know how to get the foods which contain the essential elements even if they are willing to change. Another reason is that to get the necessary elements into our daily diet requires a little effort, and it costs some money, whereas to drift along is easier and cheaper now, even though eventually there may be pain, incapacity, doctors' bills, hospitalization, or death.

So the purpose of this book -- and the objective of the person who lent you this book -- is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, YOU MUST PUT INTO YOUR BODY ALL THE FOOD FACTORS REQUIRED BY IT.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine -- why some people get sick so easily, and get well with such difficulty.

We give you the true and correct answer, and it makes sense to anyone who has owned an automobile or who has raised stock, for automobiles which are repaired with new parts as fast as they begin to wear, run forever, and stock which receive a full supply of vital food substances are healthy animals. Albert Howard, for instance, in his book, THE SOIL AND HEALTH, tells about oxen properly and scientifically fed, resisting the hoof and mouth disease of oxen in adjoining fields, even when their faces were licked by the afflicted animals, reaching through the fence!

You wouldn't feed a $50,000 race horse on third grade grain grown in sections of the United States where the soil is known to be particularly deficient in minerals. You wouldn't feed a $5,000 prize-winning dog on table scraps. You wouldn't feed your chinchillas or your foxes, which you are raising for their fur, on just any old kind of food picked up here and there at bargain prices.

Doesn't it seem reasonable to give a little thought to what you put into the bodies of your wife or husband -- into the bodies of your children -- into your own body?

And remember your reward -- a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them.

12

THE FORMULA OF TOMORROW

for the World of today

HEALTH



Includes the six
basic fundamentals
For sound Health:

- SUNSHINE
- FRESH AIR
- PURE WATER
- PROPER EXERCISE
- SUFFICIENT SLEEP
- PROTECTIVE FOODS

Remember this... THE AMERICAN DIET IS DEFICIENT IN PROTECTIVE FOOD FACTORS

1794

In the foregoing illustration we find noted the six fundamentals of health, namely: sunshine, fresh air, pure water, proper exercise, sufficient sleep, and protective foods. Pure water, fresh air and sunshine we don't worry about in most parts of the United States. We have an abundance of all of them. If we lived in many other parts of the globe, the water question would be something to worry about. But we take those things for granted in our own communities. The need for proper exercise and sufficient sleep is known to every intelligent person.

Now consider the protective food factors -- those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, nutrilites. That's a technical word you won't find in your dictionary, but it means all the little food factors -- not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

Formerly we thought that all we had to worry about was the bulk food we could see on our plates -- the fats, carbohydrates, and proteins. Now we are learning about the vitamins and other nutrilites, and the history of their discovery is interesting.

There was a Swiss bio-chemist, whose name was Lunin, who was intrigued by the consideration that there would come a time when the growing population of the world would be so great that the ground available for growing foods would be insufficient to support them, and he conceived the idea that it might be possible to feed human beings, as it was possible to feed animals, on substances which were not commonly recognized as a food. To determine that this was a sound theory, he fed experimental animals on synthetic diets made up of the substances that science then thought were contained in foods. These experimental animals were fed pure carbohydrate in the form of corn starch, pure refined fats, and protein secured from milk and leached with ether until nothing but protein was left. To this mixture he added all the minerals that analysis showed were in the body, and then fed this diet to animals. In theory they should have been able to maintain life, but they all very promptly died. And successive experiments of similar character all failed, unless small quantities of natural green materials or milk were added to the diets. Lunin concluded that there were substances not yet discovered in foods which were essential to life.

By some strange indifference there was no further recorded investigation along those lines for another twenty-five or thirty years. At that time there was a Dutch physician in charge of a prison hospital in Java. The patients in his hospital were mostly suffering from an oriental disease called beriberi, which is a Malay slang word meaning "no can do," because

the men who have it are incapacitated. They are weak, suffer much pain and finally die.

The Dutch physician, Doctor Eikjman, noticed also that the pigeons around the prison yard seemed to have a similar disease. Their heads were drawn back and their wings and legs were partially paralyzed and they died. He also noticed that what they ate was chiefly the white grains of rice that fell from the chow bowls of the prisoners as they ate their meals. Because it was polished rice, as an experiment he fed the birds unpolished rice -- and they recovered. He then fed unpolished rice to the men, and they also recovered. But, Eikjman, being a physician, not a nutritionist, and dealing with a totally new effect, concluded that there was a toxic substance in the white grain of rice for which the antitoxin was in the rice hulls.

About the same time a Japanese physician was trying to stamp out the same disease in the Japanese Navy. He knew that the staple diet of the Navy men was white rice, and he concluded that the reason a diet composed chiefly of white rice causes beriberi was because white rice did not contain sufficient protein. So, picking a training ship, he arranged that the diet of the cadets on the training ship throughout the cruise should include beans, rather than rice, as a staple food. On the trip there was no beriberi whatever, and he felt this confirmed his theory that the reason for the beriberi was the lack of protein.

An American bio-chemist, Dr. Williams, who was then in the Philippines following these conclusions, advanced the completely new idea that the reason for the sickness was not something the sufferer had eaten, but was because there were factors, normally present in natural foods, the lack of which caused the disease. In other words, the sickness resulted from something not eaten. All that is known of these factors, which we now call vitamins, or nutrilites, has been discovered in the past forty years.

Very early in this investigation it was discovered that one of the principles involved was contained in butter fat and dissolved in fats generally: It was called "fat soluble principle A." Another principle, the lack of which was responsible for beriberi, was found to be water soluble and was called "water soluble principle B." Sometime around 1912 a scientist named Funk believed from his investigations that he had proved that the substances in question were amines; so, he proposed the name vitamines, or amines vital to (vita) life -- vita-amines. Later it was discovered that they were not amines and the final "e" was dropped and they were called vitamins. Fat soluble principle A became Vitamin A. Water soluble principle B became Vitamin B. Presently -- about 1919 -- we knew of Vitamin C and Vitamin D. Later it was discovered that Vitamin B was not simple, but composed of at least two factors, and when this separation had been established, it was discovered that the second of these factors was extremely complex. It is

now known to comprise not less than fourteen distinct values, and for convenience it is called the "B-complex."

From 1920 until 1930 the knowledge of the vitamin factors grew until there were about ten known. In the next ten years perhaps thirty more were discovered or postulated, and most of the first ten were made in crystalline form.

The idea that vitamins have specific action -- that A is good for this and B good for that -- is natural but incorrect. It started with the first discoveries that C was more or less specific for scurvy, B for beriberi, and D for rickets, and the general medical idea that diseases have antidotes.

Actually, each cell of the body needs most of the factors, both the vitamins and the minerals, and their action is general, rather than specific.

The deficiency diseases for the most part are secondary effects, like having your lawn dry out and die because your water supply failed, or like being stuck ten miles from any habitation because you ran out of gas. Vitamin B_1, for example, enables the body to dispose of the waste products produced in burning fuels in the body. If it is deficient, the "clinkers" accumulate, they have a toxic effect on the cortex of nerve fibers, and pain, paralysis, and beriberi result.

In considering the following statements about the effects of individual vitamins, it should be remembered that these are only partial statements -- just as saying that an automobile is good for taking the family on a picnic is only a partial statement of what can be done with a car.

Also, we must realize that the activities of these few vitamins are no more spectacular nor more important in the body chemistry than are the activities of all the other vitamins not so well known, all the other nutrilites, or all the minerals, the amino acids, carbohydrates and fats. On the contrary, Dr. Quigley in his NATIONAL MALNUTRITION, says, "A millionth of a miligram of biotin may be as important in the daily diet as three miligrams of thiamin." Thiamin is Vitamin B_1.

So when you read about the importance of these few vitamins we list below, remember it is just as though we told you how important it is to put water in the battery of your car. You would agree, but at the same time you would be thinking, "Sure, but it is also important that I put in oil, gas, water in the radiator, and keep the tires inflated." So when you read about the importance of these few vitamins, say to yourself, "Certainly, these well-known vitamins listed here are important, but I must also remember to put into my body an ample supply of all food factors. We simply talk about these micro-food factors here because they are the better known nutrilites, and because most people eat a diet deficient in nutrilites."

In reading about these better known vitamins, we should warn you that you may run into a few technical terms. This is because this description is supplied by Mr. Rehnborg, and whenever he explains things to us, he always goes technical. So if you come upon a tongue-twister like "cocarboxylase," don't be surprised. Actually there aren't many tough words, and it is easy reading between them. But if you aren't interested at all in the behavior of these vitamins in the body chemistry, just skip over to page 19, to WHAT DOCTORS SAY ABOUT VITAMINS.

Vitamin A. Vitamin A raises the body's resistance to infections, especially infections of the respiratory tract, aids in correcting night blindness, and promotes growth in children. It preserves the integrity of the epithelial linings of the body -- the linings of the eye sockets, the mucous membranes that line the body cavities (nose, mouth, lungs, stomach, intestines, etc.), and the linings of glandular cavities. If there is too little A, these membranes "keratinize" -- that is, become scaly and horny instead of smooth and moist with their own secretions, and, among other things, they lose their capacity for normal function and they become more subject to invasions of bacteria. The outside skin tends also to become scaly and the eyes develop a conjunctivitis. The production of visual purple in the eyes is affected, and one is less able to see in dim light.

Vitamin A has an interesting link-up with Vitamin E in fertility, partly due to the keratinization of the epithelial linings of the sexual glands when it is deficient, but also in other ways connected with the development of cells, because it is an essential part of the nuclei of all cells.

Vitamin B_1. Vitamin B_1 is a typical example of the general fact that the action of the vitamins in the body is enzymatic -- that is, they form parts of enzyme systems which are to the chemical reactions of the body what a catalyst is to a reaction in commercial processes; for example, such elements as nickel and platinum, which cause chemical reactions to occur more readily and rapidly, without themselves being concerned in the reaction or used up in the reaction.

In a general sort of way, a vitamin-enzyme causes a reaction to occur, and the reaction in turn is part of the sequence by which another enzyme system is formed, which produces another reaction in the chain, which sets off the formation of another enzyme system, which produces yet another reaction, and so on forever. In the end the vitamin is still there, substantially unchanged, and is eventually excreted by way of the kidneys, so that the vitamins have to flow through the body in a constant stream.

When absorbed into the body, Vitamin B_1 and a phosphate radicle and a protein molecule unite to form a sort of super-molecule, which is an enzyme (in this case called cocarboxylase). Meanwhile sugar which is eaten is hydrolyzed in the stomach (by the action of other enzymes which

were added to it in the mouth as it was eaten) into "simple" sugar, glucose. This is absorbed and immediately converted in the liver to glycogen, or animal starch, and stored for use.

When insulin and thyroxin call out these stores for use as energy, the liver releases some reconverted glucose, the Vitamin B_1 enzyme causes it to be converted into glucose phosphate, and as such it is burned in the muscles for energy and the muscles move, while the released heat maintains the temperature of the body. The product of this burning is in part lactic acid, which the body may reconvert into glycogen and again store in the liver, but which is mostly broken down (degraded again with the help of Vitamin B_1) into its simpler constituents, ending after several steps in carbon dioxide and water, which the body gets rid of -- the carbon dioxide through the lungs and the water through the kidneys.

The sugar was originally made in a plant from carbon dioxide and water by the action of certain wave-lengths of light in the presence of the enzyme or catalyst, chlorophyll. The energy used in this conversion was stored as chemical energy in the sugar. Burning it in the muscles released the energy, and with the discarding of the carbon dioxide and water by the body we are back where we started, and the discarded carbon dioxide and water may be used by another plant to make sugar all over again. All the body has used is the energy of sunlight stored in the sugar molecule.

If there is too little Vitamin B_1, this process of degrading and getting rid of the waste is interfered with, and some of the intermediate products formed in the process of degradation, notably such compounds as methylglyoxal and pyruvic acid, accumulate in the blood and body fluids and are poisonous in excess to many tissues, but particularly to the cortex (gray active surface layer) of the nerve system, brain and nerves. The ability of these tissues to function is lowered, pain and paralysis result, and we say the individual has neuritis, shingles, beriberi, sprue or celiac disease. If the situation is not corrected, in time the individual dies, having suffered considerable pain in the process.

Vitamin B_2. The chief function of Vitamin B_2 seems to be in the formation of what are called "oxidation-reduction enzymes," by which it has to do with cell respiration. A cell picks up oxygen from the hemoglobin in the blood stream, but what actually happens is that the Vitamin B_2 enzyme associated with the cell does the picking up. It is like the mail hook at the station that grabs the mail bag from the train as it speeds past.

Vitamin C. Vitamin C is, among other things, the "cement" which holds the cells of organs and tissues together as a functioning group. When in scurvy there are hemorrhages in the capillaries under the skin, for example, it is because the capillary walls have lost this integration and do not hold the blood in its course, but allow it to escape among the surrounding cells.

The capillary wall is not a tube but merely a passage between cells from the point where the tiniest artery ends to the point where the smallest vein begins, so the weakness of the walls is a sort of flabbiness of the cells of the tissue being fed by the flowing blood. Another evidence of this flabbiness is that when you press down on the flesh of a sufferer from scurvy and then remove your hand, the depression remains and the flesh does not show any elasticity in springing back into place as healthy flesh does.

Vitamin C also appears to be the chief defense of the body against infections. A person with a fever, for example, uses from three to ten times as much of the vitamin as a person without a fever. This is why lemon juice is a favored drink for a fever patient. It has been known for generations that a fever patient craves acid fruits to drink, but lemon juice is not the best answer. Orange juice or grapefruit juice or tomatoes or Vitamin C tablets would be better. The patient can't drink enough lemon juice to get enough vitamins for his requirements.

Vitamin D. Vitamin D has to do with the metabolism (the chemical changes by which a living organism utilizes nutrients) of minerals. When it is effective in rickets it is because it enables the body to utilize calcium and phosphorus, but its effects also extend to all other minerals. The exact mechanism by which Vitamin D does this is still obscure.

Vitamin E. Vitamin E is called the "fertility vitamin." This is an accurate if indirect characterization, just as it is to call water a "thirst quencher." In some way not known, Vitamin E is essential to the maturation or ripening of new cells, and it therefore has its chief function where many new cells are ripening -- in a woman, the foetus of a new individual; in a man, the tubules of the testes where spermatozoa are forming.

If there is a deficiency of the vitamin, the woman is sterile because the foetus dies and is aborted, or is aborted before it has died because the placenta is developing inadequately. This "sterility" is not permanent.

In a man, the mechanism by which the sperms evolve from the protean cells of the tubules in the testes is interfered with, and they are incomplete and inactive. If it is of long duration, the deficiency for Vitamin E will result in permanent sterility.

Probably new cells form in muscle tissues. At any rate, in a Vitamin E deficiency there is a progressive paralysis of muscle tissues, especially, as might be expected, in a growing child, but also in adults.

Finally, Vitamin E seems to play some vital part in proper function of the brain cells, because in even partial Vitamin E deficiency there is a marked deterioration of mental vigor and the ability to think clearly or for long periods.

Vitamin B_6 has something to do with the integrity of cartilages.

Pantothenic Acid in some way is concerned in the metabolism of fats.

Niacin deficiency produces pellagra, with nervous, mental, muscular, skin, and digestive upsets, some of which may be partly due to other lacks.

This is a very partial list of "vitamin functions," and drives home the first statement, that vitamins are not specific but general in their action, and the "deficiency effects" which are listed are secondary and not primary effects.

WHAT DOCTORS SAY ABOUT VITAMINS

You will find many doctors who "prescribe" vitamins. You will find many doctors who recommend the use of various vitamin preparations you can buy in drug stores. You will also find doctors who recommend NUTRILITE.

But there are still many doctors who are antagonistic to the whole idea of health developed in a non-medical manner. To understand this attitude we need a little orientation in the field.

First, we must realize that many illnesses are caused by something foreign getting into the body (germs and poisons, for example) and that in these cases a recovery comes as a result of the use of something that will either throw out the foreign matter, counteract it, or accustom the body to it. The material used to overcome or cast out the foreign elements is usually called a "medicine."

That is the "medical" approach. It is used by medical doctors, and since much illness lies in this field, medical doctors are important and necessary.

Until recently it was thought that all, or almost all diseases were caused in this way, by the entrance into the body of some toxic matter or by germs. In fact, we have been accustomed to this explanation of disease for so long that it is only with great difficulty that we are able to think about any other possibility. For example, you remember that Eikjman, the Dutch physician studying the prisoners afflicted with beriberi, concluded that the white rice contained a toxic substance not contained in the unpolished rice. Had we been in his place, it is equally unlikely that we would have guessed that the prisoners and the pigeons became ill because of a lack of a micro-food factor.

But, as we have already learned, in the last forty years new discoveries have been made -- the vitamins and various other nutrilites. The old facts, mentioned above, are still the same, but new and important facts have been

added. The new facts are that many physical ailments and diseases are not the result of the penetration of the body by something foreign, but THE FAILURE TO PUT INTO THE BODY needed factors and materials, resulting in nutritional deficiencies.

In the mechanical world, it is the difference between a breakdown in your automobile occurring because dirt got into your carburetor, and one occurring because you failed to put in a new set of wrist pins when the old ones wore out.

With your pet dog it is the difference between its death due to poison administered by a neighbor, and failure on your part to feed the dog enough of the right kind of building material and regulating items.

With yourself, in the same way, it is the difference between fighting a particular disease with medicine to throw out the intruders, or forgetting all about the symptoms and their medical names, and putting back into the body the materials the body needs for health. In this way, you are not fighting any foreign element in the body, or trying to cure anything. You are adjusting your diet so your body can restore itself to normal. If, as a result, you find yourself without some deficiency disease you suffered with previously, that is very gratifying, but only a secondary result. The rebuilding of your whole body through the provision of necessary materials, is your primary purpose.

What complicates the whole picture is the fact that the two viewpoints (medical versus health through diet) are, in many cases, interrelated. A house may burn down, for example, because someone threw a lighted match in the window. And, you can also say in the same case that the devastating fire was due to the fact that the water supply was shut off.

In the same way, you can say the man's illness is due to the germs which entered his body. You can also say it is due to failure to feed his body properly, since a healthy body tends to resist germ invasions.

Actually, then, when a person has an ache or pain, a weakness, wasting, unsatisfactory feeling, a lesion, a symptom, or loss of physical capacity--in short, when he is ill, there are three courses of action open to him.

(1) He can reason that since his body needs all necessary building and regulating materials anyway, whether ill or well, he must make sure his body is getting all these essential items for proper rebuilding and regulating, and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs.

(2) If his physical ailment seems to be acute, he can IMMEDIATELY UPON BEGINNING HIS BODY BUILDING THROUGH FOOD AND THE MICRO-FOOD FACTORS, consult a physician to determine whether or not his condition

might be due to poisons in his system or to germ invasion. If so, WHILE HE CONTINUES TO BUILD HIS BODY THROUGH FOOD AND THE NUTRILITES, he can have medical treatment.

(3) If his belief or his ailment indicates to him the need for spiritual, psychological, psychiatric or religious assistance, he can WHILE HE CONTINUES TO SUPPLY HIS BODY WITH ALL NECESSARY BUILDING AND REGULATING MATERIAL, have whatever psychological, mental or religious assistance he wishes.

This procedure should be acceptable to all concerned. First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ailment has likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse. Second, if the ailment is acute, in addition to the physical rebuilding through food and nutrilites, medical aid is solicited. Should the trouble prove to be of such a nature as to require medicine, the presence in the patient's body of building and regulating materials can only aid the medical treatment. Any physician who is interested in getting his patient well (and naturally the physician is interested in this) will want his patient as well nourished as possible, and he would no more think of objecting to a good diet supplement for his patient than he would think of putting all his patients on a 30 day fast. Third, no matter how well nourished the body may be, we all need to think correctly, and certainly, no practitioner, psychologist, psychiatrist or mental healer could object to a person being well nourished while the process of right thinking is developed.

And so when we supply our bodies with all the necessary building and regulating materials we have everything to gain and nothing to lose. If we get well in step 1 (use of full nutritional supply) we save a lot of money otherwise spent for examinations and treatment. In step 2, the medical treatment required is more effective in the well fed body. And in step 3, any mental reeducation is facilitated when the brain and nervous system are properly nourished.

So we find -- and this is very important -- you do not have to make a far reaching and momentous decision between diet and drugs, between physical methods and mental methods or between nutritional science and Christian Science. To the extent that you need them or want them, you can have them all. As a matter of fact, "mens sana in corpore sano" is a good goal. We all need a sound mind in a sound body. And we need a sound body without any foreign elements. If you have germs -- get rid of them. If there are poisons in your body -- get rid of them. If you are afflicted with wrong thoughts -- get rid of them. But at the same time, down underneath, you need a body which is constantly being supplied with its vital building and regulating materials.

* * * * * * *

Now we have made a little study of the history of vitamins, we have seen what happens when certain of the well-known vitamins are omitted from our diet, we know something of the attitude of the medical doctors toward this subject and we know just how to proceed when we experience any physical or mental ailment of any kind.

In concluding this section we should point out that no one knows how many vitamins there are. There may even be twice as many as are known, or assumed to exist. But they have one character in common -- they all originate in plant material. And the nutrilites, you remember, are ALL the little vital food factors, including the familiar vitamins. So if you want to be really stylish and up-to-date, you should talk about the nutrilites, and not just the vitamins. And if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but all the nutrilites.

Now, be sure to remember this: the American diet is deficient in nutrilites, the protective food factors. Why is this true? Why are we sick and ailing in this land of plenty? Why don't we get all the vitamins and minerals we need?



23

Enemies of HEALTH

- DEPLETED SOIL
- IMPROPER COOKING
- PROCESSING; STORAGE & SHIPPING DELAYS

Resulting in : devitalized, demineralized and denatured foods!

An Ex-Secretary of Agriculture says:

"50% of the people in the United States do not get enough in the way of protective foods (containing vitamins and minerals) to enable them to enjoy full vigor and health."

Lela E. Booher, Chief of Foods & Nutrition Div., U. S. Bureau of Home Economics informs us:

"The chief fault of many American diets is that they provide too little of the essential minerals and vitamins.

English Academy of Medicine, LANCET, states:

"99% of common illnesses are due to or are superimposed on vitamin deficiencies."

OUR ARMED FORCES KNOW • They supplement the diets of our fighting men with vitamin concentrates.

On the previous page you just read the answer. You are probably not getting the elements you need, because depleted soil, improper cooking, processing, storage and shipping delays produce devitalized, demineralized and denatured food.

As to storage and shipping, consider an orange. An orange stored thirty days loses some of its vitamin value. Cold storage preserves food, but not one hundred per cent. Therefore, your friend and my friend in Chicago or New York gets his fruits and vegetables with a lowered value. Shippers are planning, in the future, to stop shipping fresh fruits and vegetables in railroad cars. Instead, we will put them on a plane tonight and twelve hours later they will be in New-York.

As a matter of fact, possibly you saw that clipping in the Los Angeles Daily News about the 6th of July, 1945. An American Airlines C-39 giant four-motored airfreighter carried fruit and vegetables from Salinas, the "Salad Bowl," to Cleveland. The plane loaded the produce, picked early Wednesday morning, left at 9 A.M., and the fruits and vegetables were being carried home from the Cleveland markets the next morning. Contrast that twenty-four hours with twelve times that and you will know what it means to have fresh fruit in Cleveland.

Now consider the matter of processing. The beriberi which afflicts the Orientals, who eat a lot of polished rice, is the result of processing. In this country we eat polished rice, and also white flour. Do you know why they give us white flour and why it is so hard to get whole wheat flour, and good whole wheat bread? Because millers discovered that white flour would store well without getting rancid, and that weevils would not get into the processed flour. Either the weevils had more sense, or they didn't find enough nourishment in the white flour. Anyway, that's the reason for white flour. And just as the weevils can't live on it, we can't either. It's what we don't eat that makes us sick.

Sugar is another item which is highly processed. The negroes of the tropics who chew the sugar cane get sugar and minerals and vitamins, but we who eat the refined sugar from the cane, do not. And further, the white sugar actually draws on the body's stores of certain nutrilites necessary for the chemical processes as the sugar is converted into energy, so that white sugar not only doesn't give us the nutrilites we need, but it takes from us some that we already have. A double loss.

Most of us like meat, potatoes, and gravy. We are not good vegetable eaters, but even if we were, would we get the nourishment we need? In the preparation of cabbage, as an illustration, you put a nice green head of cabbage in the pot and it comes out something between tan and brown. The chlorophyll is gone as well as the vitamins and minerals which are quite soluble in the cooking water. Even if the cabbage was as good as it should

be to start with, which is not always true under modern cultivation, storage, and transportation, it certainly is not as good as it should be when it is finally cooked and served. The drain pipe gets most of the good food and you and I get what is left.

The greatest enemy of all is depleted soil. We have known that for a hundred years, but we have done very little about it. Way back in the days of Thomas Jefferson it was recognized that the soil in Virginia was being depleted, because the quality of the tobacco crop was falling off. So Thomas Jefferson bought most of the rest of the United States for some ten million dollars. He had to have more rich, fertile soil to grow good tobacco. Now, today, the government, both state and national, is trying to sell the farmer the idea of remineralizing the soil.

As time goes on we shall see more and more remineralization of the soil, but now it is being rapidly demineralized. You have often passed some field, I'm sure, where vegetables are grown. You see them take off one yield after another, with just enough remineralization and fertilization to grow a good looking crop. The farmer doesn't care anything about the mineral content of his plants -- just their appearance and taste, for you buy according to looks and taste. So the food grown in that soil can't have as much food value as it should. It is impossible to take out, over and over, putting very little back, and have good food.

On the other hand, here is an example of what happens when the soil is properly mineralized with respect to only one of the essential elements. In Deaf Smith County, Texas, a dentist moved in to start his practice. But business was poor, and when he investigated, he found that practically nobody had any decayed teeth. The residents of Deaf Smith County didn't need a dentist because fluorine, in addition to other elements, was present in the vegetables and in the drinking water leached through that soil in quantities great enough to produce perfect teeth. So right now, they are starting to import water from Deaf Smith County into other states, in ten thousand gallon lots. But, unfortunately, there isn't enough water in Smith County to go around. Although it is a fine example of the protective value of minerals, it doesn't solve our own health problems.

Why are we having so many common health problems nowadays, whereas a hundred, or two hundred years ago they were not nearly so general?

Great-grandpa used to take the grain to the mill and bring back the whole flour for bread and cereals. Today the grain is shipped to the mill where all of the bran and germ is taken from it, then a chemical is used to bleach it. Most bakers use other chemicals to make it rise when making bread and cakes. Result -- you and I do not get what our great-grandparents used to get in the old days.

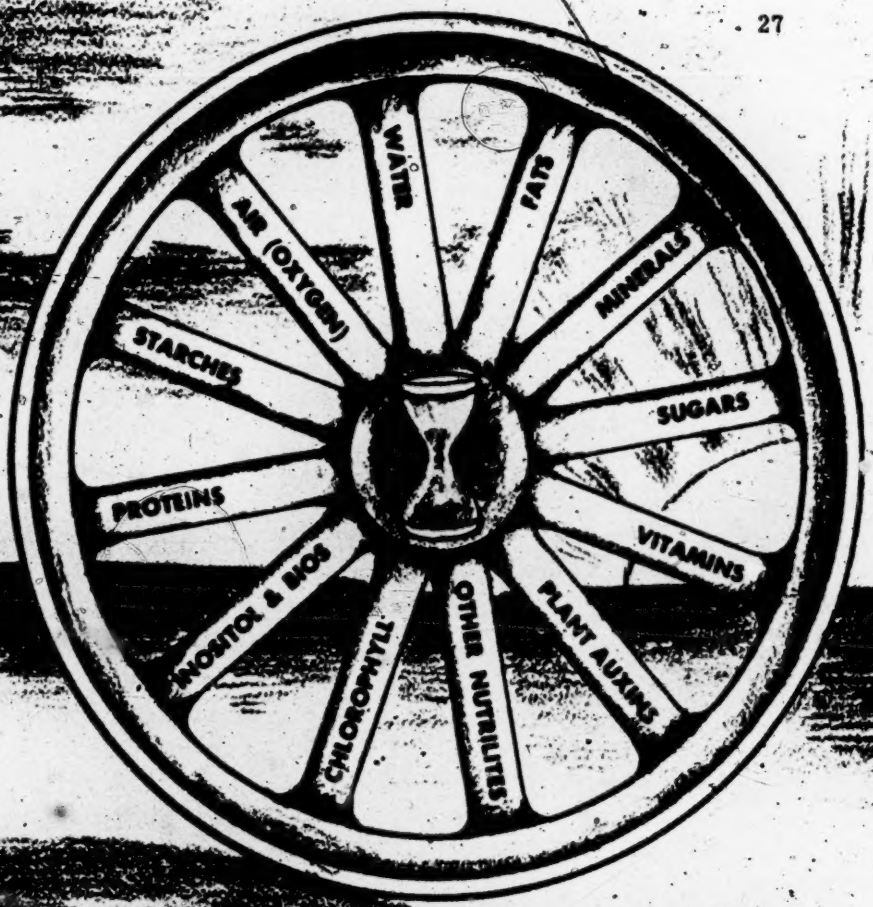
Then remember too, great-grandma's vegetables were likely grown in virgin or at least good soil, while today much of civilization's soil has been used so often and so intensively that it has become demineralized.

What does all this mean? It means that in order to compensate for the losses caused by refining and processing, storage, canning and cooking, and also due to the lack of minerals in the soil, we eat two and three times as much food as would otherwise be necessary.

This results in overloading our stomachs, overworking our livers and kidneys, and eventually a break-down of one or more of these vital organs. And in addition, we are spending more than we should for food, because we have to eat so much -- and even then our bodies are not properly nourished.

The wheel of life is only as strong as the weakest spoke of which it is composed.

27



WHEEL OF LIFE

like any wheel designed to bear a burden, is only as strong as the spokes of which it is formed. Should any of its supporting substances be missing or fail, the wheel is weakened and, as time goes on, it may break down unless these vital elements are restored.

The body must have all the proteins, sugars and starches, nutrilites, and minerals which make the spokes strong. Just deny the body any of them and what happens? You have a flat wheel. Deny yourself air and water and you know what will happen; again, a flat wheel.

Your body will do its best to live on any food you give it. This has been demonstrated by the people in the concentration camps. They lived on potato peelings and polished rice. They didn't live well, they lost weight, they lost their teeth, and many of them lost their minds, and a lot of them have flat wheels they can never overcome. Your body, too, develops a flat wheel when your diet does not contain the elements needed.

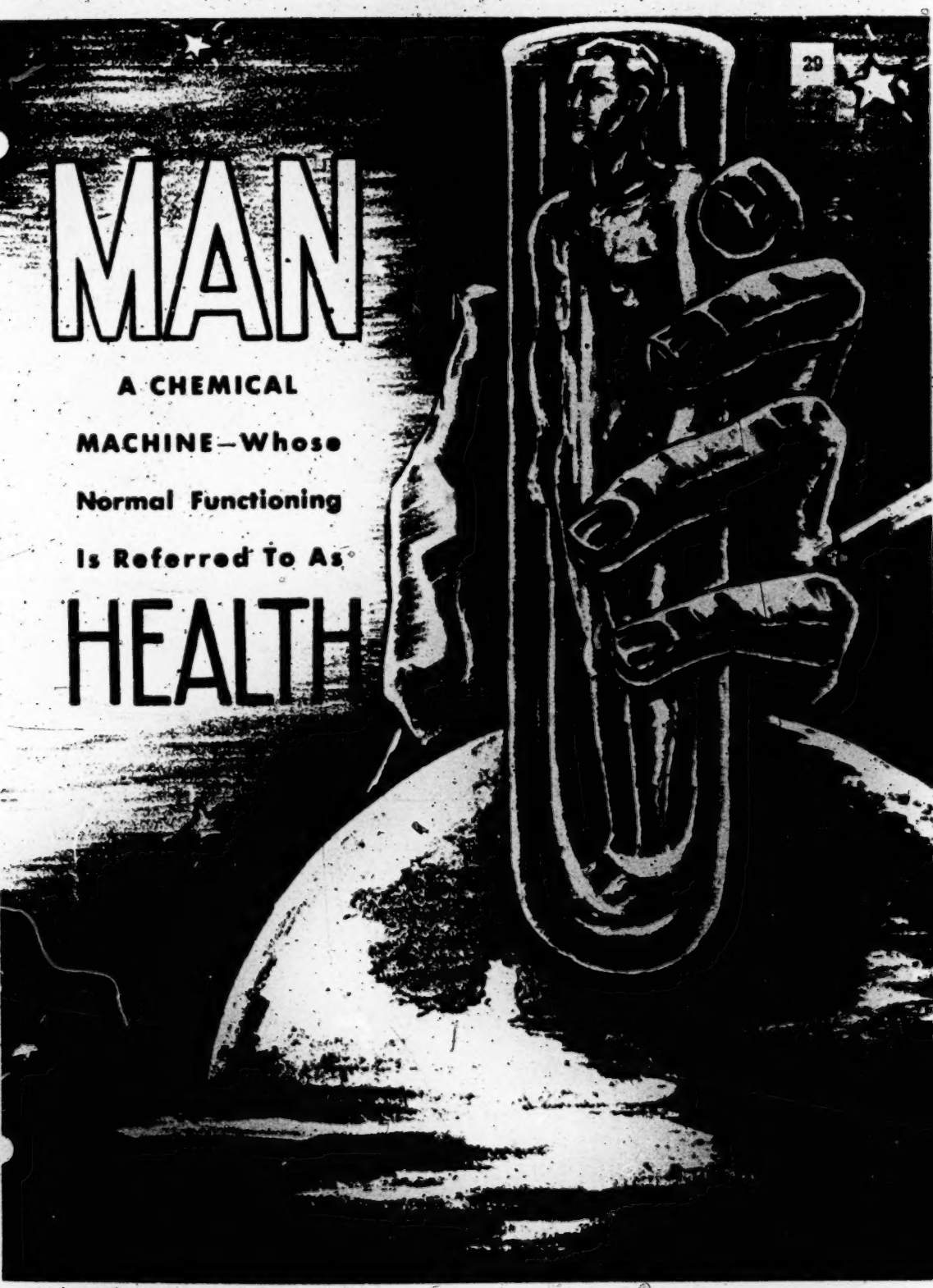
The flat wheel you develop as the result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's, whereas we should live in good health and vigor, and with full possession of our faculties, to the age of 90 or 100.

But long before the deficiencies show outwardly in the adverse physical conditions with all the medical names, there is the evidence of the deficiency showing itself in changes and upsets in the body chemistry.

Chemical and biological sciences have established the fact of the chemical nature of the life process and that living things of all kinds must be in chemical balance to be normal. Most of the ills and diseases of human beings are unnecessary -- they are the result of chemical starvation of our bodies for substances vitally necessary to life.

So much of the operation of the body is chemical in nature that Man is often referred to as a chemical machine. How this is possible is partially explained as follows. You can take some cold nitric acid and some cold copper, put the copper in the acid, and soon both the acid and the metal are hot. That is a chemical reaction. And in the same way, when you put cold food into your body, and the body converts it into heat to keep you warm -- that, too, is a chemical reaction. Thousands and thousands of chemical reactions take place in your body every second of every day, and you don't know anything about what is going on.

This is not a fad but the opening of a door to a new way of life and living for all mankind. It has to do with the accessory food factors so small in bulk that although they have always existed in foods they have only recently been recognized.


29
MAN
A CHEMICAL
MACHINE—Whose
Normal Functioning
Is Referred To As
HEALTH

How simply man could have health if he could be placed in a test tube, where his chemical reactions, metabolism, and general aches and pains could be studied. But while he can't be studied that way, modern nutritional science has been intensively studying him for the past forty years.

There are two words doctors use that often confuse us. One is the word metabolism. "Your metabolism is out of balance," they say, or "Your basal metabolism is way too low." Now this word "metabolism" -- what does it mean? Few people know. But the doctor doesn't use the word to confuse you. It's just his scientific way of expressing himself. He refers to the chemical changes in living cells by which the energy is provided for the vital processes and activities, and by which new material is assimilated to repair the waste. If your basal metabolism is low, it means that this chemical process is not very productive of energy and new material.

Another word the doctor uses is "allergy." He will tell you you are allergic. We heard a doctor say recently that almost everything wrong with us was due to some sort of allergy. He means the body has become so sensitive, that a certain something, otherwise harmless, will cause trouble. One little girl we know is allergic to feathers. When feathers are near her she breaks out in a sort of rash. Some people are allergic to pollens of weeds, or flowers. Some are allergic to cats. A doctor told me recently of a man allergic to sunlight. Allergies seem so popular, it's a wonder someone doesn't say he is allergic to his wife, and claim a divorce.

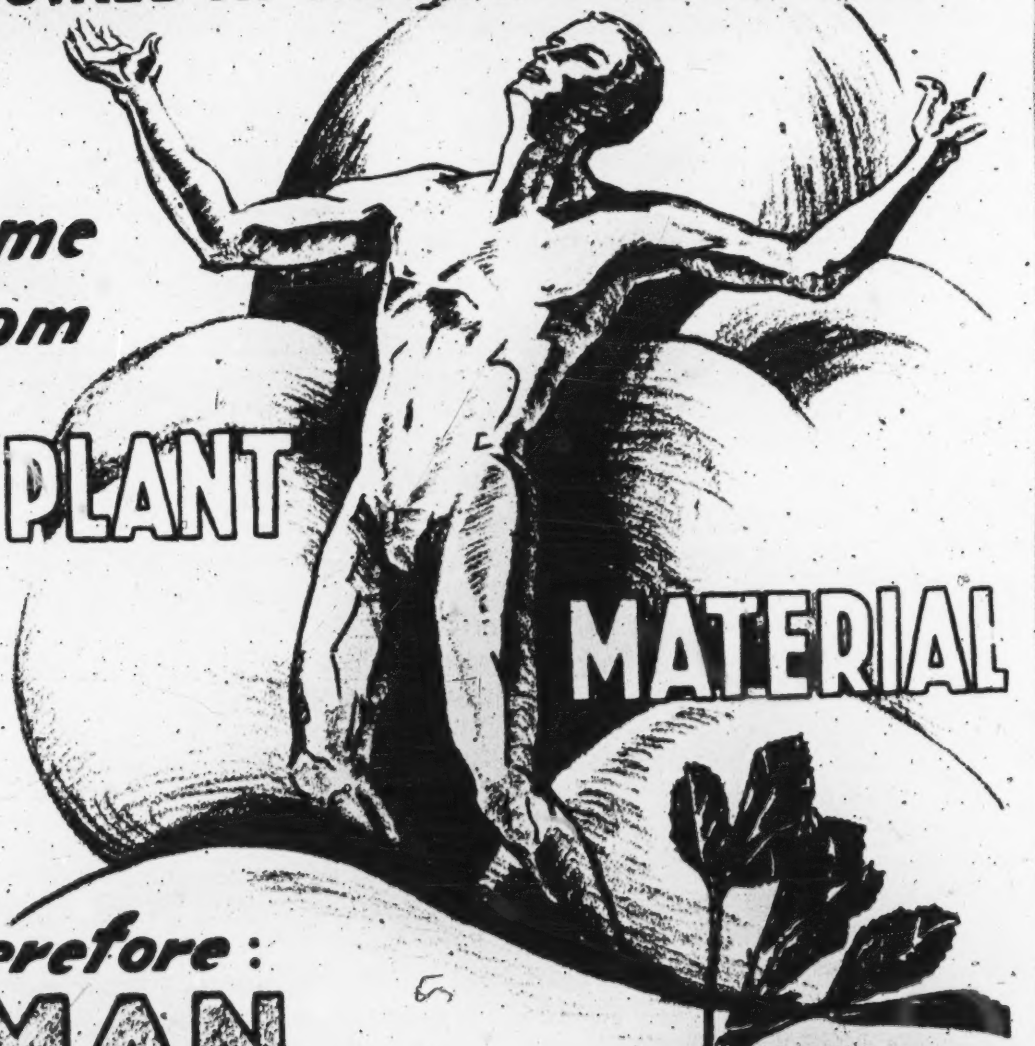
Now it may be perfectly true that your body is sensitive to certain things, and that you really do have an allergy. But this is the big question -- why is your body so sensitive? It isn't enough to know your allergies, and then try to avoid the irritants. The real need is to get your body so adjusted that you won't be so sensitive -- so you won't have the allergies. And here is what the doctors will likely be saying 25 years from now. "There is something wrong with your body chemistry if you have an allergy, and the allergy can be eliminated by your own body, automatically, if you will just give your body all the material it needs to restore its chemical balance."

Your body is a chemical machine, and always the chemical balance must be maintained. When your body gets out of chemical balance, you are ill. When you get into chemical balance and stay there, you are well. That's health in a nut shell, and that's what we find when we put man in a test tube and study him.

Now -- what keeps our body in chemical balance? In other words, what makes us well, and what keeps us well? Here is the story.

31

all of the factors REQUIRED in HUMAN NUTRITION



therefore:

MAN

is dependent upon the

PLANT KINGDOM

for

HEALTH

Once a man had a little calf. It was a cute little brown calf with a white face. The man took the calf out to his pasture -- one of those ideal pastures in a beautiful valley, so all year round the calf could find plenty of food, and water from the stream.

The man left the calf there, with some salt, and took a trip around the world. He was gone a year. When he returned to his calf he found, as we would naturally expect, that it wasn't a calf any more at all -- it was a cow. It was a great big cow, with horns and hooves and a long tail.

As the man stood there by the fence and gazed at his cow, he began to wonder where all the material came from that wasn't there when he left. What made the horns, and the hair on the tail, and the hard material of the hooves?

Obviously, it all came from the grass, since that is all the calf had to eat, with a few leaves, possibly, which it may have nibbled from a young tree.

Now, believe it or not, where the material came from, to make the cow, is important to all of us, for we too grow up in the same way. We too start as a very small animal, and we finish as adults with hair, teeth, bones, finger nails, inner organs and muscles not possessed at first. (Of course, some of us don't have any hair or any teeth when we're grown up, but that's all part of the story too.) As we grow up the hair and teeth grow -- they have to be made of something. Where does the material come from?

You say, it's in the food we eat. It's in all the stuff we put into our bodies -- in the meat, potatoes, milk, bread, candy, coffee, ice cream, pancakes and fruit, vegetables and nuts. Anyway, we hope it is.

It's much like building a house. Suppose you build a brick house, but while it is being built, the bricklayers substitute a lot of wooden boxes, made to look like bricks, for the real bricks. Obviously in an earthquake or big storm, you would lose part of your house. Or a wall might come tumbling down at almost any time. So you call some more bricklayers and they put in a lot more of the imitation bricks along with the good bricks. Everything looks all right, and you think you have done a good job in taking care of your house, but actually your house is still weak, ready to fall apart, and it will stay weak until you get every imitation brick replaced with a good brick.

How many imitation bricks do you suppose you have in your body? It's pretty hard to tell, of course, but here are some facts and figures that will give us an idea of the condition of the bodies of us Americans.

Children die every year in this country from malnutrition. Notice it is not in Europe -- not in Japan -- nof in China during a famine -- but

right here in this country. According to the Bureau of Education, 50 per cent or more of our children in schools need medical attention of some kind. Four million of the boys drafted for army service were rejected for physical defects and inability to serve.

According to a recent study made by a large and well-known eastern college, only one in a thousand is not suffering from deficiency -- from malnutrition. This means that no one can safely say: "I am perfectly healthy and my body is sound and well nourished."

Think of our population, and think of all the common ailments. Pick up any newspaper and you read of prominent citizens dying in early middle age of the various diseases that claim the lives of so many. Think of the people you know who are ill right now, and suffering, without relief.

This would certainly make it look as though each of us might have a body containing many imitation bricks, so that we look reasonably well, we can get around and do some work, but either we are now experiencing some deficiency disease, or we are ready to come down with one.

If this is the case however, if our diet is so deficient and we have so many imitation bricks in our bodies, how does it happen that we continue to live and get along even in an unsatisfactory manner?

The answer lies in the constant attempt being made by the body to adapt itself to its food.

34 THE HUMAN BODY *adjusts itself to its* FOOD SUPPLY



COMPARE the Sikh—huge, powerful fighting man—and the Madrasi—weak, puny, ailing. Blood brothers of the same ancient race, *nutrition* has made them what they are in the 20th Century. Living cramped in areas where the soil has been devitalized through centuries of cultivation, the Madrasi weighs under 100 pounds and his statistical (average) life span is less than 20 years. But the Sikh, living in the hills, cultivating only virgin soil, grows well over six feet and is proud of his 250 pounds of bone and brawn.

The two men pictured are blood brothers. The difference in size between these two groups -- the Sikh and the Madrasi -- is the result of diet. And right here at home we find that the Japanese reared in the United States are seven per cent larger, in general, than Japanese reared in Japan. The lack of vital food elements stunts growth, and a full supply of the vital food elements promotes growth.

A good illustration of the effect of food in plant life is the hydrangea. Normally an hydrangea has an orchid-pink bloom. Sometimes you will see one an orchid-pink and another a pale blue. Why? All in diet. There are some blue herons in Florida. The herons in the zoo in New York are white. For a long time they thought there was a basic difference, until they captured some of the Florida herons and took them to New York to the zoo. In a year's time, there was no difference -- just another white heron.

Here is another illustration of what diet does. Diet deficiencies bring on old age. And the diet deficiencies can bring about all the evidences of old age when the person is still in his teens! We are all acquainted with the evidence furnished by the German and Japanese prison camps, as well as the concentration camps for civilians, and we have seen the pictures of the emaciated people. On the extremely deficient prison camp diets, young people showed all the symptoms of old age, and middle aged people died with all the appearances of old age.

We know that diet deficiencies bring on aches and pains. If you don't believe that, just try living on white bread and water for a few months. Further proof, of course, comes from the laboratories where the experiments with rats show the close relationship between diet and health.* Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies.

And so we find that, simply through changes in diet, you can change the size of a race of people, change the color of a flower or bird, alter the coat of an animal, bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or, when the person is deficient, feed him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must contain all the vitamins, including those which cannot be bought in the drug store, together with all the nutrilites and minerals so often lacking in our diet.

*See Hygeia for September, 1947, pp. 684 ff.

The whole question is this -- do you want to be on top of the heap, feeling fine, thinking clearly and accomplishing things, or do you want to be on the bottom of the heap, ill, ineffective, suffering?

How to Get Well and Stay Well



IF your health problem is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well.

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FOREWORD

One of the most difficult accomplishments in writing is to use words, phrases, clauses and sentences in such a way that the reader gets exactly the impressions and understanding the writer is trying to convey.

We have done our best to include only truthful and factual statements in this book. As statements that might be misunderstood or misconstrued are brought to our attention, they are changed. These changes are made monthly, as a new printing of this book comes off the presses every thirty days.

On the other hand a certain obligation also rests with the reader. This requires him to take what is written and do his best to grasp the author's meaning without reading into it ideas and notions not expressed or intended.

Consider, for example, our title -- HOW TO GET WELL AND STAY WELL. From this title do you conclude that we offer every person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

Another example: When you read the title of this book do you assume that we are going to show you how to stay well, in spite of everything you do to the contrary? If so, it is also a wrong conclusion. You can follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet, such as proteins or carbohydrates.

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. We have done our best to be strictly truthful, and we simply ask you not to read into our words any ideas or meanings that are not there.

ARE YOU A VICTIM?

ARE YOU SUFFERING FROM HIDDEN HUNGER?

ARE YOU SLOWLY STARVING TO DEATH?

"Preposterous," you say. "I'm an American citizen. I'm not a war casualty living on a sub-standard ration, nor a victim of famine in China. I'm an American citizen, and I live in the best-fed nation in the world!"

Our message is important to you for the very reason that you do live in the United States, and because you do eat our modern American diet! Why? Just look around you at the members of your family, at your neighbors, friends and relatives -- at yourself. Can you find even three or four who are absolutely and completely well? Are you enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who should be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have died in the last year, prematurely.

Now, having thought about yourself and the members of your family, you probably feel that although some of the members of the family may be in poor health the rest are in good health.

So it might be interesting to check yourself, relatives and friends against the following requirements for health:

First -- appearance. The healthy person is good looking. His features may be irregular and far from the usual classic model, nevertheless the inner condition of health shows in a good complexion and clear skin (even for the teen agers), in sparkling eyes, a ready smile and a general air of alertness and life.

Second -- odors. The healthy person smells good. Most of the really unpleasant human odors come from a sick body.

Third -- energy. The healthy person is energetic and active. Lazy people are usually sick people. The healthy man or woman carries on his customary daily activities without fatigue. Should he be a little tired at the end of the day, the fatigue passes away by the time he has finished dinner, and no artificial stimulant or relaxer is needed. At the end of his regular day's work, the healthy person is soon ready for an active evening, carrying on his hobbies or social life. At bed time he is comfortably sleepy. He falls asleep at once, and enjoys a good night's sleep, without interruption from his body, and with no, or almost no, dreams. The healthy person awakens in the morning, eager for another active and interesting day. And during the day or evening, at any time, the healthy person is physically ready and able to put on a comfortable pair of walking shoes, and take a long hike, with pleasure.

Fourth -- feelings. The healthy individual feels good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

Fifth -- happiness. The healthy person is happy. He is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties, enables him to earn a satisfactory living. Being healthy, he is not easily upset or disturbed. He has a good disposition. The healthy individual, whether child or adult, is easy to live with and he has fewer social problems.

Now -- what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?

WHAT GOOD HEALTH MEANS TO YOUR BODY

Having seen what good health means to you, let's see what good health means to your body.

All your senses -- sight, taste, touch, hearing, and sense of smell operate in your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

Your heart is, to put it mildly, one of your most useful organs. While the body is resting it pumps approximately one and one-half gallons of blood through your arteries and veins every minute. When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

Glands are nice to have, too, in good working order. Some endocrinologists say that our glands determine our personalities. Certainly it is true that when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

Teeth, also, are useful. Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody wants to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

Here is an extract from a clipping in the New York Times, printed June 29, 1945. "The record of 33 per cent rejections for women (applying for admission in the WACS) indicates an even more serious health situation

for women than the 40 per cent rejection rate does for men," said Dorothy La Salle, in charge of the girls. "It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.," she said. "I am sure that if we could have a complete cross-section of the women between the ages of 20 and 50, a much higher rejection rate would be found."

That's interesting, isn't it? It means that you can think you don't need additional amounts of the protective health factors -- and yet be wrong.

A survey made by a large eastern college shows that out of 2511 people studied in Pennsylvania, 2509 lacked the proper nutrition. Only 2 persons out of 2,511 were receiving the vitamins, minerals and proteins they needed! Further, this same survey shows that, in all communities studied, regardless of economic status, the average diets of the children were far below the required daily intake levels recommended by the National Research council.

Along these lines is an interesting article in the American Magazine for October, 1947, titled "We Feed Our Hogs Better Than Our Children," in which it is pointed out that one-third of the population actually suffers from hunger -- from lack of nutrition -- and that we are much farther advanced in animal nutrition than we are in the science of human nutrition.

Here are some more facts --

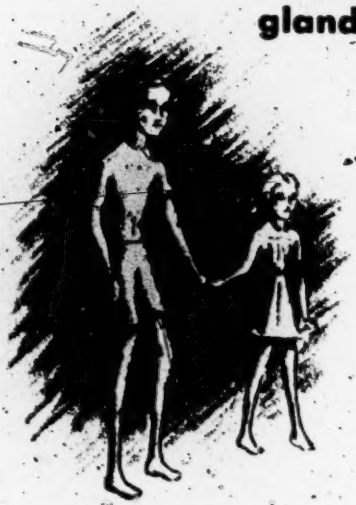
22 MILLION Children

NEED CORRECTIVE TREATMENT — U.S. CHILDCLINIC

10 MILLION
have bad teeth



6 MILLION
are suffering from a glandular disturbance



4 MILLION
are improperly nourished in other ways

1 MILLION
have tuberculosis

1 MILLION
have spinal curvatures

WHAT'S WRONG?

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature -- and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

In the First World War, we rejected 20 to 25 per cent of the men and women eligible for service. Twenty-five years later, in the Second World War, we rejected about 32 per cent -- considerably more. Fifty-two and one half per cent of those called up for service had some disability.

And remember, your 4-F was, in almost every case, a 4-F when he was eight years old -- not suddenly when he was eighteen or twenty-eight. This means that if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

SOME OBVIOUS CONCLUSIONS

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost <u>everyone</u> is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And <u>it hurts</u>!

Obviously it is better to <u>keep</u> your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this -- let us tell you a story.

The Story of a REMARKABLE DISCOVERY



Nearly Thirty Years Ago,

CARL REHNBORG, a young man of Swedish descent, majored in biochemistry in an eastern university, and in time became associated with one of the largest manufacturers of American canned milk. He was selected by this company as their representative in China -- to introduce this product to the mothers of Chinese babies. But he soon learned that this was a very difficult assignment.

He tried to convince these mothers that his company's famous product would make their babies fat and well, but everywhere he turned he came up against the stone wall of Chinese indifference. The Chinese had never used dairy products -- babies had always been nursed.

Finally, although he was not a medical man, he decided to establish a demonstration clinic. He went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. Here desperate mothers, frantic to the point where they were willing to grasp at any promise of hope for their starving, ailing infants, placed them in his care.

Mr. Rehnborg's belief in his company's product was genuine. Yet weeks of feeding one of the most highly advertised and recommended American canned milk products to these sick Chinese babies brought disappointing results. The milk was being carefully formulated, but apparently milk was not the whole answer.

植物的生命就是人類的生命

Having specialized in the chemistry of foods, and having taken part in some of the early vitamin research experiments, he was convinced that the vitamins, the various minerals, and certain other essential diet factors as yet unidentified, were present in many raw foods. But apparently they were absent or deficient in most cooked foods. It was not even certain that cow's milk contained the best concentrations of all of them -- at least for human infants.

He believed these essential food factors were most highly concentrated in green plants, from which the milk-givers and all other animals finally secured them. The therapeutic food value of green growing plants had been further indicated to many observers by the fact that even the meat-eaters among the animals, including man's own dogs and cats, almost invariably exhibited a tendency to eat grass as a conditioner, especially when ill.

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants -- scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

Almost at once some of his little charges began to show improvement. Some of the babies in the clinic, by now expanded to several times its original size, began to take on weight at a more normal rate. They became more active and commenced to throw off the visible symptoms of the various illnesses with which they had been afflicted.

But not all of them. Some still failed to show the hoped-for reaction.

But the man who held their future life and health in his hands was convinced that now he was on the right track. He suspected that the chemically worn-out soil of China was deficient, so that plants grown in it could not supply the consumer with all the required minerals, and probably did not even contain the normal quantities of vitamins and other essential organic substances they should produce. So he subjected samples of the soil to chemical analysis. When this theory was verified by the test tube he leased ground of his own, and plowed the minerals, which were lacking, into the soil. Thus he grew his own green plants, containing a full complement of essential food factors as he recognized them.

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected!

The visible results from having fed these Chinese babies on a diet rich in all the vitamins and minerals then recognized as essential, (plus other food factors which he assumed were equally essential to health because

they were normal components of normal plants, although their essential character was not then proved), convinced him that he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

Therefore, he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the nonessential cellulose and other parts of the plants, so that much value could be concentrated in small volume, and then tried the supplement formula on adults.

It is well-known that life in the Orient has always had a deteriorating effect on members of the white race. The big companies which sent men to China to represent them never kept these representatives on the job for more than about three years at a time. They were then given six months furloughs to return to their own countries. The reason for this was that by the end of two or three years, most Americans and other "foreigners" had reached a run-down condition which only a long vacation in their native country could mend. The climate in China was presumed to be the basic cause of the foreigners' bad health! Having discovered the vitamin and mineral deficiency in Chinese-grown food, our chemist reasoned that this deficiency, rather than climate, probably was the cause of much of the ill health among Americans in the Orient.

True enough, Americans fed on his specially prepared supplement were better able to withstand the deteriorating effects of life in China. These men returned to the United States in as good health as when they left.

When Mr. Rehnborg returned to the United States in 1927, he began a six year period of intensive study and experimentation, to improve his food supplement. At last, in 1933, when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it, on a small scale, in Balboa, California. This all led to further development and improvement and the creation of the present amazing food supplement, designed to supply the elements lacking in the standard American diet.

"All very interesting," you say, "But what does this have to do with me? I still think I eat a good diet. I certainly pay enough for it!"

HERE IS AN EASY CHECK ON YOUR DIET

What are some of the mistakes we make in feeding ourselves, and in feeding our families?

You probably eat white flour products, and the members of your family eat white flour products -- white bread, cake, pie, doughnuts, macaroni, spaghetti, soda crackers and refined breakfast foods. But you wouldn't feed your race horse or other prize animals on grain from which various important items had been removed.

You eat your food, grown on any old kind of soil, and you likely give it little thought. But if you owned valuable race horses, you would want your hay shipped from the blue grass region of Kentucky, or grown on re-mineralized soil.

Now why do we do our best to put the proper materials in our automobiles, and why do we make a scientific study of the feeding of prize animals and stock, while at the same time we feed our families, our children, and ourselves in a thoughtless and haphazard manner, and then wonder why our children, our wives and husbands, and we ourselves become ill?

Here is the answer. We have simply failed to carry over to our own feeding, the scientific knowledge we have learned in the raising of stock, the developing of prize animals, as well as in laboratory nutritional experiments with rats and other laboratory animals. And we have not learned that the body operates like an automobile inasmuch as neither will run efficiently if we put defective materials into them. The result is that almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

Why have we failed to extend our rational feeding to include ourselves and our families? One reason is that we become accustomed to certain food, we like the taste of it, and we don't want to change. Another reason is that most people simply don't know how to get the foods which contain the essential elements even if they are willing to change. Another reason is that to get the necessary elements into our daily diet requires a little effort, and it costs some money, whereas to drift along is easier and cheaper now, even though eventually there may be pain, incapacity, doctors' bills, hospitalization, or death.

So the purpose of this book -- and the objective of the person who lent you this book -- is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, YOU MUST PUT INTO YOUR BODY ALL THE FOOD FACTORS REQUIRED BY IT.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine -- why some people get sick so easily, and get well with such difficulty.

We give you the true and correct answer, and it makes sense to anyone who has owned an automobile or who has raised stock, for automobiles which are repaired with new parts as fast as they begin to wear, run forever, and stock which receive a full supply of vital food substances are healthy animals. Albert Howard, for instance, in his book, THE SOIL AND HEALTH, tells about oxen properly and scientifically fed, resisting the hoof and mouth disease of oxen in adjoining fields, even when their faces were licked by the afflicted animals, reaching through the fence!

You wouldn't feed a $50,000 race horse on third grade grain grown in sections of the United States where the soil is known to be particularly deficient in minerals. You wouldn't feed a $5,000 prize-winning dog on table scraps. You wouldn't feed your chinchillas or your foxes, which you are raising for their fur, on just any old kind of food picked up here and there at bargain prices.

Doesn't it seem reasonable to give a little thought to what you put into the bodies of your wife or husband -- into the bodies of your children -- into your own body?

And remember your reward -- a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them.

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THE FORMULA OF TOMORROW

for the World of today



HEALTH

Includes the six
Basic fundamentals
For sound Health:

- SUNSHINE
- FRESH AIR
- PURE WATER
- PROPER EXERCISE
- SUFFICIENT SLEEP
- PROTECTIVE FOODS

Remember this... THE AMERICAN DIET IS DEFICIENT IN PROTECTIVE FOOD FACTORS

1833

In the foregoing illustration we find noted the six fundamentals of health, namely: sunshine, fresh air, pure water, proper exercise, sufficient sleep, and protective foods. Pure water, fresh air and sunshine we don't worry about in most parts of the United States. We have an abundance of all of them. If we lived in many other parts of the globe, the water question would be something to worry about. But we take those things for granted in our own communities. The need for proper exercise and sufficient sleep is known to every intelligent person.

Now consider the protective food factors -- those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, nutrilites. That's a technical word you won't find in your dictionary, but it means all the little food factors -- not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

Formerly we thought that all we had to worry about was the bulk food we could see on our plates -- the fats, carbohydrates, and proteins. Now we are learning about the vitamins and other nutrilites, and the history of their discovery is interesting.

There was a Swiss bio-chemist, whose name was Lunin, who was intrigued by the consideration that there would come a time when the growing population of the world would be so great that the ground available for growing foods would be insufficient to support them, and he conceived the idea that it might be possible to feed human beings, as it was possible to feed animals, on substances which were not commonly recognized as a food. To determine that this was a sound theory, he fed experimental animals on synthetic diets made up of the substances that science then thought were contained in foods. These experimental animals were fed pure carbohydrate in the form of corn starch, pure refined fats, and protein secured from milk and leached with ether until nothing but protein was left. To this mixture he added all the minerals that analysis showed were in the body, and then fed this diet to animals. In theory they should have been able to maintain life, but they all very promptly died. And successive experiments of similar character all failed, unless small quantities of natural green materials or milk were added to the diets. Lunin concluded that there were substances not yet discovered in foods which were essential to life.

By some strange indifference there was no further recorded investigation along those lines for another twenty-five or thirty years. At that time there was a Dutch physician in charge of a prison hospital in Java. The patients in his hospital were mostly suffering from an oriental disease called beriberi, which is a Malay slang word meaning "no can do," because

the men who have it are incapacitated. They are weak, suffer much pain and finally die.

The Dutch physician, Doctor Eikjman, noticed also that the pigeons around the prison yard seemed to have a similar disease. Their heads were drawn back and their wings and legs were partially paralyzed and they died. He also noticed that what they ate was chiefly the white grains of rice that fell from the chow bowls of the prisoners as they ate their meals. Because it was polished rice, as an experiment he fed the birds unpolished rice -- and they recovered. He then fed unpolished rice to the men, and they also recovered. But, Eikjman, being a physician, not a nutritionist, and dealing with a totally new effect, concluded that there was a toxic substance in the white grain of rice for which the antitoxin was in the rice hulls.

About the same time a Japanese physician was trying to stamp out the same disease in the Japanese Navy. He knew that the staple diet of the Navy men was white rice, and he concluded that the reason a diet composed chiefly of white rice causes beriberi was because white rice did not contain sufficient protein. So, picking a training ship, he arranged that the diet of the cadets on the training ship throughout the cruise should include beans, rather than rice, as a staple food. On the trip there was no beriberi whatever, and he felt this confirmed his theory that the reason for the beriberi was the lack of protein.

An American bio-chemist, Dr. Williams, who was then in the Philippines following these conclusions, advanced the completely new idea that the reason for the sickness was not something the sufferer had eaten, but was because there were factors, normally present in natural foods, the lack of which caused the disease. In other words, the sickness resulted from something not eaten. All that is known of these factors, which we now call vitamins, or nutrilites, has been discovered in the past forty years.

Very early in this investigation it was discovered that one of the principles involved was contained in butter fat and dissolved in fats generally. It was called "fat soluble principle A." Another principle, the lack of which was responsible for beriberi, was found to be water soluble and was called "water soluble principle B." Sometime around 1912 a scientist named Funk believed from his investigations that he had proved that the substances in question were amines; so, he proposed the name vitamines, or amines vital to (vita) life -- vita-amines. Later it was discovered that they were not amines and the final "e" was dropped and they were called vitamins. Fat soluble principle A became Vitamin A. Water soluble principle B became Vitamin B. Presently -- about 1919 -- we knew of Vitamin C and Vitamin D. Later it was discovered that Vitamin B was not simple, but composed of at least two factors, and when this separation had been established, it was discovered that the second of these factors was extremely complex. It is

now known to comprise not less than fourteen distinct values, and for convenience it is called the "B-complex."

From 1920 until 1930 the knowledge of the vitamin factors grew until there were about ten known. In the next ten years perhaps thirty more were discovered or postulated, and most of the first ten were made in crystalline form.

The idea that vitamins have specific action -- that A is good for this and B good for that -- is natural but incorrect. It started with the first discoveries that C was more or less specific for scurvy, B for beriberi, and D for rickets, and the general medical idea that diseases have antidotes.

Actually, each cell of the body needs most of the factors, both the vitamins and the minerals, and their action is general, rather than specific.

The deficiency diseases for the most part are secondary effects, like having your lawn dry out and die because your water supply failed, or like being stuck ten miles from any habitation because you ran out of gas. Vitamin B_1, for example, enables the body to dispose of the waste products produced in burning fuels in the body. If it is deficient, the "clinkers" accumulate, they have a toxic effect on the cortex of nerve fibers, and pain, paralysis, and beriberi result.

In considering the following statements about the effects of individual vitamins, it should be remembered that these are only partial statements -- just as saying that an automobile is good for taking the family on a picnic is only a partial statement of what can be done with a car.

Also, we must realize that the activities of these few vitamins are no more spectacular nor more important in the body chemistry than are the activities of all the other vitamins not so well known, all the other nutrilites, or all the minerals, the amino acids, carbohydrates and fats. On the contrary, Dr. Quigley in his NATIONAL MALNUTRITION, says, "A millionth of a miligram of biotin may be as important in the daily diet as three miligrams of thiamin." Thiamin is Vitamin B_1.

So when you read about the importance of these few vitamins we list below, remember it is just as though we told you how important it is to put water in the battery of your car. You would agree, but at the same time you would be thinking, "Sure, but it is also important that I put in oil, gas, water in the radiator, and keep the tires inflated." So when you read about the importance of these few vitamins, say to yourself, "Certainly, these well-known vitamins listed here are important, but I must also remember to put into my body an ample supply of all food factors. We simply talk about these micro-food factors here because they are the better known nutrilites, and because most people eat a diet deficient in nutrilites."

In reading about these better nown vitamins, we should warn you that you may run into a few technical erms. This is because this description is supplied by Mr. Rehnborg, and whenever he explains things to us, he always goes technical. So if you come upon a tongue-twister like "cocarboxylase," don't be surprised. Actually there aren't many tough words, and it is easy reading between them. But if you aren't interested at all in the behavior of these vitamins in the body chemistry, just skip over to page 19, to WHAT DOCTORS SAY ABOUT VITAMINS.

Vitamin A. Vitamin A raises the body's resistance to infections, especially infections of the respiratory tract, aids in correcting night blindness, and promotes growth in children. It preserves the integrity of the epithelial linings of the body -- the linings of the eye sockets, the mucous membranes that line the body cavities (nose, mouth, lungs, stomach, intestines, etc.), and the linings of glandular cavities. If there is too little A, these membranes "keratinize" -- that is, become scaly and horny instead of smooth and moist with their own secretions, and, among other things, they lose their capacity for normal function and they become more subject to invasions of bacteria. The outside skin tends also to become scaly and the eyes develop a conjunctivitis. The production of visual purple in the eyes is affected, and one is less able to see in dim light.

Vitamin A has an interesting link-up with Vitamin E in fertility, partly due to the keratinization of the epithelial linings of the sexual glands when it is deficient, but also in other ways connected with the development of cells, because it is an essential part of the nuclei of all cells.

Vitamin B_1. Vitamin B_1 is a typical example of the general fact that the action of the vitamins in the body is enzymatic -- that is, they form parts of enzyme systems which are to the chemical reactions of the body what a catalyst is to a reaction in commercial processes; for example, such elements as nickel and platinum, which cause chemical reactions to occur more readily and rapidly, without themselves being concerned in the reaction or used up in the reaction.

In a general sort of way, a vitamin-enzyme causes a reaction to occur, and the reaction in turn is part of the sequence by which another enzyme system is formed, which produces another reaction in the chain, which sets off the formation of another enzyme system, which produces yet another reaction, and so on forever. In the end the vitamin is still there, substantially unchanged, and is eventually excreted by way of the kidneys, so that the vitamins have to flow through the body in a constant stream.

When absorbed into the body, Vitamin B_1 and a phosphate radicle and a protein molecule unite to form a sort of super-molecule, which is an enzyme (in this case called cocarboxylase). Meanwhile sugar which is eaten is hydrolyzed in the stomach (by the action of other enzymes which

were added to it in the mouth as it was eaten) into "simple" sugar, glucose. This is absorbed and immediately converted in the liver to glycogen, or animal starch, and stored for use.

When insulin and thyroxin call out these stores for use as energy, the liver releases some reconverted glucose, the Vitamin B_1 enzyme causes it to be converted into glucose phosphate, and as such it is burned in the muscles for energy and the muscles move, while the released heat maintains the temperature of the body. The product of this burning is in part lactic acid, which the body may reconvert into glycogen and again store in the liver, but which is mostly broken down (degraded again with the help of Vitamin B_1) into its simpler constituents, ending after several steps in carbon dioxide and water, which the body gets rid of -- the carbon dioxide through the lungs and the water through the kidneys.

The sugar was originally made in a plant from carbon dioxide and water by the action of certain wave-lengths of light in the presence of the enzyme or catalyst, chlorophyll. The energy used in this conversion was stored as chemical energy in the sugar. Burning it in the muscles released the energy, and with the discarding of the carbon dioxide and water by the body we are back where we started, and the discarded carbon dioxide and water may be used by another plant to make sugar all over again. All the body has used is the energy of sunlight stored in the sugar molecule.

If there is too little Vitamin B_1, this process of degrading and getting rid of the waste is interfered with, and some of the intermediate products formed in the process of degradation, notably such compounds as methyl glyoxal and pyruvic acid, accumulate in the blood and body fluids, and are poisonous in excess to many tissues, but particularly to the cortex (gray active surface layer) of the nerve system, brain and nerves. The ability of these tissues to function is lowered, pain and paralysis result, and we say the individual has neuritis, shingles, beriberi, sprue or celiac disease. If the situation is not corrected, in time the individual dies, having suffered considerable pain in the process.

Vitamin B_2. The chief function of Vitamin B_2 seems to be in the formation of what are called "oxidation-reduction enzymes," by which it has to do with cell respiration. A cell picks up oxygen from the hemoglobin in the blood stream, but what actually happens is that the Vitamin B_2 enzyme associated with the cell does the picking up. It is like the mail hook at the station that grabs the mail bag from the train as it speeds past.

Vitamin C. Vitamin C is, among other things, the "cement" which holds the cells of organs and tissues together as a functioning group. When in scurvy there are hemorrhages in the capillaries under the skin, for example, it is because the capillary walls have lost this integration and do not hold the blood in its course, but allow it to escape among the surrounding cells.

The capillary wall is not a tube but merely a passage between cells from the point where the tiniest artery ends to the point where the smallest vein begins, so the weakness of the walls is a sort of flabbiness of the cells of the tissue being fed by the flowing blood. Another evidence of this flabbiness is that when you press down on the flesh of a sufferer from scurvy and then remove your hand, the depression remains and the flesh does not show any elasticity in springing back into place as healthy flesh does.

Vitamin C also appears to be the chief defense of the body against infections. A person with a fever, for example, uses from three to ten times as much of the vitamin as a person without a fever. This is why lemon juice is a favored drink for a fever patient. It has been known for generations that a fever patient craves acid fruits to drink, but lemon juice is not the best answer. Orange juice or grapefruit juice or tomatoes or Vitamin C tablets would be better. The patient can't drink enough lemon juice to get enough vitamins for his requirements.

Vitamin D. Vitamin D has to do with the metabolism (the chemical changes by which a living organism utilizes nutrients) of minerals. When it is effective in rickets it is because it enables the body to utilize calcium and phosphorus, but its effects also extend to all other minerals. The exact mechanism by which Vitamin D does this is still obscure.

Vitamin E. Vitamin E is called the "fertility vitamin." This is an accurate if indirect characterization, just as it is to call water a "thirst quencher." In some way not known, Vitamin E is essential to the maturation or ripening of new cells, and it therefore has its chief function where many new cells are ripening -- in a woman, the foetus of a new individual; in a man, the tubules of the testes where spermatozoa are forming.

If there is a deficiency of the vitamin, the woman is sterile because the foetus dies and is aborted, or is aborted before it has died because the placenta is developing inadequately. This "sterility" is not permanent.

In a man, the mechanism by which the sperms evolve from the protean cells of the tubules in the testes is interfered with, and they are incomplete and inactive. If it is of long duration, the deficiency for Vitamin E will result in permanent sterility.

Probably new cells form in muscle tissues. At any rate, in a Vitamin E deficiency there is a progressive paralysis of muscle tissues, especially, as might be expected, in a growing child, but also in adults.

Finally, Vitamin E seems to play some vital part in proper function of the brain cells, because in even partial Vitamin E deficiency there is a marked deterioration of mental vigor and the ability to think clearly or for long periods.

Vitamin B_6 has something to do with the integrity of cartilages.

Pantothenic Acid in some way is concerned in the metabolism of fats.

Niacin deficiency produces pellagra, with nervous, mental, muscular, skin, and digestive upsets, some of which may be partly due to other lacks.

This is a very partial list of "vitamin functions," and drives home the first statement, that vitamins are not specific but general in their action, and the "deficiency effects" which are listed are secondary and not primary effects.

WHAT DOCTORS SAY ABOUT VITAMINS

You will find many doctors who "prescribe" vitamins. You will find many doctors who recommend the use of various vitamin preparations you can buy in drug stores. You will also find doctors who recommend NUTRILITE.

But there are still many doctors who are antagonistic to the whole idea of health developed in a non-medical manner. To understand this attitude we need a little orientation in the field.

First, we must realize that many illnesses are caused by something foreign getting into the body (germs and poisons, for example) and that in these cases a recovery comes as a result of the use of something that will either throw out the foreign matter, counteract it, or accustom the body to it. The material used to overcome or cast out the foreign elements is usually called a "medicine."

That is the "medical" approach. It is used by medical doctors, and since much illness lies in this field, medical doctors are important and necessary.

Until recently it was thought that all, or almost all diseases were caused in this way, by the entrance into the body of some toxic matter or by germs. In fact, we have been accustomed to this explanation of disease for so long that it is only with great difficulty that we are able to think about any other possibility. For example, you remember that Eikjman, the Dutch physician studying the prisoners afflicted with beriberi, concluded that the white rice contained a toxic substance not contained in the unpolished rice. Had we been in his place, it is equally unlikely that we would have guessed that the prisoners and the pigeons became ill because of a lack of a micro-food factor.

But, as we have already learned, in the last forty years new discoveries have been made -- the vitamins and various other nutrilites. The old facts, mentioned above, are still the same, but new and important facts have been

added. The new facts are that many physical ailments and diseases are not the result of the penetration of the body by something foreign, but THE FAILURE TO PUT INTO THE BODY needed factors and materials, resulting in nutritional deficiencies.

In the mechanical world, it is the difference between a breakdown in your automobile occurring because dirt got into your carburetor, and one occurring because you failed to put in a new set of wrist pins when the old ones wore out.

With your pet dog it is the difference between its death due to poison administered by a neighbor, and failure on your part to feed the dog enough of the right kind of building material and regulating items.

With yourself, in the same way, it is the difference between fighting a particular disease with medicine to throw out the intruders, or forgetting all about the symptoms and their medical names, and putting back into the body the materials the body needs for health. In this way, you are not fighting any foreign element in the body, or trying to cure anything. You are adjusting your diet so your body can restore itself to normal. If, as a result, you find yourself without some deficiency disease you suffered with previously, that is very gratifying, but only a secondary result. The rebuilding of your whole body through the provision of necessary materials, is your primary purpose.

What complicates the whole picture is the fact that the two viewpoints (medical versus health through diet) are, in many cases, interrelated. A house may burn down, for example, because someone threw a lighted match in the window. And, you can also say in the same case that the devastating fire was due to the fact that the water supply was shut off.

In the same way, you can say the man's illness is due to the germs which entered his body. You can also say it is due to failure to feed his body properly, since a healthy body tends to resist germ invasions.

Actually, then, when a person has an ache or pain, a weakness wasting, unsatisfactory feeling, a lesion, a symptom, or loss of physical capacity--in short, when he is ill, there are three courses of action open to him.

(1) He can reason that since his body needs all necessary building and regulating materials anyway, whether ill or well, he must make sure his body is getting all these essential items for proper rebuilding and regulating, and he will add these to his diet. Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs.

(2) If his physical ailment seems to be acute, he can IMMEDIATELY UPON BEGINNING HIS BODY BUILDING THROUGH FOOD AND THE MICRO-FOOD FACTORS, consult a physician to determine whether or not his condition

might be due to poisons in his system or to germ invasion. If so, WHILE HE CONTINUES TO BUILD HIS BODY THROUGH FOOD AND THE NUTRILITES, he can have medical treatment.

(3) If his belief or his ailment indicates to him the need for spiritual, psychological, psychiatric or religious assistance, he can WHILE HE CONTINUES TO SUPPLY HIS BODY WITH ALL NECESSARY BUILDING AND REGULATING MATERIAL, have whatever psychological, mental or religious assistance he wishes.

This procedure should be acceptable to all concerned. First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ailment has likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse. Second, if the ailment is acute, in addition to the physical rebuilding through food and nutrilites, medical aid is solicited. Should the trouble prove to be of such a nature as to require medicine, the presence in the patient's body of building and regulating materials can only aid the medical treatment. Any physician who is interested in getting his patient well (and naturally the physician is interested in this) will want his patient as well nourished as possible, and he would no more think of objecting to a good diet supplement for his patient than he would think of putting all his patients on a 30 day fast. Third, no matter how well nourished the body may be, we all need to think correctly, and certainly, no practitioner, psychologist, psychiatrist or mental healer could object to a person being well nourished while the process of right thinking is developed.

And so when we supply our bodies with all the necessary building and regulating materials we have everything to gain and nothing to lose. If we get well in step 1 (use of full nutritional supply) we save a lot of money otherwise spent for examinations and treatment. In step 2, the medical treatment required is more effective in the well fed body. And in step 3, any mental reeducation is facilitated when the brain and nervous system are properly nourished.

So we find -- and this is very important -- you do not have to make a far reaching and momentous decision between diet and drugs, between physical methods and mental methods or between nutritional science and Christian Science. To the extent that you need them or want them, you can have them all. As a matter of fact, "mens sana in corpore sano" is a good goal. We all need a sound mind in a sound body. And we need a sound body without any foreign elements. If you have germs -- get rid of them. If there are poisons in your body -- get rid of them. If you are afflicted with wrong thoughts -- get rid of them. But at the same time, down underneath, you need a body which is constantly being supplied with its vital building and regulating materials.

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Now we have made a little study of the history of vitamins, we have seen what happens when certain of the well-known vitamins are omitted from our diet, we know something of the attitude of the medical doctors toward this subject and we know just how to proceed when we experience any physical or mental ailment of any kind.

In concluding this section we should point out that no one knows how many vitamins there are. There may even be twice as many as are known, or assumed to exist. But they have one character in common -- they all originate in plant material. And the nutrilites, you remember, are ALL the little vital food factors, including the familiar vitamins. So if you want to be really stylish and up-to-date, you should talk about the nutrilites, and not just the vitamins. And if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but all the nutrilites.

Now, be sure to remember this: the American diet is deficient in nutrilites, the protective food factors. Why is this true? Why are we sick and ailing in this land of plenty? Why don't we get all the vitamins and minerals we need?



Enemies of HEALTH

- **DEPLETED SOIL**
- **IMPROPER COOKING**
- **PROCESSING; STORAGE & SHIPPING DELAYS**

Resulting in : devitalized, demineralized and denatured foods!

An Ex-Secretary of Agriculture says:

"50% of the people in the United States do not get enough in the way of protective foods (containing vitamins and minerals) to enable them to enjoy full vigor and health."

Lela E. Booher, Chief of Foods & Nutrition Div., U. S. Bureau of Home Economics informs us:

"The chief fault of many American diets is that they provide too little of the essential minerals and vitamins.

English Academy of Medicine, LANCET, states:

"99% of common illnesses are due to or are superimposed on vitamin deficiencies."

OUR ARMED FORCES KNOW

- **They supplement the diets of our fighting men with vitamin concentrates.**

On the previous page you just read the answer. You are probably not getting the elements you need, because depleted soil, improper cooking, processing, storage and shipping delays produce devitalized, demineralized and denatured food.

As to storage and shipping, consider an orange. An orange stored thirty days loses some of its vitamin value. Cold storage preserves food, but not one hundred per cent. Therefore, your friend and my friend in Chicago or New York gets his fruits and vegetables with a lowered value. Shippers are planning, in the future, to stop shipping fresh fruits and vegetables in railroad cars. Instead, we will put them on a plane tonight and twelve hours later they will be in New York.

As a matter of fact, possibly you saw that clipping in the Los Angeles Daily News about the 6th of July, 1945. An American Airlines C-39 giant four-motored airfreighter carried fruit and vegetables from Salinas, the "Salad Bowl," to Cleveland. The plane loaded the produce, picked early Wednesday morning, left at 9 A.M., and the fruits and vegetables were being carried home from the Cleveland markets the next morning. Contrast that twenty-four hours with twelve times that and you will know what it means to have fresh fruit in Cleveland.

Now consider the matter of processing. The beriberi which afflicts the Orientals, who eat a lot of polished rice, is the result of processing. In this country we eat polished rice, and also white flour. Do you know why they give us white flour and why it is so hard to get whole wheat flour, and good whole wheat bread? Because millers discovered that white flour would store well without getting rancid, and that weevils would not get into the processed flour. Either the weevils had more sense, or they didn't find enough nourishment in the white flour. Anyway, that's the reason for white flour. And just as the weevils can't live on it, we can't either. It's what we don't eat that makes us sick.

Sugar is another item which is highly processed. The negroes of the tropics who chew the sugar cane get sugar and minerals and vitamins, but we who eat the refined sugar from the cane, do not. And further, the white sugar actually draws on the body's stores of certain nutrilites necessary for the chemical processes as the sugar is converted into energy, so that white sugar not only doesn't give us the nutrilites we need, but it takes from us some that we already have. A double loss.

Most of us like meat, potatoes, and gravy. We are not good vegetable eaters, but even if we were, would we get the nourishment we need? In the preparation of cabbage, as an illustration, you put a nice green head of cabbage in the pot and it comes out something between tan and brown. The chlorophyll is gone as well as the vitamins and minerals which are quite soluble in the cooking water. Even if the cabbage was as good as it should

be to start with, which is not always true under modern cultivation, storage, and transportation, it certainly is not as good as it should be when it is finally cooked and served. The drain pipe gets most of the good food and you and I get what is left.

The greatest enemy of all is depleted soil. We have known that for a hundred years, but we have done very little about it. 'Way back in the days of Thomas Jefferson it was recognized that the soil in Virginia was being depleted, because the quality of the tobacco crop was falling off. So Thomas Jefferson bought most of the rest of the United States for some ten million dollars. He had to have more rich, fertile soil to grow good tobacco. Now, today, the government, both state and national, is trying to sell the farmer the idea of remineralizing the soil.

As time goes on we shall see more and more remineralization of the soil, but now it is being rapidly demineralized. You have often passed some field, I'm sure, where vegetables are grown. You see them take off one yield after another, with just enough remineralization and fertilization to grow a good looking crop. The farmer doesn't care anything about the mineral content of his plants -- just their appearance and taste, for you buy according to looks and taste. So the food grown in that soil can't have as much food value as it should. It is impossible to take out, over and over, putting very little back, and have good food.

On the other hand, here is an example of what happens when the soil is properly mineralized with respect to only one of the essential elements. In Deaf Smith County, Texas, a dentist moved in to start his practice. But business was poor, and when he investigated, he found that practically nobody had any decayed teeth. The residents of Deaf Smith County didn't need a dentist because fluorine, in addition to other elements, was present in the vegetables and in the drinking water leached through that soil in quantities great enough to produce perfect teeth. So right now, they are starting to import water from Deaf Smith County into other states, in ten thousand gallon lots. But, unfortunately, there isn't enough water in Smith County to go around. Although it is a fine example of the protective value of minerals, it doesn't solve our own health problems.

Why are we having so many common health problems nowadays, whereas a hundred, or two hundred years ago they were not nearly so general?

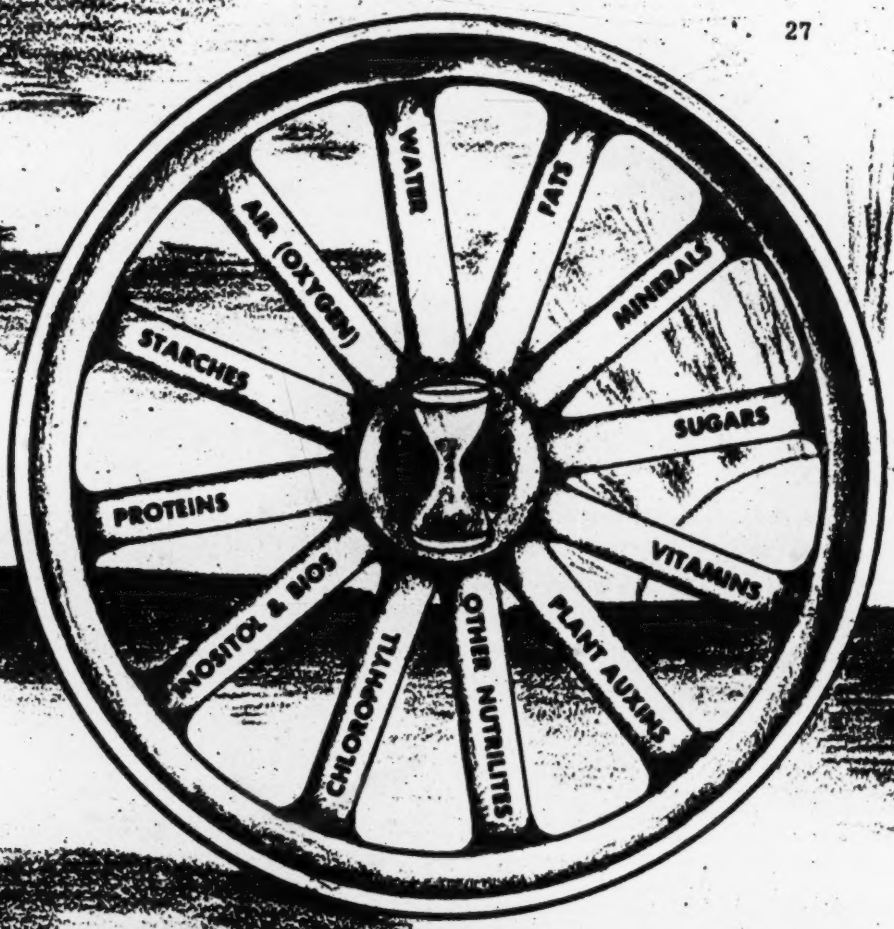
Great-grandpa used to take the grain to the mill and bring back the whole flour for bread and cereals. Today the grain is shipped to the mill where all of the bran and germ is taken from it, then a chemical is used to bleach it. Most bakers use other chemicals to make it rise when making bread and cakes. Result -- you and I do not get what our great-grandparents used to get in the old days.

Then remember too, great-grandma's vegetables were likely grown in virgin or at least good soil, while today much of civilization's soil has been used so often and so intensively that it has become demineralized.

What does all this mean? It means that in order to compensate for the losses caused by refining and processing, storage, canning and cooking, and also due to the lack of minerals in the soil, we eat two and three times as much food as would otherwise be necessary.

This results in overloading our stomachs, overworking our livers and kidneys, and eventually a break-down of one or more of these vital organs. And in addition, we are spending more than we should for food, because we have to eat so much -- and even then our bodies are not properly nourished.

The wheel of life is only as strong as the weakest spoke of which it is composed.



WHEEL OF LIFE

like any wheel designed to bear a burden, is only as strong as the spokes of which it is formed. Should any of its supporting substances be missing or fail, the wheel is weakened and, as time goes on, it may break down unless these vital elements are restored.

The body must have all the proteins, sugars and starches, nutrilites, and minerals which make the spokes strong. Just deny the body any of them and what happens? You have a flat wheel: Deny yourself air and water and you know what will happen; again, a flat wheel.

Your body will do its best to live on any food you give it. This has been demonstrated by the people in the concentration camps. They lived on potato peelings and polished rice. They didn't live well, they lost weight, they lost their teeth, and many of them lost their minds, and a lot of them have flat wheels they can never overcome. Your body, too, develops a flat wheel when your diet does not contain the elements needed.

The flat wheel you develop as the result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's, whereas we should live in good health and vigor, and with full possession of our faculties, to the age of 90 or 100.

But long before the deficiencies show outwardly in the adverse physical conditions with all the medical names, there is the evidence of the deficiency showing itself in changes and upsets in the body chemistry.

Chemical and biological sciences have established the fact of the chemical nature of the life process and that living things of all kinds must be in chemical balance to be normal. Most of the ills and diseases of human beings are unnecessary -- they are the result of chemical starvation of our bodies for substances vitally necessary to life.

So much of the operation of the body is chemical in nature that Man is often referred to as a chemical machine. How this is possible is partially explained as follows. You can take some cold nitric acid and some cold copper, put the copper in the acid, and soon both the acid and the metal are hot. That is a chemical reaction. And in the same way, when you put cold food into your body, and the body converts it into heat to keep you warm -- that, too, is a chemical reaction. Thousands and thousands of chemical reactions take place in your body every second of every day, and you don't know anything about what is going on.

This is not a fad but the opening of a door to a new way of life and living for all mankind. It has to do with the accessory food factors so small in bulk that although they have always existed in foods they have only recently been recognized.


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MAN
A CHEMICAL
MACHINE—Whose
Normal Functioning
Is Referred To As
HEALTH

How simply man could have health if he could be placed in a test tube, where his chemical reactions, metabolism, and general aches and pains could be studied. But while he can't be studied that way, modern nutritional science has been intensively studying him for the past forty years.

There are two words doctors use that often confuse us. One is the word metabolism. "Your metabolism is out of balance," they say, or "Your basal metabolism is way too low." Now this word "metabolism" -- what does it mean? Few people know. But the doctor doesn't use the word to confuse you. It's just his scientific way of expressing himself. He refers to the chemical changes in living cells by which the energy is provided for the vital processes and activities, and by which new material is assimilated to repair the waste. If your basal metabolism is low, it means that this chemical process is not very productive of energy and new material.

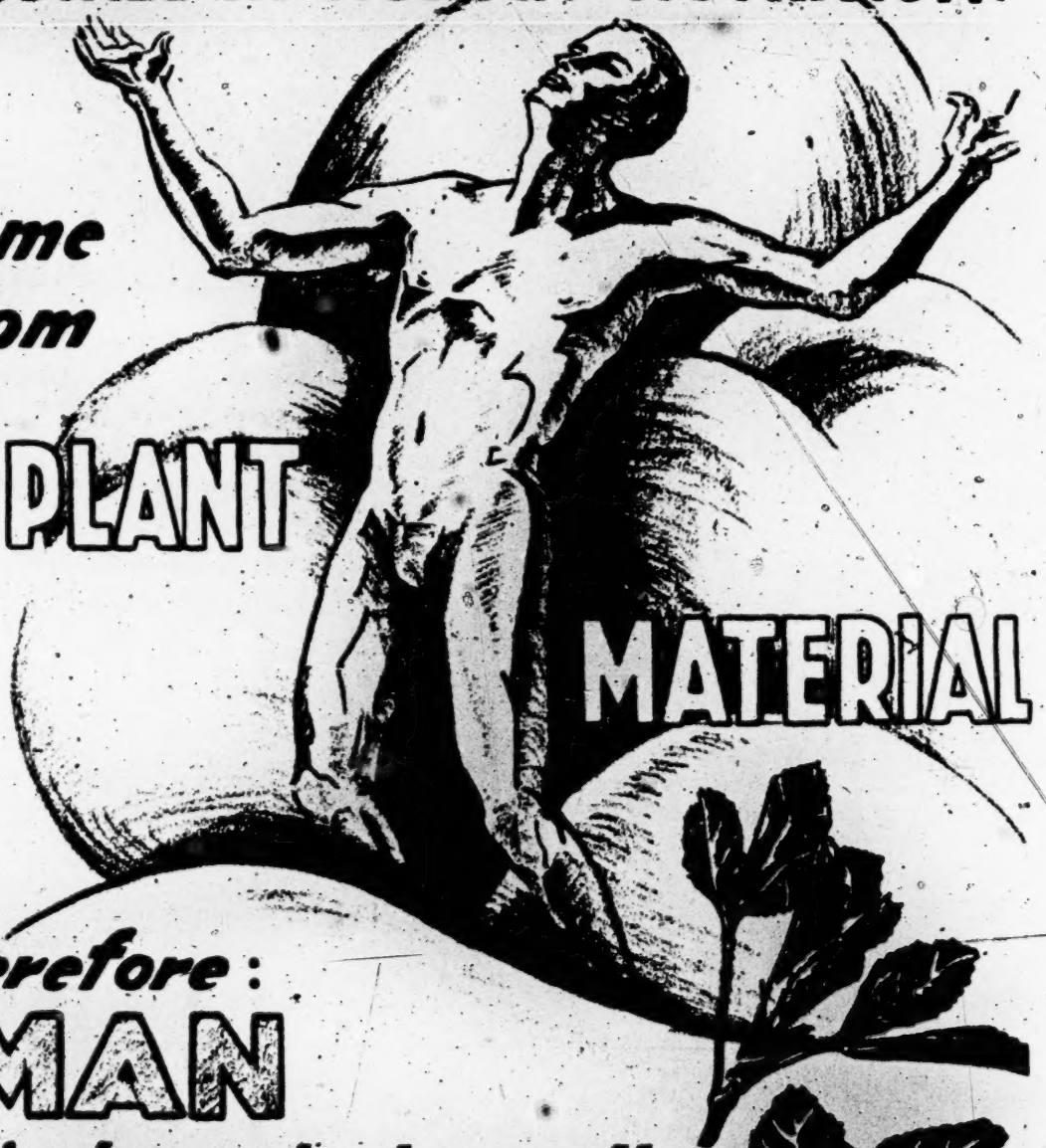
Another word the doctor uses is "allergy." He will tell you you are allergic. We heard a doctor say recently that almost everything wrong with us was due to some sort of allergy. He means the body has become so sensitive, that a certain something, otherwise harmless, will cause trouble. One little girl we know is allergic to feathers. When feathers are near her she breaks out in a sort of rash. Some people are allergic to pollens of weeds, or flowers. Some are allergic to cats. A doctor told me recently of a man allergic to sunlight. Allergies seem so popular, it's a wonder someone doesn't say he is allergic to his wife, and claim a divorce.

Now it may be perfectly true that your body is sensitive to certain things, and that you really do have an allergy. But this is the big question -- why is your body so sensitive? It isn't enough to know your allergies, and then try to avoid the irritants. The real need is to get your body so adjusted that you won't be so sensitive -- so you won't have the allergies. And here is what the doctors will likely be saying 25 years from now. "There is something wrong with your body chemistry if you have an allergy, and the allergy can be eliminated by your own body, automatically, if you will just give your body all the material it needs to restore its chemical balance."

Your body is a chemical machine, and always the chemical balance must be maintained. When your body gets out of chemical balance, you are ill. When you get into chemical balance and stay there, you are well. That's health in a nut shell, and that's what we find when we put man in a test tube and study him.

Now -- what keeps our body in chemical balance? In other words, what makes us well, and what keeps us well? Here is the story.

all of the factors 31
REQUIRED *in* HUMAN NUTRITION



come from

PLANT MATERIAL

therefore:

MAN

is dependent upon the

PLANT KINGDOM

for **HEALTH**

Once a man had a little calf. It was a cute little brown calf with a white face. The man took the calf out to his pasture -- one of those ideal pastures in a beautiful valley, so all year round the calf could find plenty of food, and water from the stream.

The man left the calf there, with some salt, and took a trip around the world. He was gone a year. When he returned to his calf he found, as we would naturally expect, that it wasn't a calf any more at all -- it was a cow. It was a great big cow, with horns and hooves and a long tail.

As the man stood there by the fence and gazed at his cow, he began to wonder where all the material came from that wasn't there when he left. What made the horns, and the hair on the tail, and the hard material of the hooves?

Obviously, it all came from the grass, since that is all the calf had to eat, with a few leaves, possibly, which it may have nibbled from a young tree.

Now, believe it or not, where the material came from, to make the cow, is important to all of us, for we too grow up in the same way. We too start as a very small animal, and we finish as adults with hair, teeth, bones, finger nails, inner organs and muscles not possessed at first. (Of course, some of us don't have any hair or any teeth when we're grown up, but that's all part of the story too.) As we grow up the hair and teeth grow -- they have to be made of something. Where does the material come from?

You say, it's in the food we eat. It's in all the stuff we put into our bodies -- in the meat, potatoes, milk, bread, candy, coffee, ice cream, pancakes and fruit, vegetables and nuts. Anyway, we hope it is.

It's much like building a house. Suppose you build a brick house, but while it is being built, the bricklayers substitute a lot of wooden boxes, made to look like bricks, for the real bricks. Obviously in an earthquake or big storm, you would lose part of your house. Or a wall might come tumbling down at almost any time. So you call some more bricklayers and they put in a lot more of the imitation bricks along with the good bricks. Everything looks all right, and you think you have done a good job in taking care of your house, but actually your house is still weak, ready to fall apart, and it will stay weak until you get every imitation brick replaced with a good brick.

How many imitation bricks do you suppose you have in your body? It's pretty hard to tell, of course, but here are some facts and figures that will give us an idea of the condition of the bodies of us Americans.

Children die every year in this country from malnutrition. Notice it is not in Europe -- not in Japan -- not in China during a famine -- but

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right here in this country. According to the Bureau of Education, 50 per cent or more of our children in schools need medical attention of some kind. Four million of the boys drafted for army service were rejected for physical defects and inability to serve.

According to a recent study made by a large and well-known eastern college, only one in a thousand is not suffering from deficiency -- from malnutrition. This means that no one can safely say: "I am perfectly healthy and my body is sound and well-nourished."

Think of our population, and think of all the common ailments. Pick up any newspaper and you read of prominent citizens dying in early middle age of the various diseases that claim the lives of so many. Think of the people you know who are ill right now, and suffering, without relief.

This would certainly make it look as though each of us might have a body containing many imitation bricks, so that we look reasonably well, we can get around and do some work, but either we are now experiencing some deficiency disease, or we are ready to come down with one.

If this is the case however, if our diet is so deficient and we have so many imitation bricks in our bodies, how does it happen that we continue to live and get along even in an unsatisfactory manner?

The answer lies in the constant attempt being made by the body to adapt itself to its food.

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THE HUMAN BODY *adjusts itself to its* FOOD SUPPLY



COMPARE the Sikh—huge, powerful fighting man—and the Madrasi—weak, puny, ailing. Blood brothers of the same ancient race, *nutrition* has made them what they are in the 20th Century. Living cramped in areas where the soil has been devitalized through centuries of cultivation, the Madrasi weighs under 100 pounds and his statistical (average) life span is less than 20 years. But the Sikh, living in the hills, cultivating only virgin soil, grows well over six feet and is proud of his 250 pounds of bone and brawn.

The two men pictured are blood brothers. The difference in size between these two groups -- the Sikh and the Madrasi -- is the result of diet. And right here at home we find that the Japanese reared in the United States are larger, in general, than Japanese reared in Japan. The lack of vital food elements stunts growth, and a full supply of the vital food elements promotes growth.

A good illustration of the effect of food in plant life is the hydrangea. Normally an hydrangea has an orchid-pink bloom. Sometimes you will see one an orchid-pink and another a pale blue. Why? All in diet. There are many pink flamingos in Florida. The flamingos in the zoo in New York were white. For a long time they thought there was a basic difference, until they captured some of the Florida flamingos and took them to New York to the zoo. In a year's time, there was no difference -- just another white flamingo.*

Here is another illustration of what diet does. Diet deficiencies bring on old age. And the diet deficiencies can bring about all the evidences of old age when the person is still in his teens! We are all acquainted with the evidence furnished by the German and Japanese prison camps, as well as the concentration camps for civilians, and we have seen the pictures of the emaciated people. On the extremely deficient prison camp diets, young people showed all the symptoms of old age, and middle aged people died with all the appearances of old age.

We know that diet deficiencies bring on aches and pains. If you don't believe that, just try living on white bread and water for a few months. Further proof, of course, comes from the laboratories where the experiments with rats show the close relationship between diet and health.**

And so we find that, simply through changes in diet, you can change the size of a race of people, change the color of a flower or bird, alter the coat of an animal, bring on premature old age, create a wide variety of aches and pains and illnesses, or bring about death.

*Just as an item of passing interest, we are informed by the curator of a zoo that most zoos have their own secret formula for restoring color to plumage.

**See Hygeia for September, 1947, pp.684ff.

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FEEDING A CHICKEN HEART

In New York, in the laboratory of the late, great scientist, Alexis Carrell of the Rockefeller Foundation, there was until recently a culture of tissue from the heart of a chicken embryo which lived healthily and grew for over 30 years, many times the life of the chicken which would have resulted if the egg from which the tissue was taken had been permitted to hatch. Fed by fresh serum, regularly renewed and oxygenated by a special device, the tissue grew steadily in its sterile dish. From time to time it was trimmed to limit its growth. In fact, it had to be trimmed, for if it had been permitted to grow unchecked and had been supplied with the required nutrient solution, it would, by the time it finally died, have covered the land area of several states. We have not been told why it did die. Perhaps some accident of infection or failure of nutrient supply. While it grew it was normal tissue, perfect and healthy and potentially immortal.

In the same way every cell of every living body is potentially immortal, provided it receives its full complement of nutrients and there is no invasion of disease organisms.

SUPPOSE IT WERE YOUR BODY

Now, suppose, instead of a bit of chicken heart tissue, consider YOUR OWN BODY. Suppose you become lazy, or grow careless, or you forget, or you don't know, and you supply YOUR BODY with almost all, but NOT QUITE ALL, of its requirements. Then what happens? Slowly, gradually, possibly over a period of years, YOUR BODY wastes away. So imperceptibly does this occur that you do not realize that you are quietly starving yourself.

LIKE TAKING WATER OUT OF A GLASS

Suppose you have a glass of water -- full to the brim. You take out one tenth of a drop a day; and we'll say none evaporates. You look at the glass day after day, and you see no difference because the change from day to day is so small. But after a few weeks you SUDDENLY realize that the water has dropped below the brim.

Just so if you happen to be starving your body for the vitally important but minute quantities of vitamins and other micro-food factors. It goes on so slowly you are not aware of the change until SUDDENLY you realize you are no longer healthy.

ARE YOU STARVING YOUR BODY?

You eat three or more meals every day. You likely eat an inadequate diet, as surveys show to be true for so many people. But most of the time you do not feel any hunger because the quantity of food is adequate. So it never occurs to you that you may be slowly starving your body, condemning yourself to inconvenience and suffering and possibly a shorter life because of substances which are not in your foods, if you are on an inadequate diet, but which you must have. You know there are things wrong with your body -- possibly organic, possibly wrong operation or malfunctioning. But it never occurs to you that these conditions may be due to a dietary deficiency and that they are unnecessary, or that you are doing this to yourself, or that it is the most serious matter of all for you. You don't even know you have left out vital parts of the ideal food formula for your body. Nothing in the taste or looks or smell of your ordinary diet will tell you.

Think about yourself for a minute. Could it be that you are starving yourself -- perhaps dangerously starving yourself?

HOW YOU CAN STARVE IN THE MIDST OF PLENTY

One way to deny your body or organs of your body of certain vital factors of foods is to eat foods grown in soil that has been depleted or exhausted. Obviously, if the raw materials for the ingredients your organs need are not in the soil, the food plants grown in that soil cannot manufacture the things you need and cannot have the ingredients in them. So you can eat the normal amounts of these foods -- or even all you can hold -- and your body will never get all the materials it needs.

Another way to starve your body is to refine the foods you eat, making white sugar from molasses or white flour from wheat, or cutting off and throwing away certain important parts of the plants or fruits you eat. If you refine it out, or cut it off and throw it away, what you need may not be in the food when you eat it, and your inner organs, your teeth, bones, skin, muscles, and nerves may not be properly nourished.

Still another way to starve yourself is to boil the needed elements out when the food is cooked. The part of your food formula that goes down the drain isn't going to nourish your body.

Finally, even if you get most of the needed parts of your food formula into your body, they still may not be absorbed because important factors needed for their assimilation are not present.

Be sure to remember that it isn't just the extreme and well-pronounced deficiency that proves your need for a good food supplement. G. G. Duncan, in Medical Clinics of North America, page 349ff, March, 1946, says, "Clinicians too often have their sights set on anatomical changes as indications of deficiencies. This is a late stage and is the result of prolonged deficiencies."

Early vitamin deficiencies ordinarily do not show themselves as pronounced physical diseases, and consequently, in many cases, it is useless to look for extreme physical changes or definite and diagnosable conditions in the structure of the body in these early stages.

Vitamin and mineral deficiencies show themselves as follows, according to Duncan:

FIRST: indescribable tissue depletion.

SECOND: biochemical lesion detectable by biochemical analysis.

THIRD: and much later, actual lesions and breakdown of the physical structure appear.

This brings us to the consideration of a fact you may have noted already. The healthy individual is not only healthy and full of well-being, but he tends to be free from pronounced psychological disturbances.

Many psychological troubles show themselves in the second stage.

People can have two kinds of psychological troubles. The first type is a matter of bad habits. Examples are: wrong habits of thinking, poor methods of solving problems, habits of introversion, submission, dependence and tantrums, inferiority feelings, procrastination, the habit of rush and hurry, tension, and poor social or business habits. For these the person should have training with a good consulting psychologist or psychiatrist skilled along these lines.

Along with these bad habits, and aggravating the condition, are the so-called "psychological" or "functional" troubles. These stem from the physical condition. We all experience this when we are irritable due to hunger, fatigue or illness.

If you want a "sound mind in a sound body," it is rather obvious that you are going to have to have a sound body. And if you want a sound body, you are going to have to supply your body with the materials it needs for health.

CONCLUSION

It is noteworthy that the babies in China did not improve as they should until the plant extract or concentrate, developed by Mr. Rehnborg, was added to their diet.

This same plant concentrate, when added to the diet of the adult Europeans in the Orient, helped them to better health and made it easier for them to withstand the deteriorating effects of living in China.

In 1933, when NUTRILITE was first sold in the United States, it consisted entirely of the plant concentrate. In preparing this concentrate, plants considered to contain the highest percentage of the micro-food factors required by all animal life, are used. The leaves are harvested and dehydrated. The dried leaves are then subjected to a variety of processes which extract from them important micro-food factors.

This concentrate was added to the diets of many people in California with excellent results.

It was the plan to continue to produce just this concentrate. But at this time the crystalline vitamins were being developed and used with beneficial results, so it was argued that NUTRILITE, good as it was, would be even better if the concentrate had added to it the crystalline vitamins in high potency and in proper proportions. The concentrated vitamins were added, the product was improved, and the present NUTRILITE Food Supplement is the result.

The advantage of the natural concentrate is that it contains the various vitamin complexes, whereas a crystalline vitamin is usually one single factor of the complex. Chemically and nutritionally the crystalline vitamin is the same but it is alone.

Dr. Quigley, famous Omaha dietition, in his book THE NATIONAL MALNUTRITION, says:

"In the selection of a concentrate, it is important to remember, first, that the original deficiency is invariably multiple in origin. The diet has usually been deficient in not one or two, but in many or all of the vitamins. This is being further established every day, in both the research laboratory and in clinical practice.

"It is essential that the concentrate contain all of the vitamins, both known and unknown. Undoubtedly many of the vitamins essential in human nutrition have not as yet been identified or synthetically reproduced. For this reason no synthetic preparation can completely replace the vitamins in which the average persons may be deficient."

In providing NUTRILITE we have attempted to combine the available crystalline vitamins and vitamin concentrates with a plant concentrate to provide in one ration as wide as possible a range of the vitamin and vitamin-like factors concerned in nutrition. Since Dr. Quigley wrote the words quoted above, other hitherto unknown vitamins have, in fact, been discovered and assigned high importance, and no student of the subject doubts that other unknowns -- perhaps many unknowns -- remain to be identified and investigated. Moreover, without exception the vitamins and pro-vitamins originate in the leaves of plants, and plants are the source one must look to for such a concentrate as we use.

The sufferer with dietary deficiencies and deficiency ailments has the problem of getting into his body all the basic food factors which either were never in his food to start with or which have been partially removed in some way. If you are such a sufferer, how can these basic food factors be added to your food? We believe that NUTRILITE Food Supplement is at least one answer.

The man, woman or child who is reasonably well, and who wishes to stay that way and if possible improve, has also the problem of keeping his body supplied with all the vital food factors. If you are in this group you too have a problem, in this civilized age of devitalized and imitation food. And here again, you can turn to -- NUTRILITE Food Supplement.

EPILOGUE

In preparing this book for your reading, our primary purpose is to cause you to realize that the average or better than average civilized diet does not always provide you with complete and adequate nourishment. We define a "civilized diet" as the usual diet of civilized man -- one which includes so-called "food" made of white flour products, pasteurized milk, polished rice, refined sugar and including vegetables and fruits which are grown in partially depleted soil, then shipped, stored and cooked or canned in such a way as to lose vital elements. The civilized diet also includes meat from animals fed grass or hay and grain grown in depleted or partially depleted soil, the meat then being stored, and finally cooked in such a way as to lose some of its important but easily destroyed food factors.

We believe the statements made in this book to be facts, and we have tried, in this book, to stick to facts.

Common sense would then suggest that, if you want to have your diet include all needed factors, you will have to do one or the other of two things -- either (1) find and eat food which contains all the items which are found in unrefined, unprocessed, fresh, uncooked plants, grains, vegetables and fruits grown in the equivalent of virgin soil, and meat from animals which have been fed on such grass, hay and grain, and which meat in turn is so handled and prepared as to preserve its vital food factors;

or (2) add to your present civilized diet those factors which either have been removed from your food, or which never were in it in the first place. The former is expensive and time consuming. The latter method is less expensive and saves valuable time. So in this book we recommend the latter method, whether you use our particular product or not.

In our effort to convey the facts and our recommendations to you, however, we are forced to use words, and to combine them into sentences. And these words and sentences, as we explained at first, may not always convey to you the exact meaning intended. With your indulgence, therefore, we would like to check up a bit.

1. After reading this book, what are your conclusions concerning the average American diet? Do you consider it entirely adequate? Or do you conclude that our civilized diet is inadequate?

Various surveys give conflicting reports as to the extent of deficiencies in the American diet, but all the surveys we have seen show that there is an astonishing proportion of people, living on what is considered the standard American diet, who are deficient in one or more of the vital food factors.

2. On page 16, where we tell about the vitamins, we say, "Vitamin A raises the body's resistance to infections, etc." When you read this do you conclude that always, in every case, no matter how much Vitamin A is now being included in a person's diet, the addition of Vitamin A will increase that individual's resistance to infections? If so, this is a mistake. In order for Vitamin A to be effective in raising a body's resistance to disease, obviously the body must be deficient in Vitamin A at the time. If we said, "Gas, exploding in the cylinders, makes the automobile engine run," would you think we meant that any gallon of gas would make any car engine run? This would be wrong, for you might have an automobile with the tank absolutely full of gas. Then a gallon of gas in a can by the car could not affect that engine at that time, since the additional gallon, poured into the tank would simply run over onto the ground. Naturally, if a body already contains sufficient Vitamin A, an additional amount of the vitamin will not contribute to the body's ability to resist infections.

You see what we mean when we say it is difficult to write in such a way that absolutely no wrong interpretation can be placed on a statement?

3. On page 28, paragraph three, we state that "We should live in good health and vigor to the age of 90 or 100." Authorities like McCollum and Sherman rather agree that the life span of man can be extended possibly ten years, by proper food. What do you think?

We still think that really adequate nourishment of the mother for a year or so before the baby is born, and then the completely adequate nourishment of the child all its life, should result in a good chance to reach the age of 90 or 100, assuming normal heredity, no accidents, and proper observance of other health rules such as exercise, rest and proper breathing.

4. When you read this book do you conclude that because NUTRILITE Food Supplement provides your body with material that may be needed due to previous deficiencies, for rebuilding and regulating, that all medication would have to stop when NUTRILITE is added to your diet? If so, you are wrong. Just as you would continue to take any needed medicine even if you added beefsteak or whole wheat bread to your diet, so you continue the use of any needed medicine when you add NUTRILITE Food Supplement to your diet.

When you begin the use of any food supplement, be sure to consider also if there is any possibility that you need the services of a physician. If there is any evidence that a doctor should be consulted, you should do so. Bear in mind that in the use of any food supplement you are only improving your nutritional status. You may have other conditions that require the services of a physician, in which event you should consult a doctor immediately. It is a sound health rule to see your dentist twice a year and to have a regular periodic check-up by your physician.

This book is not a necessity in our work. But it is a help to the thousands of interested people, our customers as well as our Distributors, in all parts of continental United States and in Hawaii, Alaska, Panama Canal Zone and the Philippine Islands, who are enthusiastically telling other people about the benefits derived from food supplementation. It proves helpful because it saves their time, and it enables a person to learn about diet, nutrition and food supplementation in the quiet of his own home, and at his leisure.

1864 PLAINTIFF'S EXHIBIT 4

60SMP WAP/FS-FD/

Washington D.C. 11-18-48 1146A.

FOOD AND DRUG ADMIN.

Rm. 201 Federal Office Bldg. MP

Mytinger and Casselberry of Long Beach, California, distributes Nutrilite, a dietary supplement, distribution through agents making door to door and club appearances. The firm has several pieces of literature used by agents and loaned to customers, principally booklet entitled "How to Get Well and Stay Well." Recent seizure and grand jury indictment has let firm to delete pages 37 through 58 from booklet and to caution agents with respect to our activities. Firm shipper yesterday to the F and M Bank Clarkfield Minnesota via rea seven cartons Nutrilite, weight 196 pounds, value $2600.00, said to be due for delivery at destination Friday. No known literature accompanied shipment. An investigation should be undertaken prior to delivery this shipment to determine scope and character of representations made orally, and by accompanying literature, by the dealers. If consignment is to be used to fill orders from regular customers who have contracted for monthly deliveries, a representative number of these users should be contacted for their understanding of the value of the product. If broad representations continue to be made, booklet pages one through 37 intact, or other collateral material which misbrands the product employed, complete facts should be reported immediately for seizure consideration.

A. E. Rayfield, Food and Drug Administration.

37 58 196 $2600.00 37.

FAH 1155A.

1865 MEMORANDUM TO ACCOMPANY 25560K NUTRILITE

Investigation preceeding the collection of this sample was started on November 19, 1948 but as there was a terrific snow storm at that time I was unable to complete the investigation which was requested to be made before sample collection. Attached is the preliminary report that was made.

On November 30, 1948 the investigation was completed and the sample was collected. Mr. Quale at present has 19 customers. Two of these who live in Clarkfield were interviewed first and these two people signed affidavits, the originals are with the records and copies are attached to all copies of this memo. Five farmers were interviewed on 12/1/48 before I collected the sample and these interviews were written up as interviews instead of affidavits. I did not take affidavits from these five as farmers are reluctant to

sign affidavits and their testimony was about the same as the two town folk although probably not as strong.

All people I talked to including Mr. Quale, the distributor, were very friendly and co-operative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type.

The Farmers and Merchants State Bank finances each shipment for Mr. Quale and this is covered in my report of 11/19/48. The stock of Nutrilite will probably be in the bank for a month or two. On the invoice are 6 bottles of vitamins B_1 and E, Mr. Quale said that these are for his own use and these were not sampled. The books "National Malnutrition" shown on the invoice of 5/7/48 are covered in Mr. Quales affidavit. Also note that the firm has sent out new pages 37 through 42.

Nutrilite was not "knocked" to any of the people interviewed or to Mr. Quale. These people were merely told that we investigate drugs to see what results the users have obtained and that was what this investigation was.

The sample has been split. One kit is being sent to Vitamin Division with the original records and the booklet "How To Get Well And Stay Well". One kit is being sent to Los Angeles Station for mineral analysis and copies of all the interviews, report, memo etc., are being sent to the Administration. Copies of everything except the records are also being sent to Los Angeles.

None of the people interviewed said that they had received any other literature from Mr. Quale other the booklet "How to Get Well & Stay Well". Mr. Quale said that the only instructions for his sales talk that he had received from the Company was to be careful what he said, not to promise any cures and to say only what is in the booklet "How To Get Well & Stay Well."

JAMES E. ANDERSON,
Inspector.

12/1/48.

1866

25-560 K
Nutrilite

Minneapolis, Minnesota.
December 1, 1948.
Mytinger & Casselberry,
Long Beach, California.

MEMORANDUM OF INTERVIEW

Between

Mrs. Oscar (Anna) West
Rural Clarkfield, Minnesota

and

James E. Anderson
Inspector

Mrs. West was interviewed in connection with the collection of 25-560 K, Nutrilite. The reason for the interview was to find out how the dietary preparation was presented to her, and her understanding of the composition and value of the product.

Mrs. West lives on a farm 5 miles south and 1¼ miles east of Clarkfield. She is approximately 30 years old. Mrs. West said that she has been suffering from arthritis and anemia. She had been treated by local doctors and part of the treatment consisted of vitamin tablets. She believed these helped her a little but hardly enough to make much difference in her condition. About 6 months ago, from her neighbor Oscar Sandager, she heard about Nutrilite which had helped Mr. Sandager's arthritis. She told Mr. Sandager to have Mr. E. A. Quale, the Nutrilite distributor, come out and see her.

Mr. Quale came to see Mrs. West about 4 or 5 months ago. He told her how Nutrilite had helped Mr. Sandager and about other people with arthritis who had used Nutrilite and had obtained relief. He told her that the preparation wouldn't cure her arthritis, but he thought it would help her arthritis and cut down her anemia by building up the body and blood through the vitamins and minerals which are in Nutrilite.

Mrs. West said that she is now on her fourth month of taking Nutrilite; in other words, she is on her fourth bottle. She said that at the time she signed up for the course Mr. Quale gave her the booklet, "How To Get Well and Stay Well" and she had read this booklet and given it back to him. When she started using the Nutrilite she did not think that she was getting a cure; in fact, she and her husband were both skeptical of the product, but from her treatment under the local doctor she knew that she needed vitamins and so wanted to give Nutrilite a chance.

Before taking Nutrilite Mrs. West had to take liver shots; after taking Nutrilite for a month she did not have to take any

more liver shots. Right now she believes her arthritis is gone in that she does not have any pains or stiffness. She is gaining weight, and is not as tired as she use to be which leads her to believe that her anemic condition is cleared up.

1867 I asked Mrs. West if she thought that Nutrilite was a cure all or something wonderful, and she said that she believes it had helped her very much but does not know if it will cure anything. It would appear that Mr. Quale did not make any wild claims to Mrs. West and that she was not led to believe that the product was anything more than vitamins and minerals which would help to build her body up.

JAMES E. ANDERSON,
Inspector.

JEA:mab

1868

Minneapolis, Minnesota.
December 1, 1948.

25-560 K
Nutrilite

Mytinger & Casselberry,
Long Beach, California.

MEMORANDUM OF INTERVIEW

Between

Mr. Oscar Sandager
Rural Hazel Run, Minnesota

and

James E. Anderson
Inspector

This interview was made as a part of the collection of 25-560 K, Nutrilite, to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mr. Sandager, had of its value.

Mr. Sandager lives 5 miles south and 1¾ miles east of Clarkfield, Minnesota. He lives with his mother and his sister, Gladys, on a farm. He is 59 years old.

Mr. Sandager said that he has had arthritis for several years and was under the treatment of Dr. Houghton in Clarkfield, Minnesota. He was given many different treatments by the doctor, and the last one consisted of shots of strep—, the name of which Mr. Sandager could not remember. About this time, which was in 1947, Mr. Sandager heard from his hired man that the hired man's sister had had arthritis and was not expected to live as her weight kept going down and she was gradually failing. She started to take Nutrilite and regained her health and is still living.

Mr. Quale, in 1947, had either been told of Mr. Sandager's condition or heard about it and came out to see him. Mr. Quale said, "I won't say this will cure or help your arthritis but I think it will". Mr. Quale then told Mr. Sandager of other people with arthritis who had been helped by Nutrilite. Mr. Sandager was given the booklet, "How To Get Well and Stay Well". He said he never read the booklet, just looked at the pictures and then returned it to Mr. Quale. Mr. Sandager said he told Mr. Quale he did not think he would use the Nutrilite and kept on taking shots from his doctor. His condition kept getting worse and finally he could hardly walk and was thinking of selling his equipment and quitting farming due to his arthritis. The doctor told him the only thing left that he knew of was gold shots, but he did not seem very sure about gold shots so Mr. Sandager did not take them. He then switched over to Nutrilite in September, 1947 and has been taking it regularly ever since. His idea of Nutrilite at the start of his treatment was that it contained vitamins and minerals to build him up. He said he was a skeptic in the beginning and did not think it would cure anything, but he had so many medicines and injections that he was ready to try anything. He said that at no time did Mr. Quale say it would cure his arthritis, and he was never led to believe that. At present he does
1869 all his own farming, walks without a limp or without any slowness in his gait, and says he is in good health. He does not believe his arthritis is cured for when his feet get wet he can feel a slight pain in his extremities. He is now on his second year of taking the Nutrilite and does not know whether to continue on or not; he is afraid that if he stops taking Nutrilite his pains and arthritic condition will return.

Mr. Sandager's sister, Gladys, is also a user of Nutrilite. She started using it after Mr. Sandager. He said that he was the reason for Gladys' taking it because he was so enthusiastic about it. She was suffering from headaches and upset stomach. At present he said his sister has pains but they are not so often or hard.

Mr. Sandager's mother is quite old and has had two strokes and is run down. He talked her into taking Nutrilite although she is still under doctors care. He believes the Nutrilite has helped her in that she is stronger now. Mr. Sandager said that Mr. Quale had not told either of these women the Nutrilite would cure anything they had and that Mr. Quale was not as enthusiastic about Nutrilite as he himself was.

JAMES E. ANDERSON,
Inspector.

1870

Minneapolis, Minnesota.
December 1, 1948.

25-560 K
Nutrilite

Mytinger & Casselberry,
Long Beach, California.

MEMORANDUM OF INTERVIEW

Between

Mr. Olaus Nyland
Rural Hazel Run, Minnesota

and

James E. Anderson
Inspector

This interview was made as a part of the collection of 25-560 K, Nutrilite, and to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mr. Nyland, had of its value.

Mr. Nyland is a farmer living about 2 miles outside of Hazel Run, Minnesota and is, I would judge, in his late 50's or early 60's.

Mr. Nyland said that for a long time he had had rheumatism all over his body and when I said arthritis, he said, "Yes, it's arthritis". From Mr. Oscar Sandager, Mr. Nyland heard about Nutrilite and how it had helped Mr. Sandager. Mr. Nyland then went to Mr. Quale's office in Clarkfield, Minnesota and told Mr. Quale that he had arthritis and was interested in Nutrilite. Mr. Quale gave Mr. Nyland the booklet, "How To Get Well and Stay Well". Mr. Quale did not give him any sales talk, just referred him to the book and told him of other customers who had used Nutrilite and had obtained relief from their arthritis. Mr. Quale told him that Nutrilite would not cure arthritis, but he believed it would help him. Mr. Nyland read the booklet and then returned it to Mr. Quale.

Mr. Nyland said that he believes Nutrilite is a vitamin and mineral preparation which he is taking to build up his body. He is hoping that the vitamins and minerals in it will build up his body and so overcome his arthritis. He does not believe that Nutrilite is a cure but thought that he would try it for at least the prescribed year and see what it would do for him. He has taken Nutrilite regularly for 5 months now. He is not as stiff as before and the arthritic pains are a little less than when he started taking Nutrilite. However, he volunteered that at this time of year he does not work as hard as in the summer and this may be the reason the pains have decreased.

JAMES E. ANDERSON,
Inspector.

JEA:mab

1871
25-560 K
Nutrilite

Minneapolis, Minnesota.
December 1, 1948.
Mytinger & Casselberry,
Long Beach, California.

MEMORANDUM OF INTERVIEW

Between

Mrs. Alfred (Louise) Hegrin
Rural Clarkfield, Minnesota

and

James E. Anderson
Inspector

This interview as made as a part of the collection of 25-560 K, Nutrilite, and to try to determine how the salesman, Mr. E. A. Quale, represented the dietary supplement and what idea the buyer, Mrs. Hegrin, had of its value.

Mrs. Hegrin is 56 years old and is a farmers wife living 5 miles south and 1½ miles east of Clarkfield, Minnesota. She said that when she was 23 years old she had an appendectomy, pneumonia, rheumatism and inflamed heart sack. She had a hard time recovering from these afflictions and was anemic and felt run down. Then 6 years ago she had her gall bladder removed. She was anemic and felt run down and was given iron. She gained some weight and felt a little better. She was still not satisfied with her physical condition, feeling that she was still run down and susceptible to colds and other contagious diseases. Her neighbor, Mr. Oscar Sandager, told her about Nutrilite and how it had helped his arthritis. She told him to send Mr. Quale, the Nutrilite distributor, out to see her.

Mr. Quale came out to see Mrs. Hegrin and she told him that she was run down. Mr. Quale told her that she should try Nutrilite and see if it would build her up. He said it would not cure anything and that Nutrilite had helped some people and had not helped others. She did not order any Nutrilite at this time. Mr. Quale left her the booklet, "How To Get Well and Stay Well". Right afterwards she caught a cold or had the flu, she did not know which but thought it was the latter, and had to stay in bed. While in bed she read the booklet and decided to try Nutrilite. She has an open mind on Nutrilite and does not know whether it is good or bad, but she has to take some vitamins, the doctor had prescribed vitamins for her, and so is taking Nutrilite believing that it contains vitamins and minerals which she needs and which she hopes will build her up so that her body will be more resistant to disease (disease means colds, flu, etc.). She is just finishing her fourth month, her fourth bottle of Nutrilite, and believes she has more pep now and feels better. She

also believes her blood is up but has not had it tested recently and so could not be sure.

JAMES E. ANDERSON,
Inspector.

JEA:mab

1872 — Minneapolis, Minnesota
December 1, 1948

25-560 K
Nutrilite — Mytinger & Casselberry
Long Beach, California

MEMORANDUM OF INTERVIEW

Between

Mr. Leonard Vold
Rural Hazel Run, Minnesota

and

James E. Anderson
Inspector

This interview was made as a part of the collection of 25-560 K, Nutrilite, to try to determine how the salesman, Mr. E. A. Quale represented the dietary supplement and what idea the buyer, Mr. Vold, had of its value.

Mr. Vold is a farmer living outside of Hazel Run, Minnesota. I would judge he is in his late 30's. Mr. Vold was not at his home and so I talked to his wife and she gave me some information. Then I found Mr. Vold on another farm cutting wood and he gave me the rest of the information.

Mrs. Vold said that her husband has had ulcers for years and goes to sleep when driving or sitting in a chair. Last September he had all his teeth out but the removal did not seem to help his condition too much. From Mr. Oscar Sandager, Mr. Vold heard about Nutrilite. He did not make any special inquiry about it, but one day when Mr. E. A. Quale, the Nutrilite distributor, was out selling him hog minerals Mr. Vold mentioned that he was going to sleep at odd times and asked Mr. Quale if Nutrilite would help him. At this point Mrs. Vold said I had better talk to her husband and she located him for me on an adjoining farm where I went and interviewed him.

Mr. Vold said that in 1939 his ulcer had ruptured and he had come to Minneapolis where he had it sewn up. The ulcer is still active, and in the spring and fall and other times he suffers attacks. The main thing which worries him is that when he is driving or sitting in a chair he falls asleep. He believes this may be due to blood loss from his ulcer although he says he does not think he is anemic.

When Mr. Quale came out to see him Mr. Vold believed that he knew he had ulcers but he was not sure of it. He told Mr. Quale that he wanted something which would make it so that he would not always fall asleep. Mr. Quale told him that Nutrilite would help build him up and thus would help him stay awake if this drowsiness was due to poor blood or loss of blood. The Nutrilite was not represented as an ulcer medicine and was not being taken as such. Mr. Quale told Mr. Vold that it would take 6 months before he would notice any results. Mr. Vold thought that Nutrilite contained vitamins and minerals which would help build up his body. He did not think it was a cure, but rather thought it was another medicine he would take to see if it would work. He has taken Nutrilite for 2 months and has not noticed any results yet.

JAMES E. ANDERSON

1873 (COPY OF WIRE)

WESTERN UNION

11 A Dec. 8, 1948

Long Beach Calif 7
E A Quale

Have just learned FDA—disapproves present customers book—Consequently return all your customers books and other sales literature immediately

Mytinger & Casselberry

1874 FEDERAL SECURITY AGENCY

FOOD AND DRUG ADMINISTRATION

REPORT ON SEIZURE ACCOMPLISHMENT

Station: Minneapolis, Minn. Sample No. 25-560 K

Product Nutrilite Food Supplement (Multiple vitamin capsules and mineral tablets) Date January 21, 1949

Date seized December 31, 1948 F.D.C. No. 26141

---

cc: Adm.—2
LA
M

Date after which default will be entered— Court Ref. No. 533

Amount seized 35 packages (Number and size of packages)

(Total weight or volume)——

Approximate total value $472.50

Possession of and location, Farmers and Merchants State Bank, Clarkfield, Minn., being held for E. A. Quale, distributor.

Where stored after seizure, Farmers and Merchants State Bank, Clarkfield, Minn.

Shipper, Mytinger & Casselberry, Long Beach, California

Did inspector accompany marshal? Seizure effected by Charles E. Morrison, Chief Deputy Marshal, unaccompanied by Food and Drug Inspector.

REMARKS: Shipped on or about November 15, 1948. Misbranded by booklet entitled "How to Get Well and Stay Well"

The U.S. Marshal's office reported that none of the libeled booklets in the above-identified case were seized. By telephone conversation with the Chief Deputy U.S. Marshal at St. Paul, I learned that a man assigned to make the seizure was relatively new in the work and it could not be stated whether the booklets had not been seized because they were not available or whether the Deputy failed to go to the home of Mr. Quale where they were located. Accordingly

(see page 2)

(SIGNED) Chester T. Hubble,
Chief, Minneapolis District

Ribbon and one copy to Administration, with copy libel (libel copy not to be sent if prepared by General Counsel's office and filed without change).

Carbon copies to: LA M

FD 456 (Rev. 2)—U. S. Government Printing Office 16—28409-2

Libel and copy of Report of Accomplishment sent to General Counsel. No copy of libel retained. Date 1-25-49. Mfb

1875 Report on Seizure Accomplishment
25-560 K

Nutrilite

further investigation was made by Inspector Christensen on January 7, 1949, and the affidavit obtained from Mr. Quale is attached.

It shows that the firm recalled the booklets in question shortly after the product was sampled by Inspector Anderson.

Chester T. Hubble
Chief, Minneapolis District

Adm—2 w libel and affidavit, wire
cc LA w affidavit and wire
M w affidavit and wire

CTH:hf.

PLAINTIFF'S EXHIBIT 5

FACTS

you should know about

Vitamins

Safeguard War-Time Savings!

BETTER BUSINESS BUREAU
FACT FINDING AND DISTRIBUTING
EDUCATIONAL DIVISION

Vitamins are measured in milligrams or micrograms (measures of weight); or in "International Units," "U.S.P." units, which are defined in terms of pure substance, or "Sherman" units which are biological units. So that one may understand vitamin measurements as expressed in these various units and to enable a better understanding of labels, the following information is provided:

MG	means milligram
G or Y or Gamma	means microgram
I. U.	means International Unit
U. S. P.	means United States Pharmacopeia

COMPARISON TABLE

1 (avoirdupois) ounce = 28.350 grams (metric system)

1 gram = approx. 1 30th of an ounce

1 milligram = 1/1000 of a gram

1 microgram = 1/1000 of a milligram

CONVERSION EQUIVALENTS

(approximate)

Vitamin A	1.5 I.U. = 1 Sherman unit or Sherman units x .7 = International Units 1 U.S.P. unit = 1 I.U.
Vitamin B_1 (Thiamin)	1 Milligram equals 333 International Units (1 microgram equals .333 International Unit).
Vitamin B_2 (G, Riboflavin)	Sherman units x 3 approximates equivalent in micrograms.
Vitamin C (Ascorbic Acid)	1 Milligram equals 20 International units.
Vitamin D	1 U.S.P. unit presumably has the same value as 1 International Unit.

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Revised and Reprinted 1942-1946 Printed in U.S.A.

INTRODUCTION

This booklet, "Facts You Should Know about Vitamins," is one of a series of fact booklets on business, merchandise, financial, and other subjects which business, through Better Business Bureaus, is publishing in the interests of consumer education — to aid consumers in their everyday money management problems and relations with business.

The importance of proper nutrition was recognized by our government in calling the first National Nutrition Conference at Washington in May, 1941. At this conference, the need for an aggressive attack upon the problem of undernourishment in this country was brought out repeatedly. According to an official report of the Conference:

"Something more than 40 per cent of the American people are not getting enough food and the right kind of food to maintain health and vigor — and this in spite of the fact that the foods of which we have a so-called surplus are the very ones they need. Less than one-fourth are getting a really good diet, even when measured by lower standards than those to which we would subscribe today. If everyone could have an adequate diet instead of an average diet, it would add 10 years to our active life span."

At the same conference, Brig. Gen. Lewis B. Hershey, Deputy Director, Selective Service System, stated:

"In summary, Selective Service has examined physically a million. The results of these examinations should be disturbing to us as a people — they should energize us to immediate and positive action. Approximately 400,000 have been found unfit for general military service — probably one-third of these are suffering from disabilities directly or indirectly connected with nutrition."

It is now being recognized that it is important that all workers and the civilian population as a whole should be properly nourished.

Vitamins are essential food elements which must be present in the diet in adequate amounts for health and well-being. Scientific and medical knowledge of vitamins is growing day by day, but this booklet undertakes to explain, in layman's language, some of the fundamentals as to what vitamins are, what values they possess, and where they may be obtained, although no pretense is made of giving all details or a complete list of food sources of the vitamins.

WHAT ARE VITAMINS?

"Vitamin" is a term given to certain food constituents which are essential for normal nutrition. They are but one of several dietary essentials. Most of us know, for example, that the diet must contain, in adequate quantities and proper balance, proteins, carbohydrates and fats which yield the energy and other requisites for life and activity and which, along with certain inorganic elements such as iodine, iron, calcium and phosphorus, form the structure of the body tissues and the fluids of the organism. In addition to these more familiar nutrients, there are other food factors essential for the preservation of bodily well-being which we commonly designate as vitamins. The absence or serious deficiency of any one of these nutrients, including any of the vitamins, from a diet which is satisfactory in other respects may lead to the development of pathological conditions which are called "deficiency diseases," which may be even more striking in appearance and effect than failure to get enough food.

Scientists have succeeded in isolating a number of compounds having the properties of vitamins, determined their chemical formula and have learned how to produce some of them synthetically. You can see these chemical compounds, feel them, weigh them. In fact, nutrition charts which recommend specified daily amounts of certain vitamins often do so in terms of milligrams or micrograms — measures of weight. (A microgram is one millionth of a gram.) Other nutrition charts express vitamin values in terms of International Units, U.S.P. Units and Sherman-Bourquin Units. (There are certain elements in Vitamin A, for example, which cannot be weighed.)

No vitamin diet charts are given in this booklet because vitamin values of foods differ according to growing conditions such as soil, climate, etc. Another reason is that vitamin requirements vary according to the age, size, activity and health of the individual. However, literature on daily allowances of vitamins and other nutrients, planning meals and diets, and other food subjects, may be secured from the Bureau of Home Economics, U.S.D.A.; Children's Bureau, Dept. of Labor; and Nutrition Division, Federal Security Agency, all at Washington, D. C.; or from many local or state Health Departments.

SOURCES OF VITAMINS

Vitamins are present in a great variety of food products, in varying quantities. There is no reason why a properly selected diet should not afford an adequate supply of the requisite vitamins. Yet it is believed that a great many people fail to get enough vitamins not, primarily, because we do not get enough food but because we do not eat enough of the right kinds of food. Many of us do not get an adequate diet. Most of us get enough vitamins to prevent specific deficiency diseases, but

many people who do not develop acute or recognizable symptoms of disease nevertheless fail to secure the full amount of vitamins consistent with ideal physical well-being. This is particularly true of people who go in for "one-sided" diets such as ill-advised reducing diets and fads of various kinds, and people who eat too much of certain groups of food to the exclusion of others. In many cases deficiency conditions may be properly corrected by the use of appropriate foods or, a corrective result may be effectively and speedily secured by the administration of various vitamins in concentrated form or products especially rich in them.

VITAMINS NOT CURE-ALLS

It must be emphasized that vitamins should not be regarded as an indiscriminate means of treating deficiency disease conditions but, rather, as an indispensable aid in maintaining normal health. While physicians do employ vitamins in the treatment of various diseases, vitamins are generally used as an adjunct to more complete measures. Although a deficiency of vitamins does cause certain deficiency diseases, some disease symptoms similar in nature may be caused by other factors which would not respond to vitamin treatment. For these reasons, treatment of deficiency disease conditions with vitamins should be left to qualified physicians. However, all of us can endeavor to prevent the appearance of ailments due to vitamin deficiency by obtaining an adequate supply of these essential elements in the daily diet. While an adequate supply of vitamins will not, in itself, assure good health or prevent all dietary deficiencies or deficiency disease conditions, the vitamins do have a vital effect on practically every organ in the body and deficiencies of them are related to a score of diseases and deformities.

Medical scientists are still studying the effects and usefulness of vitamins and any peculiar or allergic effects which vitamin supplements might have on certain persons.

There are limitations on present medical and scientific knowledge of the usefulness of vitamins in the treatment of disease. For this reason alone, one should not attempt to be his own doctor by trying to treat a disease condition by vitamins.

VITAMIN NOMENCLATURE

That there are more vitamins than was originally believed is definite. What remains to be determined is how many. Many of the known vitamins have been given alphabetical names for convenience, such as Vitamin A, B_1, B_2(G), C, D, etc. From a scientific standpoint, the most practical way of naming vitamins is to give each one its chemical name, where known, but because the public as a whole still recognizes vitamins by their alphabetical designation, both chemical and alphabetical names are given in this booklet.

VITAMIN A

Vitamin A is essential for the maintenance of a healthy condition of the epithelial cells which cover body surfaces and line the body cavities such as the mouth, stomach, glands, and ducts of glands. When there is a deficiency of vitamin A, dryness and scaliness of the skin is likely to appear. It also has important functions with respect to the eyes. One of the first symptoms of vitamin A deficiency is the condition known as night-blindness. The vitamin will prevent or relieve this condition, if it is not too far advanced, when due to vitamin A deficiency. In fact, the physicians of ancient Egypt are credited with curing thousands of cases of night-blindness with liver, a rich source of vitamin A. However, there are other cases of "night-blindness" not of dietary origin, which do not respond to treatment with vitamin A. Another characteristic eye disease called xerophthalmia also results from a more advanced deficiency of vitamin A.

Vitamin A is also highly important for normal growth and for proper tooth and bone formation in growing children, although the same can be said of other food essentials. In addition, its insufficiency in the diet may lessen the resistance of the body to infection, especially of the respiratory tract. However, vitamin A has not been definitely shown to be a preventive of specific infections, such as colds or influenza.

Vitamin A is found in the liver and yellow body fat of most animals. In addition, various plant foods contain what are known as "precursors" of vitamin A. These are yellow pigments called "carotenes" which, when consumed, are transformed into vitamin A. This is the only known vitamin which is "manufactured" by the human body from plant food. Vitamin A can be stored in the liver by man and other animals. Cod and other fish liver oils are excellent; and liver, butter, cheese, eggs and milk are good sources of vitamin A. Green and green leafy vegetables, such as green beans, beet tops, dandelion greens, spinach, swiss chard, kale, etc., tomatoes, and bright yellow fruits and vegetables, such as apricots, peaches, persimmons, carrots, yellow corn, sweet potatoes, winter squash, etc. are good sources of vitamin A precursors.

THE VITAMIN B COMPLEX

What was originally called vitamin B and was thought to be a single substance, has since been found to be a group of several substances and to this group is applied the term "vitamin B complex." While the exact number of the constituents of the Vitamin B complex is not known at present, the chemical nature of several has been determined and they can be produced synthetically. Of them, at least three have been shown to be necessary in human nutrition and to be of value in the prevention and treatment of human deficiency diseases. They are Vitamin B_1, or thiamin, Vitamin B_2, or riboflavin, and nicotinic acid.

All of these substances are usually found together in a single food product, such as yeast or liver. For the purpose of this booklet it is not deemed necessary to give detailed information on all the Vitamin B factors because scientific conclusions are still incomplete.

VITAMIN B_1 (THIAMIN)

One of the first facts to be established about vitamin B_1 was that, in the presence of a severe deficiency, a disease called beriberi made its appearance. This is a disease characterized by partial paralysis, swelling of the legs and general dropsy. Vitamin B_1 is of value in preventing as well as correcting certain forms of this disease. It is of value in the treatment of certain types of neuritis, but it should be employed in the treatment of such conditions under the direction of a physician. There are many types of neuritis not due to a deficiency of vitamin B_1, requiring other forms of treatment.

When the diet is deficient in vitamin B_1, lack of appetite occurs, but there are many other causes of lack of appetite, such as infections, organic disorders, etc. However, vitamin B_1 does contribute to and is necessary for the maintenance of normal appetite.

When their diet is deficient in vitamin B_1, the rate of growth of infants and children is retarded. Some investigators believe that lack of the vitamin plays a part in faulty elimination. When metabolism is increased, as occurs in feverish conditions, vigorous muscular activity, hyperthyroidism, etc., there are indications of greatly increased requirements for vitamin B_1.

Although vitamin B_1 is widely distributed, it occurs in high concentration in only a few foods. There are grounds for believing that American diets as a whole have been unsatisfactory with respect to the content of vitamin B_1. Yeast and wheat germ are the richest natural sources, but they are not commonly used as foods. However, whole grain cereals and flours, and the products made from them, are excellent sources as are such meats as pork, fresh ham and liver, and soy beans, green peas, nuts, egg yolk and lima beans. In the past, the refinement of various foods, has been responsible for a deficiency of vitamin B_1 in the diet of many individuals, but this difficulty is being overcome through the enrichment of such foods. (See section on "Fortified" Foods.)

VITAMIN B_2 (G) (RIBOFLAVIN)

After vitamin B_1 was discovered, the term vitamin B_2, or vitamin G, was used to designate what was left of the vitamin B complex. It was first believed that this vitamin was a single substance which was of value in the treatment of pellagra and it was popularly designated as the anti-pellagra vitamin. Later, vitamin B_2 (or G) was identified as riboflavin, a single chemical substance, and it was determined that

another constituent of the vitamin B complex, nicotinic acid, was the pellagra-preventive factor.

Vitamin B_2 or riboflavin has a wide distribution in living cells and is essential for normal nutrition. Among other things, deficiency of riboflavin is reported to result in the formation of various lesions around the corners of the mouth, on the tongue and ears, etc.

Riboflavin is widely distributed. Yeast, meats, particularly the liver of beef, calf, lamb, mutton and pork are excellent sources. Whole cereals, milk, eggs, cheese and many green leafy and other vegetables, such as beans and peas, fruits, peanuts, and fish such as halibut, haddock, canned sardines and, particularly, mackerel, are all important sources.

NICOTINIC ACID

The pellagra-preventive factor of the vitamin B complex has been identified as nicotinic acid, a substance which, incidentally, is not the same as the nicotine found in tobacco. Seemingly miraculous results have been obtained with nicotinic acid in the treatment of acute pellagra, a disease which has occurred widely in the South and is characterized by leathery, reddish skin, mouth and gum inflammation and progressively more serious symptoms including, in advanced cases, alimentary and mental disorders. Pellagra can be prevented by securing an adequate supply of nicotinic acid in the diet and is often cured quickly, by physicians, who inject nicotinic acid into the body. However, since most deficiencies are of a multiple nature, a diet rich in vitamin B_1, B_2 and B_6 is also frequently necessary in the treatment of this disease. Liver, lean meats, salmon, yeast, green vegetables, whole grains, tomato juice, eggs and milk are believed to be good food sources of nicotinic acid.

VITAMIN C (ASCORBIC ACID)

Vitamin C is another of the vitamins which can be produced synthetically in pure chemical form. It is officially known as ascorbic acid.

A deficiency of vitamin C results in the development of scurvy, a disease the notable symptoms of which are pain and a tendency to bleeding, as of the gums and capillary blood vessels. This disease may be avoided or entirely cured by the inclusion in the diet of foods which are rich in vitamin C. The term "limey," applied to British sailors, was derived from the Merchants Shipping Act of 1854 which provided that lime or lemon juice form a part of the stores of all ships likely to be away from port more than ten days. The juice of citrus fruits is a rich source of vitamin C.

Vitamin C is also one among other essential factors for the normal development and the maintenance of the bones and cartilages, the teeth and gums. Such symptomatic conditions as dental caries

(cavities), lack of appetite, certain gum infections, and anemia may be concomitant signs of vitamin C deficiency or lack of assimilation of vitamin C.

Vitamin C is wide-spread in practically all raw fruits and vegetables, particularly citrus fruits such as oranges, grapefruit and lemons. Properly canned fruits and vegetables, including fruit juices, retain a large share of their vitamin C, and may be an important source of this factor in the diet. The green leaves and shoots of plants such as are served in salads; such fresh fruits as apples, apricots, bananas, black currants, red raspberries, and strawberries; and many raw vegetables including brussels sprouts, cabbage, cauliflower and fresh-picked green peppers also generally supply a liberal portion of this vitamin. Potatoes, when baked or boiled in skins, are another important source, particularly in view of the extent to which potatoes figure in the average diet. It is necessary that adequate amounts of this vitamin be secured daily since it is stored in the body only to a limited extent and a deficiency may result in injurious effects. In fever, the needs of the body for vitamin C are increased.

VITAMIN D

Vitamin D is necessary for the proper utilization by the body of calcium and phosphorus. It is related to the development of bone and a deficiency causes rickets, a common disease of childhood, in which deformed bones manifest themselves as bow legs, knock-knees, swollen joints, distorted chests and spines, etc. A deficiency may also result in two other fearsomely named diseases, spasmophilia and osteomalacea. All of these conditions are manifestations of abnormal calcium and phosphorus metabolism which may result from a deficiency of vitamin D. The vitamin is essential not only in the prevention but in the treatment of these diseases.

Vitamin D plays an important role in tooth formation and maintenance of normal tooth structure. However, adequate vitamin D intake will not, in itself, prevent dental caries or insure normal tooth structure. As in the case of the bone disorders previously referred to, vitamin D becomes of value only when an adequate supply of calcium and phosphorus are also present. The function of the vitamin is to regulate the utilization of these elements.

Vitamin D has been produced in crystalline form and at least two forms of naturally-occurring vitamin D have been isolated. This vitamin is not present in any great amount in our common foods. The best food source is the liver oil fish, such as halibut, tuna and cod. Canned salmon, sardines, and eggs and butter are regarded as good sources, while small amounts are present in liver, cream, milk and oysters. Most other foods have no vitamin D or only minute amounts. However, various foods such as milk, yeast, cereals, etc. may be "fortified" with the vitamin by artificial means (See section on "Fortified" Foods).

When the skin is exposed to the sun, vitamin D is formed in the body. The same result may be obtained through exposure to ultra-violet ray lamps which produce radiation similar to that of natural summer sunshine. It is believed that the body has the property of storing vitamin D so that exposure to sunlight when it is most potent, may exert a protective influence over a considerable portion of the year. However, existing conditions in certain localities, such as dust, smoke and moisture in the air, also indoor living, clothing, etc., reduce the effect of sunshine so that it may be difficult, particularly for infants, to obtain an adequate supply of vitamin D from the sun. It is well known that physicians commonly prescribe vitamin D preparations, or products rich in this vitamin, for babies and young children, particularly during the winter months.

The need for vitamin D appears to be greater in infancy and childhood, in pregnancy and during the nursing period. The vitamin D requirements of adults, except those specified above, are not known at present.

VITAMIN E

Although it has been shown that an adequate supply of vitamin E is essential for normal reproduction in animals, very little is definitely known about the function of this vitamin, in the human body. Attempts to produce a market for substances containing vitamin E among would-be parents through representations that the vitamin is capable of preventing sterility or promoting physical vigor have been banned by government agencies. One of the richest known sources of vitamin E is wheat germ oil (also seeds of legumes, muscle meats, egg yolk, milk and milk products, are good sources), but vitamin E is so widely distributed among so many common foods and so resistant to destructive action that, so far as is known, the necessary amount will accompany any ordinary diet. Accordingly, claims implying a need for special sources of vitamin E in the diet or recommendations for use of a particular preparation because of its vitamin E content are, up to date, deprecated by authorities generally.

VITAMIN F

The term "vitamin F" has been used to refer to at least three different substances but at the present time it has no scientific recognition. Attempts have been made to exploit "vitamin F" as a term to designate certain essential fatty acids. However, practically all nutritionists refer to this dietary factor as the "essential fatty acids." Furthermore, no evidence has been found to satisfactorily establish that there is any lack of essential fatty acids in the average normal diet of either babies or older persons. Neither governmental agencies nor authorities on nutrition recognize the existence of any dietary factor under the name "vitamin F."

VITAMIN K

One of the latest vitamins to be discovered, vitamin K, is necessary for the formation of prothrombin, one of the substances which enables the blood to clot. Because it is widely distributed and occurs in a variety of foods, (for example, spinach, kale, tomatoes, oat sprouts) the average person need not worry about failure to secure an adequate supply of vitamin K if the diet is normal otherwise. In fact, deficiencies generally do not come from inadequate diet, but from faulty absorption which occurs when there is not enough bile in the intestines. Vitamin K is useful primarily in surgery.

SERVE TO CONSERVE VITAMINS

Substantial proportions of certain vitamins present in foods in their natural state may be lost unless the housewife observes proper precautions in the cooking and serving of such foods. While certain vitamin losses during cooking are unavoidable, considerable quantities of these valuable protective substances are needlessly thrown away every day. For example, vitamin C, vitamin B_1, vitamin B_2 and nicotinic acid all dissolve readily in water and the water in which foods are cooked may acquire considerable amounts of these vitamins in proportion, depending upon the amount of water used. These amounts are lost unless the water is utilized in making gravies, soups, etc. Soups, because of the method by which they are cooked, whether in cans or not, retain a large proportion of the natural contents of the ingredients used. Other losses may be involved in certain practices frequently employed in cooking. Cooking fruits and vegetables with skins on may help to preserve vitamins.

Vitamin A is gradually lost, and there may be serious destruction of vitamin C during storage of foods. Vegetables which are allowed to wilt, for example, suffer a loss of vitamin C and some loss of vitamin A. The bruising, peeling, cutting or chopping of fresh fruits or vegetables accelerates the loss of vitamin C, although the acid in such foods as tomatoes and citrus fruits helps to preserve vitamin C, and extracted juices from these may be stored in the refrigerator for two or three days and still retain considerable quantities of this vitamin. Foods lose vitamin A and particularly vitamin C during slow drying. Obviously, therefore, it is desirable to obtain fruits and vegetables in the freshest state possible and serve them as promptly as possible.

To assist housewives in the preservation of vitamin values in cooking and serving foods, the Bureau of Home Economics of the U. S. Department of Agriculture, offers the following practical suggestions:

Don't stir air into foods while they are cooking.

Don't put foods through a sieve while they are still hot.

Don't use soda in cooking green vegetables.

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In boiling foods, raise the temperature to the boiling point as rapidly as possible.

Use as little water as possible.

Don't use long cooking processes such as stewing when shorter methods are feasible.

Don't throw away the water in which vegetables have been cooked. Use it in making gravies, sauces, and soups.

Don't fry foods valuable for their content of vitamins A, B_1 or C.

Prepare chopped fruit and vegetable salads just before serving.

VITAMINS IN CANNED FOODS

Generally speaking, canned foods compare favorably with fresh foods in vitamin values. When canned under proper conditions, they retain practically the same vitamin A value as fresh foods and with modern methods of canning, it is possible to exclude air so completely that fruits or vegetables canned immediately after picking are important sources of vitamin C. Properly canned citrus fruit juices, tomato juice and pineapple juice, for example, are recognized as excellent sources of this vitamin. In fact, canned foods may be superior in vitamin C content to "fresh" foods which have been exposed to heat or air or light for any considerable period. The same precautions in cooking canned food should be observed as in the case of fresh food. It is particularly important to utilize the full contents of the can in cooking in order to avoid loss of water soluble vitamins which would result if the housewife discarded the liquid portion of the canned food.

VITAMINS IN FROZEN FOODS

The quick-freezing of fresh foods immediately after harvest preserves and retains color, flavor, vitamins, and nutritional food values. Quick-freezing reduces the probability of loss of vitamins due to chemical changes that may take place during the time involved in the distribution of so-called fresh fruits and vegetables to the consumer. However, frozen foods lose certain vitamin content rapidly after they have been allowed to thaw. Accordingly, they should be kept in frozen state or cooked immediately upon removal from refrigeration. Frozen foods to be eaten without cooking should be served immediately after thawing.

"ENRICHED" OR "FORTIFIED" FOODS

In order that we may have a more abundant supply of vitamins in the foods included in the ordinary diet, some foods are now subjected to processes whereby additional vitamins are added to them.

Milk, for example, which is one of our most valuable foods, is frequently sold today with added vitamin D. There are several methods of fortifying milk with vitamin D. It may be accomplished, for example, by adding vitamin D in concentrated form to the milk; by feeding to cows foods which are rich in vitamin D; or by subjecting the milk to ultra-violet rays. Milk which has been fortified under the latter process, is described as "irradiated milk." Similarly, chickens are sometimes provided with foods rich in vitamin D so that their eggs may have added vitamin D value.

The term "enriched" has a particular connotation due to the fact that official standards for "enriched" flour have been promulgated by the Food and Drug Administration. A number of states require this enrichment of flour or bread, but it is not yet required by federal law. Recently, there has been much talk about "enriched" products. The reason for this is that certain members of the vitamin B complex and other valuable elements are concentrated in the coarse outer portions of grains which are discarded under many milling processes. Therefore, ordinary white flour and bakery products made with it, are poor sources of these valuable substances. Now, however, it is possible to retain or to restore them to a great degree. Thus, "enriched" flour is white or near-white flour which has in it specified amounts of vitamin B_1 (thiamin), B_2 (riboflavin), nicotinic acid, and iron, and it may also contain certain amounts of vitamin D, and calcium. "Enriched" flour may be made by special methods of milling wheat, which save the recommended amounts of vitamins and minerals; or more commonly by adding to plain white flour the recommended amounts of vitamins and minerals; or by combining these methods. Although official standards for "enriched" bread have not yet been promulgated, it is bread which has in it the added vitamins and minerals present in "enriched" flour. It may be made with "enriched" flour; with plain white flour and leavened with a special yeast enriched with these dietary factors; by the direct addition of vitamins and minerals; or by a combination of these methods. "Enriched" flour and bread are important supplementary sources of these vitamins and minerals often lacking in the diet and provide a stronger "staff of life" for everyone.

To give another example, butter is an important source of vitamin A in the ordinary diet. The same could not be said for oleomargarine which many people have used as a substitute for butter. Oleomargarine is now often sold with vitamin A added to it.

Other examples of foods which have been fortified with vitamins could be given. Under proposed regulations covering these and other foods offered for special dietary purposes, the Food and Drug Administration either will establish standards or require adequate labeling. So read labels carefully.

The "enrichment" or "fortification" of various foods with vitamins represents one of the greatest developments in nutrition for the common

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good. For example, one accustomed to eating white bread from which certain members of the vitamin B complex and other valuable elements had heretofore been lost in the manufacturing process, may now obtain, without additional expense, "enriched" bread in which vitamins and minerals, once lost, have been retained or restored.

VITAMIN CONCENTRATES

In addition to obtaining vitamins from ordinary foods, it is possible to secure them in concentrated or synthetic form as tablets, capsules, etc. Such a product may furnish a single vitamin or a combination of several vitamins, and, possibly, certain minerals. Food and Drug Administration regulations require that the proportions of the minimum daily requirements of vitamins and minerals supplied by the product, be specified in the directions on the label. Those purchasing such a product should scrutinize the label carefully as some vitamin mixtures may include large amounts of the less expensive vitamins, but only inconsequential amounts of others which are more expensive. Governmental action is being initiated for the purpose of requiring that if a vitamin is listed as contained in such a product, it must be present in consequential amount. Physicians frequently prescribe concentrated vitamin preparations for a specific purpose depending upon diagnosis. The amount or type prescribed will depend upon the particular deficiency or ailment of the patient.

Every one will agree that the average healthy individual should secure his supply of vitamins from a proper amount and selection of daily food, and that he who does so, is under no necessity of increasing this amount by other means. With one or two exceptions, it is believed that any excess of vitamin intake is not stored up for future use. Vitamins are but one group of many dietary essentials and concentrated vitamins are not a substitute for a well-balanced diet. Adequate amounts of properly selected and properly prepared protective natural foods will provide not only the known vitamins, but also whatever unknown vitamins there may be, and the other nutritional essentials in addition to vitamins.

Proper selection and *proper preparation* of foods are the all-important key words to healthful nutrition. Without them, no one can say he is receiving all the vitamins and minerals he needs. Mass diet studies conducted by the U. S. Department of Agriculture have shown that 75% of Americans receive *less* than the proper amounts. The answer to this problem is better diets, with protective natural foods, the use of "enriched" foods, and an appropriate use of vitamin supplements. Those who do not or will not obtain adequate vitamin values by a properly regulated diet may be aided by vitamin concentrates supplementing their diet, if appropriate selection is made according to their needs.

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VITAMINS FOR EXTERNAL USE

Various products such as cold creams, soap, and hair tonic have been offered to the public upon representations that because of their vitamin content they possess certain cosmetic values. In a number of cases the Federal Trade Commission has ordered the discontinuance of such representations.

CONCLUSION

Do not forget that the current interest in vitamins today is but one phase of a national trend toward better diet. The importance of vitamins, essential as they are, should not be over-emphasized. One cannot live upon vitamins alone, for the body needs minerals, such as calcium, phosphorus and iron, and also protein, fats and carbohydrates. It is hoped that this booklet will stimulate readers to explore the general subject of nutrition more thoroughly.

It is to be emphasized that one need not spend exorbitant sums to secure an adequate supply of vitamins and other food essentials in the daily diet. It is primarily a question of selecting proper foods and budgeting food purchases wisely. Those suffering from malnutrition are not confined to the under-privileged, but include a high percentage of the population that can well afford to and does spend considerable money for food. Too many people who have been eating adequate *amounts* of food, from the caloric standpoint, have nevertheless not been eating the *right kinds* of food from the standpoint of vitamin and mineral content.

Authorities say that, for an adult, about 60 per cent of the food calories should be in the form of starches and sugars, about 25 to 30 per cent in the form of fat, and about 10 to 12 per cent in the form of protein. In addition, a wide range of minerals and vitamins must be supplied. All this can be obtained from a well-balanced diet.

Such a diet should include, daily, adequate amounts of milk, eggs, meat; green and yellow vegetables; fruit (particularly citrus fruit or tomato); potato; butter; cereal and bread, especially whole grain or "enriched"; sugar, fat, and other food to complete the calory needs. The exact amounts required will vary according to the age, size, activity, and state of health of the individual.

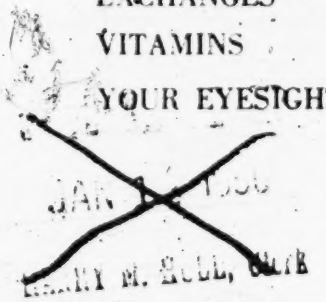
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FACT BOOKLETS

Business, through Better Business Bureaus, is publishing a series of FACT booklets as aids to consumers in their everyday money management problems and relations with business. The booklets are published in the interest of consumer education. Other booklets are in process of preparation. Additional information available on request. The booklets published to date include:

FACTS You Should Know About

ADVERTISING
BORROWING
BUDGETING
BUYING OR BUILDING A HOME
BUYING USED CARS
COMMERCIAL BANKS AND TRUST COMPANIES
COSMETICS
DOMESTIC TEXTILE RUGS
FURS
HEALTH CURES
HOUSEHOLD PESTS
INVESTMENT BANKING
INVESTMENT (TRUST) COMPANIES
JEWELRY
LEGAL PROBLEMS
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SAVINGS
SCHEMES
SECURITIES
SECURITY AND COMMODITY EXCHANGES
VITAMINS
YOUR EYESIGHT



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1892 PLAINTIFF'S EXHIBIT 6

EXHIBIT B

1. MODERN HOME MEDICAL ADVISER (1949) edited by Morris Fishbein.

The following chart appears at the conclusion of Chapter 18, DEFICIENCY DISEASES by Russell M. Wilder and Hugh R. Butt, *supra* Exhibit A.

Pages 504-505:

Resume of the Known Vitamins, Their Names, Sources, Purposes, and Deficiencies

Vitamin	Other Names	Sources			Excellent Purposes	Deficiency Leads To
		Fair	Good	Excellent		
A	Anti-ophthalmic Anti-infective Growth promoting Fat soluble A Carotene or provitamin A	Fruits	Tomatoes Whole yellow corn Hen's eggs Ordinary green vegetables	Butter Cod-liver oils Other liver oils Spinach Kale Turnip greens	Maintains integrity of epithelial (covering) tissues, thereby helping in part to prevent infections Promotes growth and vigor Essential for reproduction	Lowered resistance to infection of many organs, especially of the eyes (xerophthalmia) Failure of growth of children Loss of vigor Night blindness
B	B_1 Anti-neuritic Anti-beriberi Thiamine Chloride	Green vegetables	Heart, liver, kidney, eggs, milk Whole cereals Lean muscle Meat	Wheat germ Yeast	Promotes appetite and digestion Stimulates body activity Overcomes some forms of neuritis	Loss of tone of digestive tract Fatigue Depression Loss of appetite Forms of neuritis
	B_2 Riboflavin	Whole wheat Dried beans Soya beans	Wheat germ Meat Green vegetables	Dried yeast Milk Eggs Heart Kidney	Extrinsic factor in pernicious anemia (Castle)? Necessary for normal growth Development of cells	Disorders of growth Digestive disturbances. Nervous weakness Infection
	Nicotinic Acid	Milk Wheat germ Lean meats	Green vegetables Beans	Yeast	Prevention of features of pellagra	Nerve, skin and intestinal disturbances

Vitamin	Other Names	Sources			Excellent Purposes	Deficiency Leads To
		Fair	Good	Excellent		
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C	Anti-scorbutic Ascorbic acid Cevitamic acid	Fresh apples and onions	Bananas Pineapple Collards Green peas	Green peppers Tomatoes Grapefruit Lemons Oranges Tomato juice Cabbage	Protects body from scurvy Required for proper formation of bones and teeth	Scurvy Softening of bones Decay of teeth Loss of muscle strength Hemorrhage
D	Anti-rachitic Irradiated ergosterol Viosterol	Milk or butter	Eggs	Cod-liver oil Sunlight Artificial ultra-violet lights Irradiated ergosterol (viosterol)	Proper calcification (hardening) of bones Prevents rickets	Rickets Bone deformities Defects and caries of teeth General muscular weakness
E	Anti-sterility	Whole cereals	Whole wheat Lettuce Watercress	Wheat germ	Necessary for reproduction in animals and man?	Sterility (noted in animals only) Failure of reproduction (noted in animals only)
K	Anti-hemorrhagic vitamin	Grass	Alfalfa	Concentrates	Prevention of hemorrhage by maintaining concentration of prothrombin in blood	Tendency to bleed, in newborn infants and in patients who have jaundice
Vitamin B Complex	Vitamin B complex includes also filtrate factor; vitamin B_3, 4, 5, and 6	These factors are known particularly for effects in absence in animals but have been related to complications of pellagra and similar disturbances in human beings. Pantothenic acid (filtrate factor) is related to graying of hair in human beings. Vitamin B_6 (pyridoxine) is related to some chronic nervous disturbances.				

1894 2. NEW AND NON-OFFICIAL REMEDIES (1948), issued under the direction and supervision of the Council on Pharmacy and Chemistry of the American Medical Association.

Page 530-531:

"*Allowable Claims.*—1. Evidence for the existence of vitamin A and its role in human nutrition is based on the fact that a characteristic eye disease, usually called xerophthalmia, results from a deficiency of this vitamin.

"2. It is generally agreed that the first symptom or at least one of the first clinical symptoms of vitamin A deficiency is night-blindness, or nyctalopia. For this type of night blindness vitamin A is a specific . . .

"3. Vitamin A is reported to be effective in the treatment of certain types of hyperkeratosis of the skin of persons suffering from severe deficiency of vitamin A.

"4. Vitamin A in excess of normal requirements has not been shown to be of value in the prevention of colds, influenza and such infections.

"5. There is at the present time inadequate evidence to warrant the claim that the ingestion of sufficient vitamin A will prevent the formation of renal calculi in man or that it is useful in the treatment of hyperthyroidism, anemia, degenerative conditions of the nervous system, sunburn, or ulcerative conditions of the skin."

Page 532-533:

"*Allowable Claims.*—1. Thiamine is of value in correcting and preventing beriberi.

"The general opinion of the students of beriberi is that this disease with its nervous and cardiovascular manifestation is due primarily to an insufficient supply of thiamine. It is probable that in the majority of instances of human beriberi
1895 there are also deficiencies of food constituents other than thiamine. There are conditions which probably could be designated as 'latent beriberi'; it does not seem wise at this time to attempt the formulation of a definite statement covering such conditions other than that presented in Item 5.

"2. Thiamine may be cited as of value in correcting and preventing anorexia of dietary origin in certain cases.

"There are many causes of anorexia, some referable to infections and the reactions thereto, others to organic disorders, and still others related to faulty diet. Where there is no rather obvious cause of anorexia in question other than a possible dietary one, it is permissible to claim that thiamine may be of therapeutic value when the condition to be treated is due to a deficiency of that vitamin.

"3. The administration of thiamine in excess of that present in the ordinary diet may be advantageous when there are specific conditions indicating interference with proper assimilation of the vitamins.

"The present status of research on the clinical use of thiamine for specific diseases other than beriberi and for infant feeding, is such that *definite* claims for therapeutic value in relation to such diseases cannot be recognized. Its use may be indicated, however, in such restricted conditions as pernicious vomiting of pregnancy, tube feedings through a jejunal fistula, and the like; because the above permitted statement applies to such conditions and gives an intelligent basis for such therapy.

"4. While it has not been established that thiamine deficiency is the sole cause of conditions described as alcoholic neuritis, the neuritis of pregnancy and the neuritis of pellagra, there is some definite evidence of the value of this vitamin in the
1896 treatment of these conditions. Vague representations with respect to the value of thiamine in the treatment of other types of neuritis are not permissible.

"5. Thiamine deficiency in animals is associated with dysfunctions of the heart and of the vascular system. Thiamine is effective in reestablishing the normal function of the cardiovascular system if the dysfunction was caused by thiamine deficiency. Evidence is lacking that thiamine is effective in any other type of heart disease. At times organic heart disease and beriberi heart coexist. Administration of thiamine is justified in these patients.

"6. It appears that there is an increased requirement for thiamine when there is greatly augmented metabolism such as occurs in febrile conditions, hyperthyroidism, or vigorous muscular activity."

Page 534:

"*Allowable Claims.*—1. Riboflavin is recognized as a specific in the treatment of certain characteristic lesions of the tongue, the lips, and the face. The symptoms may be described briefly as follows: A typical glossitis may often be observed before other signs of riboflavin deficiency are present. In contrast to the glossitis of pellagra, the tongue is clean, the papillae are flattened or mushroom-shaped rather than atrophic, and the color is definitely purplish-red or magenta instead of being scarlet as in nicotinic acid deficiency. As the disease progresses, the lips become reddened, then shiny and denuded, with maceration and fissuring of the angles of the mouth (cheilosis). Frequently, seborrheic follicular keratoses occur at the nasolabial folds and even over the nose and forehead. The above

symptoms are promptly alleviated by the administration
1897 of adequate amounts of riboflavin.

"2. Riboflavin deficiency is responsible for certain ocular manifestations characterized by itching, burning and a sensation of roughness of the eyes (keratitis), accompanied by mild photophobia. The anatomical changes may vary from a superficial invasion of the cornea by capillaries to an extensive vascular proliferation, with or without infiltration, opacity, and exudate formation. These symptoms, when due to a riboflavin deficiency, are relieved promptly by the administration of the vitamin.

"3. It is permissible to recommend the use of riboflavin for the alleviation of symptoms of riboflavin deficiency encountered in other diseases, notably pellagra."

Page 535:

"*Allowable Claims.*—1. Nicotinic acid and nicotinamide are recognized as specifics only in the treatment of pellagra."

Page 537:

"*Allowable Claims.*—1. Ascorbic acid is acceptable for the correction and prevention of scurvy. Definite claims for the therapeutic value of ascorbic acid should be permitted only in relation to scurvy until further clinical or experimental evidence has substantiated its usefulness in other states.

"2. It may be permissible under certain conditions to refer to the therapeutic value of ascorbic acid in early and latent scurvy. Convincing clinical evidence has established that this state does occur. It would be well to emphasize the fact that the diagnosis rests, however, on the basis of roentgenologic evidences in the long bones, the blood level, and possibly failure to excrete an optimum amount of ascorbic acid in the urine.
1898 "3. Dental caries, pyorrhea, certain gum infections, anorexia, anemia, undernutrition and infection alone are not in themselves sufficient indications of ascorbic acid deficiency but according to experimental and clinical investigation may be concomitant signs of ascorbic acid deficiency. Therefore, it is permissible to accept the claim for the therapeutic value of ascorbic acid in these symptomatic conditions *only when* it is definitely stated that they are the consequences of a deficiency or suboptimal amount of ascorbic acid or when there is a pathologic interference with assimilation of the amount necessary for the preservation of health. . . .

"6. A reasonable general statement regarding allowable claims for ascorbic acid would be as follows:

"An optimum amount of ascorbic acid should be supplied at all ages for its therapeutic value in preventing the development of acute or latent scurvy."

Page 540:

"*Allowable Claims.*—1. Vitamin D is recognized as a specific in the treatment of infantile rickets, spasmophilia (infantile tetany) and osteomalacia, diseases which are manifestations of abnormal calcium and phosphorus metabolism. Vitamin D is valuable in the prevention as well as in the curative treatment of these diseases. Complications such as renal insufficiency or glandular malfunction may preclude normal response to vitamin D therapy. During acute infections, especially of the gastrointestinal tract, vitamin D may prove ineffective because poorly absorbed. . . .

"3. There is clinical evidence to justify the statement that vitamin D plays an important role in tooth formation. Likewise experimental evidence justifies the statement that
1899 vitamin D is a beneficial factor in preventing and arresting dental caries when the intake of calcium and phosphorus is liberal and the diet is adequate with respect to other nutrients. Claims should not state or imply that vitamin D is the only important factor in caries prevention or arrest.

"4. Animal experimentation has shown that correction of an inadequate intake of vitamin D results in the more economical utilization of calcium and phosphorus and also that the undesirable effects of improper ratios of calcium and phosphorus in the diet can largely be overcome by normal intake of vitamin D. The importance of these observations in their application to man is not entirely apparent because of the lack of adequate clinical evidence showing the availability of different forms of calcium and phosphorus, but it may be stated that vitamin D has a favorable influence on calcium and phosphorus metabolism."

Pages 542-543:

"*Allowable Claims.*—Vitamin K, both in its crude form and in certain related naphthoquinones with analogous antihemorrhagic activity, seems to have a specific effect on prothrombin deficiency occurring under certain sets of circumstances:

"1. In primary dietary deficiency of vitamin K which, while admittedly rare, does exist.

"2. In obstructive jaundice, in which vitamin K has proved to have an extraordinary protective effect against hemorrhagic diathesis.

"3. The hemorrhagic state associated with primary hepatic disease is controlled in part, but not entirely, by vitamin K and by the naphthoquinones with analogous activity. The difficulty seems to lie in the fact that the liver cannot utilize
the material in the formation of prothrombin, except
1900 to a limited degree.

"4. The hemorrhagic states, which exist in connection with certain intestinal diseases such as ulcerative colitis, sprue and celiac disease, characterized by either a loss of continuity of the intestinal tract or by a disturbance of its absorptive surface, are also affected in a specific manner by vitamin K."

3. THE PHARMACOLOGICAL BASIS OF THERAPEUTICS (1941) by Louis Goodman and Alfred Gilman, Assistant Professors of Pharmacology and Toxicology, Yale University School of Medicine.

Page 599:

"*Calcium Requirements.* The body is in constant need of the calcium ion. This is obtained from the diet and it is only in abnormal circumstances that this source need be supplemented. The average adult requires 0.45 gram of calcium daily, but growing children and pregnant and lactating women should ingest twice this amount."

Page 601:

"*Nervous System.* An excess of calcium has little effect on the function of the nervous system, but a reduction in the ionized calcium leads to a serious physiological disturbance, known as *low calcium tetany*, characterized by an increased irritability of all types of muscle. The symptoms most often observed are carpopedal spasm, laryngospasm and convulsions. An increased activity of smooth muscle is evidenced by spasm of the ciliary muscle, sphincter of the iris, esophagus, gastrointestinal tract, bladder and bronchi. Cardiac muscle likewise is affected and arrhythmias occur."

Page 1248:

"The symptoms of *mild thiamine deficiency* are not as
1901 characterisic as those of the severe form and the condition may easily escape diagnosis. It is only within recent years that the attention of the physician has been directed to the possibility that thiamine deficiency may be fairly

prevalent. The work of Cowgill (1934) on the vitamin B requirement of man offers a quantitative approach to this problem. It is now becoming more and more appreciated that beriberi is merely the fulminating type of a not uncommon deficiency disease. It is not only in the Orient that economic stress sufficient to limit the thiamine content of the diet exists. The symptoms consist of loss of appetite, muscular weakness, pains and paresthesias in the extremities, a tendency to edema, decreased blood pressure and low body temperature. The diagnosis may be confirmed by a careful study of the dietary history. Thiamine deficiency, however, may occur in association with an apparently adequate diet, for the vitamin is not stored in the body to a great extent. Thus, an increase in metabolic rate or gastro-intestinal disturbance, such as diarrhea of fairly long duration, necessitates an increased thiamine intake. Mild deficiency is also observed in infancy, and childhood. The symptoms are pallor, loss of weight, restlessness, slight stiffness of the neck and spasticity of the extremities."

Page 1256:

"The chief symptoms referable to the digestive tract are stomatitis, enteritis and diarrhea. The tongue becomes very red and swollen and may ulcerate. There is also excessive salivary secretion and the salivary glands may be enlarged. Diarrhea is recurrent. The stools are watery, and may occasionally be bloody. Nausea and vomiting are also common. Gastric achylia is observed in about 50 per cent of the cases.

"Symptoms referable to the nervous system consist of
1902 headache, dizziness, insomnia, depression and impairment of memory. In severe cases, delusions, hallucinations and dementia may appear. Motor and sensory disturbances of the peripheral nerves also occur.

"In addition, certain cases of pellagra manifest a macrocytic, hyperchromic anemia (page 1137)."

Page 1257:

"*Symptoms of Mild Deficiency.* A milder degree of deficiency has been termed 'sub-clinical pellagra.' The patients are nervous, irritable and complain of headache and insomnia. They also suffer from indigestion, occasionally nausea and vomiting, and may have diarrhea or constipation. A certain degree of pigmentation of the skin often exists and there is a burning sensation in the affected cutaneous areas."

4. DISEASE OF METABOLISM, (1947), edited by G. G. Garfield, Director of Medical Division, Pennsylvania Hospital, Clinical Professor of Medicine, Jefferson Medical College, Philadelphia.

The following excerpts are from Chapter 8, "Vitamins and Avitaminoses" by Tom D. Spies and Hugh R. Butt, *supra* Exhibit A.

Page 397:

"Decreased facility for *dark* adaptation is one of the earliest functional changes associated with deficiency of vitamin A."

Page 397:

"Dryness and scaliness of the skin are perhaps among the earliest manifestations of involvement of the skin resulting from deficiency of vitamin A."

Page 401:

"It must be remembered that in the presence of
1903 diarrhea or jaundice (in infants) larger doses of vitamin A must be administered."

Page 403:

"*Skin Lesions*—Within the past few years, several groups of investigaters have reported patients who had cutaneous lesions which were considered to be the result of a deficiency of vitamin A."

Page 403:

"Gastrointestinal Diseases: Patients who have chronic diarrhea require more vitamin A than is necessary for normal persons. Patients who have hepatic disease likewise require a rather larger dose."

Page 426:

"The most constant and striking findings of thiamine deficiency arise from chemical alterations which lead ultimately to degenerative changes in the nervous system."

Page 380:

"Clinically it is well known that among patients who have chronic biliary fistulas an abnormal tendency to bleed sometimes develops. It has been demonstrated that in these instances there is an associated deficiency of prothrombin in the circulating blood which can be corrected by the administration of vitamin K."

Page 392:

"Alfalfa is a rich source of vitamin K and concentrates of this material have received extensive clinical application."

Page 457:

"It is important to emphasize that a long period of ill health with symptoms of a vague non-descriptive character
1904 usually precedes the appearance of diagnostic lesions. Because deficiencies of the B-complex vitamins tend to occur as complexities rather than as single entities, it is important to separate the premonitory symptoms of spontaneous riboflavin deficiency from those of pellagra or beriberi. Prominent among such symptoms are anorexia, weight loss, weakness, and inability to perform mental work. Digestive disturbances, nervousness, vague pains in various parts of the body, burning sensations of the skin, eyes, and corners of the mouth, as well as soreness at the corner of the mouth, pain in the eyes and visual disturbances, headaches, dizziness, mental depression, insomnia, forgetfulness and mild states of confusion are common complaints."

5. Rehabilitation Through Better Nutrition (1943) by Tom D. Spies, *supra* Exhibit "A".

Page 17:

"A protracted deficiency of vitamin A results in changes in the retinal which leads to night blindness and changes in the epithelial surfaces of the body. . . . "

"The clinical signs are such that a diagnosis is possible only when the deficiency is moderately advanced. The earliest detectable result of a deficiency of vitamin A in the eyes is a slight impairment of dark adaptation. The first change which may be observed by the patient or the physician is the drying of the eye, known as xerophthalmia. . . . "

Page 18:

"From the clinical point of view, vitamin A deficiency often manifests itself in photophobia, lacrimination and inflammation, frequently followed by a purulent exudate. Physical examination may show thickening of the conjunctiva
1905 in the early stages, or there may opaqueness of the cornea. Lesions of the cornea sometimes spread with extreme rapidity, and in rare instances, sight may be lost for a few hours. . . . "

Page 18:

"Changes in the skin, which most often occur rather late in the course of the disease, give it somewhat the appearance of toadskin. . . . "

Page 20:

"In the late stages of vitamin A deficiency, a frequent respiratory infection occurs."

Page 20:

"The prodromal period may be of a long duration with insidiously advancing symptoms, trivial in nature but gaining importance by their persistance rather than by their severity. The symptoms during this time are in all probability due to a deficiency of the entire B complex rather than the deficiency of niacin alone. Before diagnostic lesions of the mucous membranes, or skin appear, there is loss of appetite which is at least in part responsible for weight loss. Ill defined disturbances of the elementary tract including 'indigestion' and changes in bowel function occur. General muscular weakness, plasitude, irritability, depression, memory loss, headache and insomnia develop without obvious reasons. Inability to work, abdominal pain, burning sensations in various parts of the body, vertigo, numbness, nervousness, palpitation, distractibility, flights of ideas, apprehension, morbid fear, mental confusion and forgetfulness frequently occur. There may be intermitten diarrhea and constipation. There is much that obviously is abnormal at this stage but nothing that is pathognomonic. Since the entire syndrome often appears
1966 without objective cause, a diagnosis of neurastagnia,
anxiety state, malingering or neurosis is usually entertained."

Page 24:

"For the most part, thiamine is concerned with the efficiency of carbohydrate metabolism and primarily with the metabolism of nervous tissue. A study of many persons developing beriberi shows that they have a prodromal period of ill health. This is much like the period described previously as the prodromal period of pellagra. It is the period when the initial nervous syndrome appears. Observations by Spies, Bradley, Rosenbaum and Knott show that some impairment of intellectual and cognitive functions exemplified by difficulties in concentration, attention, comprehension, and probably slight memory deficits, occur long before any evidence of peripheral neuritis appears. Anorexia and sometimes constipation may accompany these symptoms. Often there are profound emotional disturbances such as abnormal fears, apprehension, increased irritability, rage, hostility, depression and other emotional phenomena. All the symptoms may be manifestations of a mixed B complex deficiency. Be-

cause they frequently are relieved by the administration of thiamine, it seems evident that they constitute an important feature of early thiamine deficiency.

"Peripheral neuritis is the most common objective sign of deficiency of thiamine. Its appearance follows the prodromal symptoms by weeks or years. Initial signs are moderate weight loss, weakness and lassitude. Fatigue is prominent and is followed by sensations of heaviness and stiffness of the legs, inability to walk long distances and finally by burning and paresthesias, particularly referrable to the distal portions of the lower extremities. Cramps in the legs and thighs are a prominent complaint. Symmetrical sensory disturbances may become demonstrable."

1907 Page 25:

"Vasomotor phenomena are evident in aberrations of sweating in the involved extremities, and the pooling of peripheral blood when the extremities are dependent. . . .

"The cranial nerves may be affected in beriberi. The vagi are most commonly implicated but in the literature from the Orient, one finds that almost any of the spinal or cranial nerves or their branches, for instance, the phrenic, the recurrent laryngeal, or even the optic nerve, may show signs of the neuritis of beriberi. In most instances the sphincter muscles are not involved until late stages of the disease. When muscular degeneration is severe, the gait usually becomes altered and there is no true cerebellar ataxia. If the patient becomes bedridden, the tendency to develop decubitus ulcers, particularly in anesthetic areas, is dominant."

Page 29:

"Heart disease, due to beriberi, may be indirectly the result of involvement of the neuroregulatory mechanism of the heart. The oriental descriptions of the disease are now thought to be representative only of the very acute stages of this type of heart disease. They are characterized by dyspnea edema, a bounding pulse with wide pulse pressure, pistol shot sounds over the large arteries, tachycardia, all manifestations of a fast circulation and peripheral vasodilatation. Under these circumstances, there is marked enlargement of the heart, increased venous pressure, and pulmonary congestion. Attacks of syncope are usual and sudden death is common."

1908 Page 31 (Under the heading, "Riboflavin Deficiency"):

"It is important to emphasize the long period of ill health with symptoms of a vague, non-descriptive character that

usually precede the appearance of diagnostic lesions. Because deficiencies of the B-complex vitamin tend to occur as complexities rather than as single entities, it is impossible to separate the premonitory symptoms of spontaneous riboflavin deficiency from those of pellagra or beriberi. Prominent among such symptoms are anorexia, weight loss, weakness, and inability to perform mental work. Digestive disturbances, nervousness, vague intermittent pains in various parts of the body, burning sensation of the skin, eyes and corners of the mouth, as well as soreness at corners of the mouth, pain in the eyes and visual disturbances, headaches, dizziness, mental depression, insomnia, forgetfulness, and mild states of confusion are common complaints. Frequently none of the symptoms is objective; and there are no signs indicating that any specific system in the body is primarily affected. Such symptoms may persist for a long time after diagnostic lesions appear, and in some persons they remain constant while the specific lesions wax and wane.

"The physician who is unfamiliar with deficiency diseases may interpret these prodromal symptoms as being functional in origin. They should, however, lead him to consider the possibility of an inadequate food intake, or the faulty utilization of food playing a role in their development. Even though persons with such symptoms have no diagnostic signs of a deficiency disease, they should be observed repeatedly over a long period of time for in many cases diagnostic lesions eventually appear."

1909 6. DIETOTHERAPY (1945) edited by Michael G. Wahl, Associate Professor of Medicine, Temple University; Chairman, Advisory Committee on Nutrition, Philadelphia Department of Public Health.

The following excerpts are from Chapter 8 CALCIUM AND PHOSPHOROUS by Julia O. Holmes, *supra* Exhibit "A":

Page 152:

"Functions (of calcium). Slightly less than 1 percent of the body's calcium is not in the bone; but that small amount is absolutely essential for the maintenance of life."

"Intercellular cement. That calcium is a constituent of the cement which holds cells together has been demonstrated by tissue culture technique. When well developed sheets of epithelium from embryonic kidney, parotid gland or intestine were washed in a calcium free fluid the sheets became loosened from one another. Later when calcium was added to the solution recovery of the separated cells was rapid. Additional evidence that calcium is involved in the intercellular cement is

seen in the study of Chambers and Zweifach who perfused capillaries with fluids with and without calcium. Lack of calcium was found to weaken the cement substance between the endothelial cells with the result that extravasation of both fluids and blood cells occurred; with a calcium rich fluid cement substance was reformed and normal permability was reestablished. A conclusion has been drawn that calcium apparently acts in fixing the cement by converting it into a non-dispersible complex."

Page 153:

"Although surveys of American dietaries indicate that many persons are subsisting on diets poor in calcium, medical literature is not replete with evidence of widespread suffering and disability due to calcium deprivation. Only
1910 one reference has been found which suggests that soft tissues may be affected as a result of a calcium deficiency. In this study the administration of calcium and viosterol to pregnant women, relieved such symptoms as muscle soreness, spasms, numbness, tingling and neutritis. Disturbances in bone calcification however are probably not uncommon. Thus poor bone structure and soft skulls and early rickets have been reported in infants whose mothers ate little calcium during pregnancy. Moreover a calcium deficiency appears to be involved in two diseases of adults i.e.: osteomalacia and osteoporosis."

The following excerpt is taken from Chapter 12, VITAMIN C IN HEALTH AND DISEASE by Gilbert Dalldorf, *supra* Exhibit "A":

Page 295:

"The cardinal symptoms of scurvy appear suddenly after prolonged subsistence on inadequate diet. The characteristic manifestation of the disease is a hemorrhagic diathesis. The other cardinal symptoms are weakness and signs and symptoms due to skeletal lesions and hemorrhage.

"Essentially, scurvy is the same in all age groups; but the signs vary with the state of skeletal development, the presence or absence of teeth, and the activities characteristic of different periods of life. Thus, infants show, as the commonest symptoms, swelling and tenderness of the thighs, a disinclination to move, and pain and crying when they are handled. In infantile scurvy, too, skin petechiae are common where the diaper rubs or presses. Hemorrhagic gingivitis may or may not be common depending on whether the infant is edentulous. In general the patients appear pale and worried, are frequently febrile (scurvy

fever), and exhibit hematuria. Though limited to a few red blood cells, this last is a very common symptom. What
1911 is called 'rheumatism' is the presenting symptom in 92% of the cases (Park)."

"Adult scurvy patients also complain of 'rheumatism' and of weakness. * * * Mouth changes are often very severe. * * * Fatigue, breathlessness, and palpitations are other common symptoms."

The following excerpt is taken from Chapter 24 NUTRITION IN THE AGED by J. H. Musser, *supra* Exhibit "A":

Page 510:

"Vitamins. A consideration of mineral elements in the diet of the aged is relatively unimportant compared with a consideration of vitamin requirements in that diet. It is extremely common to find in old people clinical evidence of vitamin deficiency, notably of B complex deficiency. These deficiency expressions may have as a basis already existing disease of the gastro intestinal tract or of the liver incident to the aging process as result of which there is inadequate absorption and utilization of vitamins or poor storage of them. But the older person who has disease elsewhere than in the gastro intestinal tract or the liver may suffer from vitamin deficiency too. The chronic cardiac patient may have poor absorption as a result of chronic passive congestion. The diabetic may not obtain an adequate supply of vitamins because of dietary restrictions. The patient with chronic disease of some other type is likely to have dietary deficiency symptoms not only because of the underlying disease, but also because of an improperly balanced diet. For the person suffering from chronic disease has anorexia and will not or cannot take food substances which contain a high percentage of vitamins. Eliminating the disease condition, however, there still remains a goodly company of elderly people who fail to eat Vitamin rich foods which might prevent deficiency expression."

1912 7. THE DISPENSATORY OF THE UNITED STATES (24th ed., 1947) by Arthur Osol, Professor of Chemistry and Director of Chemistry, Philadelphia College of Pharmacy and Science; and George E. Farrar, Associate Professor of Medicine, School of Medicine, Temple University.

Page 773:

"The outstanding pathological conditions produced by this avitaminosis are karatinization of epithelium, apparently of all mucous membranes of the body and loss of the visual purple

from the retina. As a result of the former, there is diminution in the secretion of the salivary gland, lacrimal and perhaps others; this effect seems to be due rather to the blocking of the ducts by desquamated cells than by an action on the secretive cells. The unhealthy condition of the mucous membrane of the respiratory tract renders animals abnormally susceptible to respiratory infections." (Citing Journal of the American Medical Association, 1940, Volume 114, Page 386). "Lehman and Rapaport have described a specific form of dermatitis which is apparently due to lack of vitamin A; the characteristic appearance of this was a karatotic plugs projecting from the hair follicles and causing a peculiar roughness of the skin. Apparently also the desquamated epithelium in the urinary tract may act as a nidus for the formation of stones of the kidney, provided the conditions are such as to encourage the precipitation of calcium salts."

Page 774:

"The symptom which first drew attention to this avitaminosis is the peculiar inflammation of the conjunctiva and cornea of the eye known as xerophthalmia, which may lead on to
1913 necrosis and ulceration. It is interesting to note that in young growing children, tooth enamel which is the product of epithelial cells, does not develop normally if there is lack of vitamin A."

Page 115:

"The outstanding symptoms of scurvy are great fragility of the blood capillaries as shown by tendency to hemorrhages either external or internal on the slightest injury, improper development of the teeth or softening of the matured teeth and great muscular weaknesses." * * * patients often show evidence of degeneration of skeletal muscles, anemia, enlargement of the heart, atrophy of the adrenals, lowered resistance to infection and disturbance of calcium metabolism."

Page 740:

"The characteristic symptoms of pellagra are dermatitus, diarrhea and dementia. The skin becomes red, resembling sunburn, this involves chiefly the unclothed area of the body. The skin is dry and scaly and often thin. Lesions of the skin become dark brown in color and desquamate; scars remain. The tongue and mouth become scarlet red in color and swollen so that indentations are seen where the teeth have been in contact with the tongue, large red fungi forms of papillae may stand out

over the dorsom of the tongue later there is atrophy of both the fungi form and filliform papillae and the tongue may appear pale and smooth; multiple deep fis-ures often form. There is headache, vertigo, insomnia, depression, irritability and loss of memory usually precedes the dementia."

1914 Page 985:

"The clinical manifestations of riboflavin deficiency likewise have been the subject of controversy. It was noted that some cases of human pellagra, which were refractory to nicotinic acid, recovered when riboflavin was added to the diet. Sebrell and Butler (Public Health Report 1939, Vol. 54, Page 2121) reported a peculiar inflammation of the buccal buchosa (cheilosis), which was caused experimentally in healthy humans by the exclusion of riboflavin from the diet. Johnson and Eckhardt, having observed changes in the cornea of riboflavin-deficient rats, employed this substance in the treatment of keratitis in humans. The clinical manifestation of ariboflavinosis were listed by Cayer (Journal AMA 1946, 132, 558), as follows: lacrimation, photophobia, sore tongue and mouth, magenta glossitis, cheilisis, seborrhea of the naso-labial hole, ears and forehead, vascularization of the cornea, and decreased urinary excretion of riboflavin." . . . "Nevertheless, the presence of these manifestations is an indication for treatment with riboflavin. The study of the nutritional status of the population in Newfoundland by Amundsen, et al (Canadian Medical Association Journal, 1945, 52, 227) contains excellent photographs in color of the lesions. The lips become red and shiny with a very thin and often scaly epithelium. Erythema spreads from the angles of the lips over the cheeks, and results in scars that radiate from the angles of the mouth; in some instances, this takes the form of a moist, white macerated area at the angles of the mouth, although this lesion is also associated with other etiological factors. The tongue has a characteristic magenta color (cyanotic red), and is often cleaned with enlarged fungiform papillae. The eye manifestations consist of hyperemia of the conjunctive, circum-corneal injection, photophobia and
1915 eventually, vascularization of the cornea with opacity of the cornea which interfers with vision. The eye lids become swollen and red and have a dry exudate from them. Erythema extends laterally from the external canthus, somewhat similar to the lesion at the angles of the mouth, and there is often a suborbital area of erythema. A diffuse purplish-brown discoloration of the eyelids occurs but it is not pathognomonic of ariboflavinitis since it is associated with other conditions."

Page 1209:

"The first scientifically demonstrated avitaminosis was the disease known as beriberi which Eijkman showed in 1897 could be cured by rice polishing. Beriberi has been well known among the Asiatics for nearly a century. There are two types recognized, one commonly known as 'dry' beriberi, in which the predominant symptoms involve the nervous system, especially the peripheral nerve fibres of the lower extremities. Degenerative changes are found in the ganglion cells of the nervous systems with degeneration of the myelin sheath and fragmentation of the axis cylinders of the peripheral nerves and atrophy and degeneration of the muscles supplied by these nerves. In the second form, commonly referred to as 'wet' beriberi, the outstanding manifestations are in the circulatory apparatus, and include edema, increased venous pressure, tachycardia, low voltage and 'T' wave changes in the electrocardiogram, increased cardiac output (in spite of the findings usually associated with congestive heart failure), increasing rate of circulation, enlargement of the heart, particularly of the right side, capillary pulse and pistol shot sounds over the large arteries, gallop rhythm of the heart, often syncopal attacks, and response to th-amine therapy but not to digitalis. Early symptoms of thi-
1940 amine deficiency are changes in mental attitude, and behavior, anorexia, fatigue, emotional instability, lassitude, lack of cooperation and deterioration of judgment and foresight. Endurance is decreased. Tenderness of the gap muscles, muscular weakness and pain may occur in the lower extremities. The blood pyruvic acid is increased and the glucose tolerance is decreased."

Page 1210:

"Although frank beriberi is uncommon in the United States, sub-clinical deficiencies are quite prevalent, and apparently have greatly increased in the last few years. This increase is due to change in our dietetic habits, the most important of these habits being the enormous increase in the use of sugar and the excessive milling of flour and other cereals. Thiamine is not concentrated in any of our ordinary foodstuffs, the most important source in the normal diet being the cereal grains, such as wheat, rice, oatmeal, and so forth. In these grains the vitamin is limited almost entirely to the seed coat and is removed in the effort to produce the white flour. As the need for thiamine rises with an increased proportion of carbohydrates in the diet, an augmented intake of sugar which contains of course no vitamin, increases the amount of thiamine which the body requires. So marked is this effect of sugar that in some patients an intra-

venous injection of dextrose may precipitate a frank beriberi. Thiamine deficiency is especially liable to occur in alcoholics for the same reason that excessive sugar in diet causes the condition, and it is probable that many of the symptoms of alcoholism such as neuritis and delirium, are due to the vitamin deficiency. Another factor which contributes to the widespread deficiency is that the vitamin is not well stored in the body. That
1917 is, that we cannot take on excess for a few days and then go for long periods of time without renewing our supply.

"Thiamine is readily destroyed by heat in alkaline solution and may be lost in the water in which the food is cooked. Thiamine is stable in normal gastric juice. The presence of bile causes rapid loss of thiamine."

8. CHEMISTRY OF FOODS AND NUTRITION (1946 ed.) by Henry C. Sherman, *supra* Exhibit "A".

Page 231:

"The distribution and functions of calcium have been studied in greater detail than those of magnesium. It is estimated that over 99% of the calcium in the body belongs to the bones, the remainder occurring as an essential constituent of the soft tissues and body fluids. * * * The blood contains more calcium than magnesium.

"That calcium ion is necessary to the coagulation of the blood has been known and frequently cited as example of the great importance of calcium salts to the animal economy. Equally striking is the function of these salts in regulating the action of heart muscle.

"It is well known that heart muscle may be kept beating normally for hours after removal from the body when supplied, under proper conditions, with an artificial circulation of blood or a water-solution of blood ash. Howell, Loeb and others have studied the parts played by various salts * * * Calcium salts also, although occurring in blood in very much smaller quantities are absolutely necessary to the normal action of the heart muscle; while at present in concentrations above normal cause a condition of tonic contraction 'calcium rigor'. There is therefore a balance which must be maintained between
1918 calcium on the one hand and sodium and potassium on the other. Thus it is found that the alternate contractions and relaxations which constitute the normal beating of the heart are dependent in part upon the presence of a sufficient but not excessive concentration of calcium salts."

Page 234:

"Iron like phosphorous is a constituent of the chromatim substances which are often referred to as concerned with the most vital activities of the cells, and recently it appears that a small amount of iron has an essential relation to the oxidation-reduction functioning cytochrome; but much the largest part of the iron in the body exists as hemoglobin in the blood. In round numbers the blood constitutes only about seven per cent of the weight of the body but contains at least seventy percent of its total iron. The hemoglobins in different species of vertebrates differ but little; all are iron containing proteins constituting a considerable part of the red blood corpuscles and functioning as oxygen carriers in respiration."

Page 283:

"Hence an iron poor body tends to be anemic; and while anemia may be due to many other causes as well as lack of iron the studies of the adequacy of iron supply in nutrition have been closely interwoven with the studies of anemia, of hemoglobin formation and regeneration, of the history and functioning of the red cells or corpuscles of the blood.

"More recently it has been found that copper is in some way involved in the process of hemoglobin formation."

1919 9. INVESTIGATIONS OF HUMAN REQUIREMENTS FOR B-COMPLEX VITAMINS by Max K. Horwitt, Erich Liebert, Oscar Kreisler, and Phyllis Wittman, Bulletin No. 116, June 1945, National Research Council, National Academy of Sciences.

Page 50:

"MILD RESTRICTION OF B VITAMIN COMPLEX . . . Mental Activity. Mental changes came so gradually that it was difficult to know when they actually appeared. The most prominent change was a dulling of faculties involving attention, interest, ambitions, and sociability, and this change was associated with a decrease of talking and a slowing of movements. One elderly subject, AO1, who was alert, quick of movement, eager at all times to help in the first one and one-half years of the mild B vitamin complex restriction phase, withdrew from the center of activities, lost his friendliness and the briskness of his movements."

Page 73:

"In a discussion of these findings comparisons should be made with observations in other recent B vitamin restrictions studies.

"Ray D. Williams and coworkers conducted a study (1) in which the intake of thiamine was restricted to an average of 450 mcg. (220 mcg. per 1000 calories) daily in young to middle-aged female subjects who had previously suffered from psychotic episodes. Changes of attitude and behavior, diminished inclination to perform accustomed tasks, and decrease of ability to make social adjustments were observed as early signs in the subjects after eight to twelve weeks. Irritability, agitation, depression, and anxiety were also noted. The subjects complained of headache, backache, sleeplessness, tenseness,
1920 paresthesias, sensitivity to noise. Tolerance to exercise was affected. Muscles were found weak and tender. Episodes of nausea, vomiting, and epigastric distress occurred, and constipation was common. Lowering of the basal metabolic rate was seen: There were cardiovascular disturbances such as lowered blood pressure, vasomotor instability, pallor, marked tachycardia on moderate exertion, arrhythmia, electrocardiographic changes, and precordial pain. Elevations of pyruvate blood levels accompanied clinical exacerbations."

~~Page 102:~~

"Mild restriction of B vitamin complex led to physical and mental changes in these chronically psychotic, mostly sedentary, old and young male subjects. The important physical changes were regressive changes in the skin, impairment of appetite, lowering of blood pressure, slight edema, dulling of vibration sense, and diminution of deep reflex activity. The predominant mental changes were decrease of psychomotor activity, dulling of attention, loss of interest and ambition, and seclusiveness. The development of both mental and physical signs and symptoms was exceedingly slow. No definite claim of changes could be made in the first year of the experiment. There was a difference in the resistance of the age groups in that only old subjects showed signs of circulatory insufficiency. Nerve involvement was also more pronounced and more persistent in the old. The subsequent therapeutic response to yeast extract administration was, in general, rather prompt as to feeling, interest, and appetite, rather slow, though distinct, as to deep reflexes, and hardly noticeable as to regressive skin change except for slight return of lost elasticity."

1921 Page 103:

"Severe restriction of vitamin B complex in another group of rather sedentary, chronically psychotic old and young subjects led to severe physical and mental changes. The main physical changes were signs of circulatory insufficiency, of

neuropathy, of disturbed gastrointestinal motility, loss of appetite, and changes in the appearance of the skin and tongue. The mental changes were chiefly characterized by loss of inhibitory emotional control, paranoid trends, manic or depressive features, and confusion. Both physical and mental changes were acute to subacute in onset. Sometimes the emotional manifestations were explosive in character. The physical and mental changes correlated well in the individual case with rise of pyruvate and lactate in the blood, especially in blood samples taken after exercise. The therapeutic response to subsequent yeast-extract administration was dramatic as to appetite, circulation, gastrointestinal motility, appearance of tongue, certain aspects of sensibility (pains and paresthesias), and general display of energy. The recovery from loss of muscle power was rather prompt."

10. ESSENTIALS OF NUTRITION (1943) by Henry C. Sherman, *supra* Exhibit A, and Carolina Sanford, Columbia University.

Page 175-176:

"Wolback offers, as a result of his pathological research an impressive array of ways in which body function may be impaired through the effects of shortage of Vitamin C upon the integrity of the intercellular material in different bodily organs and tissues:

1922 "(1) Hemorrhages, which may occur anywhere in the body, and which are a prominent feature of the classical picture of scurvy. . . .

"(2) Structural changes in the gums and teeth, the latter having been considered by some investigators to be the most delicate structurally observable indications of shortage of vitamin C.

"(3) Changes in the growing ends of bones, sometimes causing confusion between rickets and scurvy in children.

"(4) Defective calcification due to degeneration or lack of proper development of the bone matrix.

"(5) Displacement of bones due to weakness of the supporting cartilage.

"(6) Anemia due to interference with the functioning of blood-forming cells in the bone marrow, as well as to the loss of blood by hemorrhage.

"(7) Damage to heart muscles, sometimes shown by enlargement of the heart."

11. PRINCIPLES OF NUTRITION AND NUTRITIVE VALUE OF FOOD by Henry C. Sherman, *supra* Exhibit A, U. S. Department of Agriculture Miscellaneous Publication No. 546.

Page 13:

"The body's framework or skeletal system of bones and teeth owes its strength and normal form to the fact of its being well mineralized."

Page 15:

"Calcium is one of the two nutrients in which American dietaries or food supplies most often fall below the recommendations of the Food and Nutrition Board of the National Research Council.

1923 "Calcium deficiencies in nutrition are much more frequent than physicians commonly realize, because there is no good way of detecting them. In fact, a condition which nutrition research has now shown to be one of shortage, as viewed in the light of the full life history, is still commonly counted as within the range of the normal. In the light of present knowledge of lifetime relationships it is now apparent that we are all born calcium poor. That is, the human body at birth has not only a much smaller amount but also a much smaller percentage of calcium than the normal fully developed body contains."

Page 16:

"Notwithstanding the fact that, for a large proportion of the population, the National Research Council's standards provide less safety margin for calcium than for other nutrients, shortage of calcium in American dietaries (as judged by these standards) is of outstanding frequency."

Page 24:

"But when scurvy is ancient history, vitamin C will . . . be . . . of immediate interest because of its important nutritional function."

Pages 24-25:

"It is essential to the integrity of the cement substance which lies between the cells of the body's various tissues and keeps each cell properly set and supported for the performance of its part in the work of the body. This involves, among other things, the prevention of hemorrhages or oozing of blood through tissue, which in a shortage of vitamin C may occur in almost any part of the body; the maintenance of a healthy

condition of the gums and teeth; the development and maintenance of right relations between the ends of growing
1924 bones, and of a matrix suitable for normal calcification within each bone; the prevention of some forms of anemia; and the regulation of heart muscle and of muscle tone generally.

"Moreover, there are interesting indications that vitamin C may have an important part in what has been attractively called 'the preservation of the characteristics of youth'; and King and Menten have definitely shown that liberal amounts of vitamin C in the body increase its ability to resist the toxins formed by certain species of bacteria. So it is clearly well worth while to take account of vitamin C in our choice and use of food even if we are already living safely above the scurvy level."

Page 21:

"Of much more frequent occurrence in the United States are the relatively mild but often long-continued shortages of thiamine which do not develop the typical symptoms of beriberi but may be responsible for much of our all-too-common ill-defined heart and nerve troubles. Dr. R. M. Wilder, of the Mayo Clinic, and his associates there have particularly emphasized the importance of the relatively high amounts of thiamine called for by the National Research Council recommendations, which are about double the minimum amounts which suffice to prevent beriberi."

12. THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Volume 131, No. 8, published June 22, 1946.

The following excerpts appear under the heading COUNCIL ON FOODS AND NUTRITION. VITAMIN DEFICIENCIES: STIGMAS, SYMPTOMS AND THERAPY and it is stated that "the accompanying syllabus is a consensus of current views:"

1925 Pages 666-667:

"Stigmas suggesting deficiency of vitamin A"

"Kerosis of the conjunctiva:

Thickening with loss of transparency, so that only the more superficial vessels of the bulbar conjunctiva are clearly seen, associated with more or less yellow pigmentation, especially along the horizontal meridian of the eyeball; infrequently associated with small foamlike plaques called Bitot's spots.

"Papular eruptions of pilosebaceous follicles:

A grater-like feel, which in early stages resembles gooseflesh but, when more fully developed, presents the picture of keratosis pilaris. The extensor surfaces of the arms and thighs and the flexor surfaces of the legs are primarily affected.

"Xerosis or asteatosis of the skin:

Dryness, scaliness and crinkling, in extreme cases resembling alligator skin. In early stages the condition is associated with keratosis pilaris but it persists and extends after follicles have disappeared, the body hairs being broken and later lost. All parts of the body are involved, but the skin of the extremities, particularly of the legs, is more severely affected than the skin of the head and the trunk.

"Follicular conjunctivitis:

Hypertrophy of the follicles, particularly of the lower eyelids.

"Night blindness:

Conspicuous only in cases of advanced, severe deficiency.

1926 "Keratomalacia:

Thickening with subsequent ulceration and necrosis of the cornea; present only in most severe and advanced forms of deficiency.

"*Treatment of vitamin A deficiency*"

"Early deficiency state:

25,000 U. S. P. units of vitamin A twice daily for two months or longer.

"More chronic states:

25,000 U. S. P. units of vitamin A two to three times daily for a prolonged period:

"*Stigmas suggesting deficiency of thiamine*"

"Loss of strength of the quadriceps: disproportionate to loss of general strength, evidenced by difficulty in arising from the squatting position.

"Loss of vibration sense: first of the toes and later of the malleoli and tibias.

"Tenderness of the calves and hyperesthesia of the feet:

"Diminution and loss of the achilles tendon and patellar reflexes first. Other tendon reflexes are lost in the later stages of the polyneuritis of 'dry beriberi.'

"Edema of the shins, ankles and knee joints: found in 'wet beriberi.'

"Enlarged heart with dependent edema and elevated venous pressure: Poor response to rest and administration of digitalis unless thiamine is given. This is a late manifestation of severe deficiency (beriberi heart).

1927 "Papillary edema with retinal hemorrhages: associated with ophthalmoplegia and polyneuritis. The condition is a late manifestation of severe deficiency."

"*Treatment of thiamine deficiency*"

"Acute deficiency state:

10 to 20 mg. or more of thiamine twice daily until relief of symptoms; this may be days or weeks."

"Chronic deficiency state:

5 to 10 mg. or more of thiamine twice daily for a prolonged period."

"*Stigmas suggesting deficiency of riboflaven*"

"Congestion of the limbic plexus:

Visible with a small hand lens or the + 20 lens of the opthalmoscope; invasion of the cornea by capillaries arising from this plexus (vascularization) requires a biomicroscope and slit lamp for detection."

"Cheilosis:

Represented in chronic deficiency by excessive and irregular wrinkling, in acute deficiency by swelling and erasure of the normal wrinkling of the lips. Reddening, thinning, scaling, chapping of epithelium are associated."

"Angular stomatitis:

Various combinations of erythema and open fissuring in the angles of the mouth with or without a white, moist maceration (perleche); scars of healed fissures.

"Dysseb acia:

An erythema overlaid with somewhat greasy, flaky accumulations resembling hoar frost, noted mostly in the alae nasi,

canthi, pinnae and other folds of the skin, accompanied
1928 in some cases by coarsening and elevation of the sebaceous follicles of the nose and cheeks, the latter also seen with deficiency of vitamin A".

"Magenta tongue:

A purplish red coloring with moderate edema and flattening of filiform papillae; observed in more advanced deficiency.".

"*Treatment of riboflaven deficiency*"

"Acute deficiency state:

5 mg. of riboflaven three times daily for weeks.

"Chronic deficiency state:

3 to 5 mg. of riboflaven three times daily for a prolonged period."

"*Stigmas suggesting deficiency of ascorbic acid*"

"Redness, edema, tenderness and bleeding on pressure of the gums:

Observed in acute or subacute deficiency of moderate severity, sometimes with, but usually without, other signs of ascorbic acid deficiency.

"Thickening and increased firmness of the gums:

With recession and exposure of the base of the teeth, including recession of interdental papillae; observed in chronic deficiency.

"Retraction of the gums:

Leaving pockets between gum and tooth, secondary infection and resulting pyorrhea; observed in chronic deficiency.

"Loosening and shedding of the teeth:

"Increased capillary fragility:

Manifested by petechial hemorrhage of the skin, especially
— in the tourniquet test; observed in more severe acute and
1929 subacute deficiency. Easy bruising, spontaneous ecchymosis of the skin, idiopathic hemorrhage into joints and slow healing of wounds, observed in severe acute and subacute deficiency."

"*Treatment of ascorbic acid deficiency*"

"Acute or subacute deficiency state:

100 mg. or more of ascorbic acid for weeks.

"Chronic deficiency state:

100 mg. of ascorbic acid three times daily over a prolonged period."

"*Stigmas suggesting deficiency of vitamin D*"

"Deformities of the skeleton:

Bowed legs, malformation of the chest (funnel brest) and defects of the teeth may be residues of early rickets which is usually no longer active or susceptible to treatment; enlargment of the wrists, elbows, knees, ankles and chostochondral unetions (beading, rachitic rosary) and bulging forehead (cranial bosses) which respond to treatment are found in infancy and in the rare example of late rickets."

"*Treatment of vitamin D deficiency*"

"In infants:

1,500 to 2,500 U. S. P. units of vitamin D daily, continued for several months (double this amount for premature infants)."

"*Stigmas suggesting deficiency of vitamin K*"

"A tendency to bleeding:

Particularly from minor wounds, related to abnormal lengthening of the prothrombin time, developing spontaneously in newborn infants; observed in adults after treatment with
1930 dicumarol or large doses of salicylates; in advanced disease of the liver with poor excretion of bile, and in disease of the intestine, such as sprue in which vitamin absorption is disturbed."

"*Treatment of vitamin K deficiency*"

"In adults:

1 mg. of vitamin K two to three times daily with or without bile (1 Gm. of desiccated bile or bile salts).

"In newborn babies:

1 mg. of synthetic vitamin K intramuscularly daily in oil solution for several days."

"Deficiency Symptoms"

"A diagnosis of vitamin deficiency only rarely can be based on symptoms or less significant abnormalities than those which have been listed thus far. However, such symptoms and abnormalities frequently accompany the more specific lesions of deficiency.

"Symptoms commonly observed with deficiency of thiamine, also less conspicuously in deficiency of other vitamins, include apathy, lethargy, increased emotional irritability, hypersensitivity to noise and painful stimuli, headache, vague fears, confusion of thought, uncertainty of memory, asthenia, loss of manual dexterity, insomnia, heart consciousness, paresthesia, anorexia, nausea, flatulence, epigastric pain, constipation.

"Photophobia, burning of the eyes, lacrimation and eyestrain not relieved by glasses are encountered in deficiency of riboflavin.

"Other abnormalities unrelated to deficiency of any
1931 single vitamin but commonly observed in persons who are malnourished are dry, brittle, lack-luster, rebellious, so-called staring head hair, a loss of sleekness analogous to the rough coat of malnourished animals, blepheritis, spider-like telangiectasis of the face, seborrhea of the face, patchy pigmentation of the face, especially suborbital and circumoral, sinus arrhythmia, bradycardia, tachycardia, low blood pressure, loss of tone of muscles and anemia."

13. Recommended Dietary Allowances (Revised 1948) Circular No. 129 of the National Research Council.

Page 5:

"Studies on man, as well as more complete experience with animals, clearly indicate substantial improvements in growth and function when the intakes of certain nutrients are increased above the level which is just sufficient to prevent obvious deficiency symptoms. The level above which lesions or symptoms are not commonly observed is merely one point on a long curve relating intake to function. The allowance of a margin of intake above the critical level for each nutrient is, therefore, designed to permit additional benefits as well as to cover individual variations.

Pages 5-6:

"The usual undiscriminating view is that, if the diet furnishes enough of any given factor to meet functional need, any further amount supplied by the food is normally a matter very

nearly of indifference, significant only as a sort of insurance against some emergency. This may be true for most of the essential food-factors. Of a few nutrients, however, there is evidence from long-term (animal) experimentation that
1932 one may, in the course of a lifetime, derive increased benefit from increased intake up to levels very considerably above those of ordinarily accepted adequacy. (Ascorbic acid, vitamin A, and calcium are perhaps the best-established cases of this kind.)"

14. The National Malnutrition, by D. T. Quigley, *supra*, Exhibit A.

Page 12:

"Apparently pantothenic acid has a relatively specific effect on the hair, nails, and the skin epithelium, and the integrity of the nervous system and brain. In the animals well supplied with pantothenic acid, the skin glands appear to remain in better health, and the skin does not take on the wrinkling and aged appearance which occurs in those who are deprived of this vitamin. In human subjects, the same thing seems to be true—that a good appearance of skin, hair, and nails is preserved in those who have a sufficient amount of pantothenic acid in the diet. It has been called the vitamin which prevents old age; but this statement is of course in error. No one vitamin prevents old age.

"Earlier in our studies of vitamins, Sherman of Columbia University was convinced that the vitamin which we now call riboflavin was an important element in preventing old age. Only by a judicious combination of all vitamins, combined with sufficient minerals, do we have the answer to the problem of old age."

Page 14:

"One of the needs of human beings, monkeys, and guinea pigs is vitamin C. This vitamin has to do with the
1933 integrity of blood vessels. It has something to do with the growth and function of bones. It has a good deal to do with the nutrition of teeth (dentine). Dr. Hanke formerly of the University of Chicago made experiments (Asylum at Moosehart, Ill.) on several hundred orphans in which he showed that tooth decay and pyorrhea were caused in part, at least, by a deficiency in vitamin C. The work of the Mellanbys in England showed that vitamin C has to do with the health of the dentine, and vitamin D has to do with the health of tooth enamel. Further work by the Mellanbys in London and Hanke

in Chicago showed that the cause of tooth decay in children who were not properly nourished was associated with scurvy. 'Mouth scurvy' might as well be used instead of the term 'phorrhea' or 'tooth decay'."

Page 22:

"Calcium is excreted from the body in the discharges which comes from wounds and open sores, and ulcers. Cancer usually exists as an ulcerated area. Much calcium is lost in the fluid that seeps from the ulcerated cancer surface. The small bodily supply is further depleted; therefore the giving of calcium by mouth or by intravenous use quiets the cancer pains."

Page 23:

"In order that physiological processes may be carried on in a normal, proper way, oxygen must be carried to each individual cell. The oxygen is carried to the cells of the body by a compound which is made up partly of iron. Oxygen enters the lungs, penetrates the wall of the air cells, and enters the blood. The iron containing hemoglobin exists in the red blood corpuscles and having combined with the oxygen, carries it
c1934 to the cells, where oxidation takes place. Without iron, no metabolism and no oxidation would occur. The need for iron is constant, as much of the hemoglobin is being destroyed and excreted every day. As new supplies of calcium must be provided, so new supplies of iron must come in by way of the gastrointestinal tract in order to provide for new hemoglobin daily.

"In the life processes of the ordinary individual, around 3 percent of the red cells are being destroyed every day. This means that a certain definite amount of iron must be provided to make up for what is lost. Iron must be supplied and absorbed in the amount of 10 to 25 milligrams every day. The dilution of iron-containing foods by devitalized carbohydrates makes this optimum impossible. We may measure the amount of iron in the blood by the amount of hemoglobin present (red coloring matter)."

Page 24:

"One of the most important of the mineral needs is the need for iodine. Without iodine the thyroid gland does not properly develop. In diets which contain quantities of iodine below the normal amount, all the life processes are operating below par. The thyroid gland contains the largest amount of iodine of any of the organs of the body, and as all the blood in the

body goes through this gland every 17 minutes, it evidently serves as a trap for the filtering out of toxic material, the iodine acting as an antitoxin. A good deal of the toxic material in the blood stream is living material—that is, low-grade micro-organisms that gain access to the circulating fluids of the body. The iodine-containing thyroid undoubtedly inhibits the growth of these invading germs. In cases where the amount of iodine in the diet is definitely small, the thyroid undergoes a compensatory growth. It becomes many times larger than
1935 normal. This is evidently an attempt to furnish more thyroid cells to more effectively to filter out and use what little iodine there is in the blood stream. This function carried to excess produces the more poisonous types of goiters."

Page 25:

"The need for iodine is unquestionable. There is no doubt as to its value in providing the body with the ability to resist infections in general. . . . . In parts of the country where there is a relatively small amount of iodine in the soil, the amount to be found in the crops is correspondingly less. In parts where the iodine is practically absent from the soil, on account of having been washed out, there is very little iodine in the grains and vegetables. In these parts, goiter and other thyroid diseases are very common. In such areas as South Carolina where the iodine content of the soil is high, goiter is very much less frequent."

Page 26:

"In medical circles, iodine is known chiefly as a treatment for goiter. This element, however, since it has to do with increasing the anti-bactericidal elements in the blood, is of value in every type of goiter, arthritis, and rheumatic disease."

Page 30:

"The small child on a deficient diet becomes afflicted with chronic tonsillitis. The school child may develop tuberculosis. The youth is pimply and anemic. All have bad teeth. Many have permanently crippled hearts due to rheumatic infections. Seventy percent have rickets. A large proportion have digestive diseases and constipation. All these handicaps are the result of errors in diet.

1936 "Drs. Williams and Spies made examinations of diets in various parts of the United States, and in their book, 'Vitamin B_1' published in 1938, they said there is much sameness in diets all over the country. This sameness is largely in the enormous consumption of non-vitamin, non-mineral foods, com-

posed of white flour and sugar. The average diet furnishes a Vitamin B_1 intake of from 200 to 300 International Units. This is just enough to prevent the development of the oriental disease, —beriberi. The American population are quite evidently not getting enough vitamin B_1 and are existing on the edge of pellagra and beriberi all the time. In order to have the optimum benefit from Vitamin B_1 a person of 150 pounds weight should have from 700 to 1,000 units per day.

"G. R. Cowgill, one of the outstanding workers in this field, states: 'There are grounds for believing that American dietaries as a whole are unsatisfactory with respect to the content of vitamin B_1'."

Page 32:

"Dr. Burt Wolbach, of Harvard University, has shown that certain changes take place in the epithelium lining the windpipe and bronchial tubes of children who do not receive enough Vitamin A."

15. Arthritis and Related Conditions (1948) edited by Theodore F. Bach, *supra* Exhibit "A".

Page 108:

"Vitamin B is usually employed in the treatment of arthritis because there may be clinical evidence of its deficiency shown by the presence of anorexia, peripheral neuritis, etc. 1937 Furthermore, it has been demonstrated that carbohydrate metabolism requires sufficient quantities of the vitamin B-complex to prevent the depletion of reserve of nicotinic acid, thiamin and riboflavin."

16. Diabetes and Its Treatment (1949), Joseph H. Barach, *supra* Exhibit "A".

Page 92:

"Occasionally a patient with positive evidences of diabetic neuropathy will make a good recovery with injections of crude liver extract and general doses of multiple vitamins."

Page 94:

"It should be noted that some diabetics—refractory cases—have enlarged livers. Especially in the young diabetics, the response to adequate diet and insulin, and, in some cases, to large doses of vitamin A and B, is one of striking improvement."

1938 17. Facts You Should Know About Vitamins, copyright 1941 by Boston Better Business Bureau; Revised and Reprinted 1942-1946 by the Better Business Bureau.

"This booklet, "Facts You Should Know about Vitamins," is one of a series of fact booklets on business, merchandise, financial, and other subjects which business, through Better Business Bureaus, is publishing in the interests of consumer education—to aid consumers in their everyday money management problems and relations with business.

"The importance of proper nutrition was recognized by our government in calling the first National Nutrition Conference at Washington in May, 1941. At this conference, the need for an aggressive attack upon the problem of undernourishment in this country was brought out repeatedly. According to an official report of the Conference:

"'Something more than 40 per cent of the American people are not getting enough food and the right kind of food to maintain health and vigor—and this in spite of the fact that the foods of which we have a so-called surplus are the very ones they need. Less than one-fourth are getting a really good diet even when measured by lower standards than those to which we would subscribe today. If everyone could have an adequate diet instead of an average diet, it would add 10 years to our active life span.'

"At the same conference, Brig. Gen. Lewis B. Hershey, Deputy Director Selective Service System, stated:

"'In summary, Selective Service has examined physically a million. The results of these examinations should be disturbing to us as a people—they should energize us to immediate and positive action. Approximately 400,000 have been found
1939 unfit for general military service—probably one-third of these are suffering from disabilities directly or indirectly connected with nutrition.'

"It is now being recognized that it is important that all workers and the civilian population as a whole should be properly nourished.

"Vitamins are essential food elements which must be present in the diet in adequate amounts for health and well-being. Scientific and medical knowledge of vitamins is growing day by day, but this booklet undertakes to explain, in layman's language, some of the fundamentals as to what vitamins are, what values they possess, and where they may be obtained, although no pretense is made of giving all details or a complete list of food sources of the vitamins.

"*What Are Vitamins?* 'Vitamin' is a term given to certain food constituents which are essential for normal nutrition. They are but one of several dietary essentials. Most of us know, for example, that the diet must contain, in adequate quantities and proper balance, proteins, carbohydrates and fats which yield the energy and other requisites for life and activity and which, along with certain inorganic elements such as iodine, iron, calcium and phosphorus, form the structure of the body tissues and the fluids of the organism. In addition to these more familiar nutrients, there are other food factors essential for the preservation of bodily well-being which we commonly designate as vitamins. The absence or serious deficiency of any one of these nutrients, including any of the vitamins, from a diet which is satisfactory in other respects may lead to the development of pathological conditions which are called 'deficiency diseases,' which may be even more striking in appearance and effect than failure to get enough food.

1940 "Scientists have succeeded in isolating a number of compounds having the properties of vitamins, determined their chemical formula and have learned how to produce some of them synthetically. You can see these chemical compounds, feel them, weigh them. In fact, nutrition charts which recommend specified daily amounts of certain vitamins often do so in terms of milligrams or micrograms—measures of weight. (A microgram is one millionth of a gram.) Other nutrition charts express vitamin values in terms of International Units, U. S. P. Units and Sherman-Bourquin Units. (There are certain elements in Vitamin A, for example, which cannot be weighed.)

"No vitamin diet charts are given in this booklet because vitamin values of foods differ according to growing conditions such as soil, climate, etc. Another reason is that vitamin requirements vary according to the age, size, activity and health of the individual. However, literature on daily allowances of vitamins and other nutrients, planning meals and diets, and other food subjects, may be secured from the Bureau of Home Economics, U. S. D. A.; Children's Bureau, Dept. of Labor; and Nutrition Division, Federal Security Agency, all at Washington, D. C.; or from many local or state Health Departments.

"*Sources Of Vitamins.* Vitamins are present in a great variety of food products, in varying quantities. There is no reason why a properly selected diet should not afford an adequate supply of the requisite vitamins. Yet it is believed that a great many people fail to get enough vitamins not, primarily, because we do not get enough food but because we do not eat enough of the right kinds of food. Many of us do not get an adequate diet.

Most of us get enough vitamins to prevent specific
1941 deficiency diseases, but many people who do not develop acute or recognizable symptoms of disease nevertheless fail to secure the full amount of vitamins consistent with ideal physical well-being. This is particularly true of people who go in for 'one-sided' diets such as ill-advised reducing diets and fads of various kinds, and people who eat too much of certain groups of food to the exclusion of others. In many cases deficiency conditions may be properly corrected by the use of appropriate foods or, a corrective result may be effectively and speedily secured by the administration of various vitamins in concentrated form or products especially rich in them.

"*Vitamins Not Cure-Alls.* It must be emphasized that vitamins should not be regarded as an indiscriminate means of treating deficiency disease conditions but, rather, as an indispensable aid in maintaining normal health. While physicians do employ vitamins in the treatment of various diseases, vitamins are generally used as an adjunct to more complete measures. Although a deficiency of vitamins does cause certain deficiency diseases, some disease symptoms similar in nature may be caused by other factors which would not respond to vitamin treatment. For these reasons, treatment of deficiency disease conditions with vitamins should be left to qualified physicians. However, all of us can endeavor to prevent the appearance of ailments due to vitamin deficiency by obtaining an adequate supply of these essential elements in the daily diet. While an adequate supply of vitamins will not, in itself, assure good health or prevent all dietary deficiencies or deficiency disease conditions, the vitamins do have a vital effect on practically every organ in the body and deficiencies of them are related to a score of diseases and deformities.

"Medical scientists are still studying the effects and useful-
ness of vitamins and any peculiar or allergic effects
1942 which vitamin supplements might have on certain persons.

"There are limitations on present medical and scientific knowledge of the usefulness of vitamins in the treatment of disease. For this reason alone, one should not attempt to be his own doctor by trying to treat a disease condition by vitamins.

"*Vitamin Nomenclature.* That there are more vitamins than was originally believed is definite. What remains to be determined is how many. Many of the known vitamins have been given alphabetical names for convenience, such as Vitamin A, B_1, B_2 (G), C, D, etc. From a scientific standpoint, the most practical way of naming vitamins is to give each one its

chemical name, where known, but because the public as a whole still recognizes vitamins by their alphabetical designation, both chemical and alphabetical names are given in this booklet.

"*Vitamin A.* Vitamin A is essential for the maintenance of a healthy condition of the epithelial cells which cover body surfaces and line the body cavities such as the mouth, stomach, glands, and ducts of glands. When there is a deficiency of vitamin A, dryness and scaliness of the skin is likely to appear. It also has important functions with respect to the eyes. One of the first symptoms of vitamin A deficiency is the condition known as night-blindness. The vitamin will prevent or relieve this condition, if it is not too far advanced, when due to vitamin A deficiency. In fact, the physicians of ancient Egypt are credited with curing thousands of cases of night-blindness with liver, a rich source of vitamin A. However, there are other cases of 'night-blindness' not of dietary origin, which do not respond to treatment with vitamin A. Another characteristic eye disease called xerophthalmia also results from a more advanced deficiency of vitamin A.

1943 "Vitamin A is also highly important for normal growth and for proper tooth and bone formation in growing children, although the same can be said of other food essentials. In addition, its insufficiency in the diet may lessen the resistance of the body to infection, especially of the respiratory tract. However, vitamin A has not been definitely shown to be a preventive of specific infections, such as colds or influenza.

"Vitamin A is found in the liver and yellow body fat of most animals. In addition, various plant foods contain what are known as 'precursors' of vitamin A. These are yellow pigments called 'carotenes' which, when consumed, are transformed into vitamin A. This is the only known vitamin which is 'manufactured' by the human body from plant food. Vitamin A can be stored in the liver by man and other animals. Cod and other fish liver oils are excellent; and liver, butter, cheese, eggs and milk are good sources of vitamin A. Green and green leafy vegetables, such as green beans, beet tops, dandelion greens, spinach, swiss chard, kale, etc., tomatoes, and bright yellow fruits and vegetables, such as apricots, peaches, persimmons, carrots, yellow corn, sweet potatoes, winter squash, etc. are good sources of vitamin A precursors.

"*The Vitamin B Complex.* What was originally called vitamin B and was thought to be a single substance, has since been found to be a group of several substances and to this group is applied the term 'vitamin B complex.' While the exact number of the constituents of the Vitamin B complex is not known at present, the chemical nature of several has been determined

and they can be produced synthetically. Of them, at least three have been shown to be necessary in human nutrition
1944 and to be of value in the prevention and treatment of human deficiency diseases. They are Vitamin B_1, or thiamin, Vitamin B_2, or riboflavin, and nicotinic acid. All of these substances are usually found together in a single food product, such as yeast or liver. For the purpose of this booklet it is not deemed necessary to give detailed information on all the Vitamin B factors because scientific conclusions are still incomplete.

"*Vitamin B_1 (Thiamin).* One of the first facts to be established about vitamin B_1 was that, in the presence of a severe deficiency, a disease called beriberi made its appearance. This is a disease characterized by partial paralysis, swelling of the legs and general dropsy. Vitamin B_1 is of value in preventing as well as correcting certain forms of this disease. It is of value in the treatment of certain types of neuritis, but it should be employed in the treatment of such conditions under the direction of a physician. There are many types of neuritis not due to a deficiency of vitamin B_1, requiring other forms of treatment.

"When the diet is deficient in vitamin B_1, lack of appetite occurs, but there are many other causes of lack of appetite, such as infections, organic disorders, etc. However, vitamin B_1 does contribute to and is necessary for the maintenance of normal appetite.

"When their diet is deficient in vitamin B_1, the rate of growth of infants and children is retarded. Some investigators believe that lack of the vitamin plays a part in faulty elimination. When metabolism is increased, as occurs in feverish conditions, vigorous muscular activity, hyperthyroidism, etc., there are indications of greatly increased requirements for vitamin B_1.

"Although vitamin B_1 is widely distributed, it occurs in high concentration in only a few foods. There are grounds for believing that American diets as a whole have been un-
1945 satisfactory with respect to the content of vitamin B_1.

Yeast and wheat germ are the richest natural sources, but they are not commonly used as foods. However, whole grain cereals and flours, and the products made from them, are excellent sources as are such meats as pork, fresh ham and liver, and soy beans, green peas, nuts, egg yolk and lima beans. In the past, the refinement of various foods, has been responsible for a deficiency of vitamin B_1 in the diet of many individuals, but this difficulty is being overcome through the enrichment of such foods. (See section on 'Fortified' Foods.)

"*Vitamin B_2 (G) (Riboflavin).* After vitamin B_1 was discovered, the term vitamin B_2, or vitamin G, was used to desig-

nate what was left of the vitamin B complex. It was first believed that this vitamin was a single substance which was of value in the treatment of pellagra and it was popularly designated as the anti-pellagra vitamin. Later, vitamin B_2 (or G) was identified as riboflavin, a single chemical substance, and it was determined that another constituent of the vitamin B complex, nicotinic acid, was the pellagra-preventive factor.

"Vitamin B_2 or riboflavin has a wide distribution in living cells and is essential for normal nutrition. Among other things, deficiency of riboflavin is reported to result in the formation of various lesions around the corners of the mouth, on the tongue and ears, etc.

"Riboflavin is widely distributed. Yeast, meats, particularly the liver of beef, calf, lamb, mutton and pork are excellent sources. Whole cereals, milk, eggs, cheese and many green leafy and other vegetables, such as beans and peas, fruits, peanuts, and fish such as halibut, haddock, canned sardines and, particularly, mackerel, are all important sources.

1946 "*Nicotinic Acid.* The pellagra-preventive factor of the vitamin B complex has been identified as nicotinic acid, a substance which, incidentally, is not the same as the nicotine found in tobacco. Seemingly miraculous results have been obtained with nicotinic acid in the treatment of acute pellagra, a disease which has occurred widely in the South and is characterized by leathery, reddish skin, mouth and gum inflammation and progressively more serious symptoms including, in advanced cases, alimentary and mental disorders. Pellagra can be prevented by securing an adequate supply of nicotinic acid in the diet and is often cured quickly, by physicians, who inject nicotinic acid into the body. However, since most deficiencies are of a multiple nature, a diet rich in vitamin B_1, B_2 and B_6, is also frequently necessary in the treatment of this disease. Liver, lean meats, salmon, yeast, green vegetables, whole grains, tomato juice, eggs and milk are believed to be good food sources of nicotinic acid.

"*Vitamin C (ascorbic Acid).* Vitamin C is another of the vitamins which can be produced synthetically in pure chemical form. It is officially known as ascorbic acid.

"A deficiency of vitamin C results in the development of scurvy, a disease the notable symptoms of which are pain and a tendency to bleeding, as of the gums and capillary blood vessels. This disease may be avoided or entirely cured by the inclusion in the diet of foods which are rich in vitamin C. The term 'limey,' applied to British sailors, was derived from the Merchants Shipping Act of 1854 which provided that lime or lemon juice form a part of the stores of all ships likely to be

away from port more than ten days. The juice of citrus fruits is a rich source of vitamin C.

"Vitamin C is also one among other essential factors for the normal development and the maintenance of the bones
1947 and cartilages, the teeth and gums. Such symptomatic conditions as dental caries (cavities), lack of appetite, certain gum infections, and anemia may be concomitant signs of vitamin C deficiency or lack of assimilation of vitamin C.

"Vitamin C is wide-spread in practically all raw fruits and vegetables, particularly citrus fruits such as oranges, grapefruit and lemons. Properly canned fruits and vegetables, including fruit juices, retain a large share of their vitamin C, and may be an important source of this factor in the diet. The green leaves and shoots of plants such as are served in salads; such fresh fruits as apples, apricots, bananas, black currants, red raspberries, and strawberries; and many raw vegetables including brussels sprouts, cabbage, cauliflower and fresh-picked green peppers also generally supply a liberal porfion of this vitamin. Potatoes, when baked or boiled in skins, are another importanct source, particularly in view of the extent to which potatoes figure in the average diet. It is necessary that adequate amounts of this vitamin be secured daily since it is stored in the body only to a limited extent and a deficiency may result in injurious effects. In fever, the needs of the body for vitamin C are increased.

1948 "*Vitamin D.* Vitamin D is necessary for the proper utilization by the body of calcium and phosphorous. It is related to the development of bone and a deficiency causes rickets, a common disease of childhood, in which deformed bones manifest themselves as bow legs, knock-knees, swollen joints, distorted chests and spines, etc. A deficiency may also result in two other fearsomely named diseases, spasmophilia and osteomalacea. All of these conditions are manifestations of abnormal calcium and phosphorus metabolism which may result from a deficiency of vitamin D. The vitamin is essential not only in the prevention but in the treatment of these diseases.

"Vitamin D plays an important role in tooth formation and maintenance of normal tooth structure. However, adequate vitamin D intake will not, in itself, prevent dental caries or insure normal tooth structure. As in the case of the bone disorders previously referred to, vitamin D becomes of value only when an adequate supply of calcium and phosphorus are also present. The function of the vitamin is to regulate the utilization of these elements.

"Vitamin D has been produced in crystalline form and at least two forms of naturally-occurring vitamin D have been isolated. This vitamin is not present in any great amount in our common foods. The best food source is the liver of oil fish, such as halibut, tuna and cod. Canned salmon, sardines, and eggs and butter are regarded as good sources, while small amounts are present in liver, cream, milk and oysters. Most other foods have no vitamin D or only minute amounts. However, various foods such as milk, yeast, cereals, etc. may be 'fortified' with the vitamin by artificial means (See section on 'Fortified' Foods).

1949 "When the skin is exposed to the sun, vitamin D is formed in the body. The same result may be obtained through exposure to ultra-violet ray lamps which produce radiation similar to that of natural summer sunshine. It is believed that the body has the property of storing vitamin D so that exposure to sunlight when it is most potent, may exert a protective influence over a considerable portion of the year. However, existing conditions in certain localities, such as dust, smoke and moisture in the air, also indoor living, clothing, etc., reduce the effect of sunshine so that it may be difficult, particularly for infants, to obtain an adequate supply of vitamin D from the sun. It is well known that physicians commonly prescribe vitamin D preparations, or products rich in this vitamin, for babies and young children, particularly during the winter months.

"The need for vitamin D appears to be greater in infancy and childhood, in pregnancy and during the nursing period. The vitamin D requirements of adults, except those specified above, are not known at present.

"*Vitamin E.* Although it has been shown that an adequate supply of vitamin E is essential for normal reproduction in animals, very little is definitely known about the function of this vitamin in the human body. Attempts to produce a market for substances containing vitamin E among would-be parents through representations that the vitamin is capable of preventing sterility or promoting physical vigor have been banned by government agencies. One of the richest known sources of vitamin E is wheat germ oil (also seeds of legumes, muscle meats, egg yolk, milk and milk products, are good sources), but vitamin E is so widely distributed among so many common foods and so resistant to destructive action that, so far

1950 as is known, the necessary amount will accompany any ordinary diet. Accordingly, claims implying a need for special sources of vitamin E in the diet or recommendations for

use of a particular preparation because of its vitamin E content are, up to date, deprecated by authorities generally.

"*Vitamin F.* The term 'vitamin F' has been used to refer to at least three different substances but at the present time it has no scientific recognition. Attempts have been made to exploit 'vitamin F' as a term to designate certain essential fatty acids. However, practically all nutritionists refer to this dietary factor as the 'essential fatty acids.' Furthermore, no evidence has been found to satisfactorily establish that there is any lack of essential fatty acids in the average normal diet of either babies or older persons. Neither governmental agencies nor authorities on nutrition recognize the existence of any dietary factor under the name 'vitamin F.'

"*Vitamin K.* One of the latest vitamins to be discovered, vitamin K, is necessary for the formation of prothrombin, one of the substances which enables the blood to clot. Because it is widely distributed and occurs in a variety of foods, (for example, spinach, kale, tomatoes, oats sprouts) the average person need not worry about failure to secure an adequate supply of vitamin K if the diet is normal otherwise. In fact, deficiencies generally do not come from inadequate diet but from faulty absorption which occurs when there is not enough bile in the intestines. Vitamin K is useful primarily in surgery."

1951 18. Inadequate Diets and Nutritional Deficiencies in the United States, Bulletin No. 109 of the National Research Council (Nov. 1943).

"SUMMARY AND CONCLUSIONS:

"All the evidence from numerous surveys over the past ten years to the present among persons of all ages in many localities is without exception in complete agreement that inadequate diets are widespread in the nation. Although an appreciable percentage of the diets failing to meet the Council's recommended dietary allowances were more than 50 percent deficient in amounts of the several essential nutrients, most of the diets were less than 50 percent deficient. Accordingly, there is widespread prevalence of moderately deficient diets.

"It has long been recognized that other circumstances besides deficient diet impair nutrition. Certain so-called conditioning factors, such as physical exertion, light, trauma of several kinds, and disease, raise the requirements for essentials. Therefore, adequate intake is an individual matter related to the conditioning factors in operation. If these factors are sufficiently severe, even optimum intake may not completely protect

against their force during the period of maximum operation. It is evident that many factors affect nutritional status.

"But evidence that deficient diet or conditioning factors are in operation at some particular point of time gives only a slight and incomplete conception of the full scope of their influence and effects. The frequency and duration of their operation is extremely important. Thus time, which for persons is age, is a significant factor. Few people eat an adequate diet every day during their lifetime. Rather, there are numerous 1952 or protracted periods when the diet is faulty. Similarly, few people escape the operation of conditioning factors at frequent or lengthy periods in their life. The repeated or protracted operation of faulty diet or various conditioning factors slowly leads to cumulative effects in deficiency states.

"All the data from numerous surveys, with new methods among persons of all ages in many regions are entirely in accord in showing that deficiency states are rife throughout the nation. Relatively few are the traditional severe, acute, types. Most are milder in intensity and gradual in their course. Predominantly they are subacute or chronic states: some marked, but very many mild or moderate.

"From this evidence it is clear that there is both a preventive and corrective problem. On the preventive side, it is evident that production of sufficient food should be maintained and that more effective distribution of proper food is needed. For the latter, it would seem advisable to give further consideration to the program of judicious enrichment of appropriate foods since that would add much to the guarantee of successful nutrition. It is also evident that diet education must be intensified and extended to the utmost, and raised to new heights of effectiveness.

"On the corrective side, there is need for detection and therapeutic treatment of deficiency states among the population. For this project it is necessary to disseminate the new diagnostic methods among the medical and public health professions. Foremost among the steps in this direction would be: (1) preparation of a handbook on methods of detecting deficiency states; (2) establishment of training centers for instruction in the medical aspects of nutrition, especially diagnosis of the deficiency states; and (3) introduction of adequate courses on nutrition, particularly its clinical aspects, into medical schools."

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PLAINTIFF'S EXHIBIT 7

Title 21—Food and Drugs

Chapter I—Food and Drug Administration

[Docket No. FDC-24]

Part 2 Regulations for the Enforcement of the Federal Food, Drug, and Cosmetic Act

Amendment to General Regulations

By virtue of the authority vested in the Federal Security Administrator by provisions of the Federal Food, Drug, and Cosmetic Act [Sec. 701 (a), 52 Stat. 1055, 21 U. S. C., Sup. V, 371 (a)], the Reorganization Act of 1939 (53 Stat. 561 ff.; 5 U. S. C., Sup. V, 133 ff.), and Reorganization Plans No. I (53 Stat. 1423, 4 F. R. 2727) and No. IV (54 Stat., 5 F. R. 2421); the following general regulations under the Federal Food, Drug, and Cosmetic Act. [Sec. 403 (j), 52 Stat. 1048, 21 U. S. C. Sup. V, 343 (j)] are hereby promulgated:

§ 2.10a *General.* (a) The term "special dietary uses", as applied to food for man, means particular (as distinguished from general) uses of food, as follows:

(1) Uses for supplying particular dietary needs which exist by reason of a physical, physiological, pathological or other condition, including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergic hypersensitivity to food, underweight, and overweight;

(2) Uses for supplying particular dietary needs which exist by reason of age, including but not limited to the ages of infancy and childhood;

(3) Uses for supplementing or fortifying the ordinary or usual diet with any vitamin, mineral, or other dietary property. Any such particular use of a food is a special dietary use, regardless of whether such food also purports to be or is represented for general use.

(b) No provision of any regulation under section 403 (j) of the Act shall be construed as exempting any food from any other provision of the Act or regulations thereunder, including sections 403 (a) and (g) and, when applicable, the provisions of Chapter V. (Sec. 403 (j), 52 Stat. 1048; 21 U. S. C., Supp., 343 (j)).

WATSON B. MILLER,
Acting Administrator.

November 18, 1941.

[F. R. Doc. 41-8702; Filed, November 21, 1941; 11:48 a. m.]

[Docket No. FDC-24]

Part 125—Label Statements Concerning Dietary Properties of Food Purporting To Be or Represented for Special Dietary Uses

Findings of Fact and Regulations

By virtue of the authority vested in the Federal Security Administrator by provisions of the Federal Food, Drug, and Cosmetic Act [Sec. 403 (j), 52 Stat. 1048, 21 U. S. C., Sup. V, 343 (j); Sec. 701 (e), 52 Stat. 1055, 21 U. S. C., Sup. V, 371 (e)], the Reorganization Act of 1939 (53 Stat. 561 ff.; 5 U. S. C., Sup. V, 133 ff.), and Reorganization Plans No. I (53 Stat. 1423, 4 F. R. 2727) and No. IV (54 Stat., 5 F. R. 2421); and upon the basis of evidence of record at the above entitled hearing duly held pursuant to notice thereof issued by the Administrator on August 31, 1940 (5 F. R. 3565), the following order is hereby promulgated:

Findings of Fact

1. The value of a food for any special dietary use is determined by its dietary properties, such as the presence or absence of a substance or the quantity or altered character of a constituent.

2. Information necessary in order to inform the purchaser of the value of a food for a special dietary use includes a statement of the dietary properties upon which its value for such use is based.

3. Among other dietary properties of food, certain vitamins and minerals are known to be essential to the normal functioning of the human organism; the quantity of any vitamin or mineral required is customarily expressed in terms of the quantity required each day and is referred to as the daily requirement.

4. Deficiency in the intake of any essential vitamin, mineral, or other dietary property produces pathological conditions known as a deficiency disease, whereas, intake of a certain minimum quantity of such substance prevents the onset of such conditions.

5. The value of a food for special dietary use may depend on its suitability for the treatment of a deficiency disease.

6. The quantity of a vitamin, mineral, or other dietary property necessary to prevent a deficiency disease is usually less than the quantity necessary for the effective treatment of that disease.

7. The quantity and the duration of administration of such a property for the correction of such disease may differ under different conditions.

8. Purchasers in general are unaware of the quantities of dietary constituents or the duration of their consumption necessary for the effective treatment of deficiency diseases.

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9. Information required by the purchaser to evaluate a food for the correction of deficiency diseases includes adequate directions for use.

10. The value of a food for special dietary use may depend on its content of one or more of the vitamins A (or precursors thereof), B_1, C, D, riboflavin, nicotinic acid or nicotinic acid amide, and some other vitamins.

11. The terms "vitamin B_1" and "thiamine", the terms "vitamin C" and "ascorbic acid", and the terms "riboflavin", "vitamin B_2" and "vitamin C", are synonymous.

12. Deficiency in the intake of vitamin A produces the pathological conditions known as nutritional night blindness and as xerophthalmia.

13. Vitamin A exists as such in certain animal tissues and is produced by the animal organism from precursors of vitamin A, which include the vegetable pigments alpha carotene, beta carotene, gamma carotene, and cryptoxanthin.

14. The vitamin A activity of food is determined by biological assay; an equal weight of vitamin A and of each of its known precursors, when reacted upon by the animal organism, do not all have the same degree of activity; none of such precursors has as high a degree of activity as vitamin A.

15. It is necessary, in order fully to inform the purchaser of the value of the precursors of vitamin A for special dietary use, that their activity be measured and stated as vitamin A, but that any such precursor sold as such be designated by its common or usual name and not as vitamin A.

16. Deficiency in the intake of vitamin B_1 produces the pathological condition known as beriberi.

17. Deficiency in the intake of vitamin C produces the pathological condition known as scurvy.

18. Deficiency in the intake of vitamin D produces the pathological conditions known as rickets and osteoporosis.

19. Deficiency in the intake of riboflavin produces the pathological condition known as ariboflavinosis.

20. The value of a food for special dietary use may depend on its content of one or more of the mineral elements calcium, phosphorus, iron, iodine, and possibly other mineral elements.

21. Deficiency in the intake of calcium or phosphorus produces the pathological conditions known as rickets and osteoporosis.

22. Deficiency in the intake of iron results in the pathological condition known as nutritional anemia.

23. Deficiency in the intake of iodine results in the pathological condition known as simple goiter.

24. The minimum daily requirements for such vitamins and minerals in the human diet are the quantities necessary for the prevention of such deficiency diseases.

25. The requirements of different persons for most of the essential vitamins bear a relationship to body weight which in turn bears a relationship to age groups. Thus, for nutritional purposes, with respect to these and many other dietary factors, persons are commonly classed as infants (persons under one year of age), children (persons one or more but less than 12 years of age), and adults (persons 12 or more years of age), children may be further classified as the groups less than six, and six or more years of age, when nutritional requirements bear an unusually close relationship to body weight.

26. The nutritional requirements for vitamins A, B_1, C, and riboflavin are so correlated with age, but the requirements for vitamin D and minerals are not.

27. Purchasers generally do not know the quantity of vitamins and minerals needed to supply their minimum daily requirements.

28. Information necessary for the purchaser to evaluate a food for special dietary use based on its vitamin or mineral property for which the minimum daily requirement has been established is a statement of the proportion of the minimum daily requirement for such vitamin or mineral supplied by a specified quantity of such food.

29. To be reasonably useful to the purchaser, the quantity so specified must be the quantity of the food customarily or usually consumed during a period of one day, or a quantity reasonably suitable for or practicable of consumption during a period of one day.

30. The quantity of vitamin A in a food is expressed as the biologically measured activity of vitamin A and its precursors in terms of United States Pharmacopoeia units (commonly referred to as U. S. P. units).

31. The quantity of vitamin B_1 in a food is expressed by weight in terms of the metric system or by United States Pharmacopoeia units (commonly referred to as U. S. P. units).

32. The quantity of vitamin C in a food is expressed by weight in terms of the metric system or by United States Pharmacopoeia units (commonly referred to as U. S. P. units).

33. The quantity of vitamin D in a food is expressed in terms of United States Pharmacopoeia units (commonly referred to as U. S. P. units).

34. The quantity of riboflavin in a food is expressed by weight in terms of the metric system.

35. The quantities of calcium, phosphorus, iron, and iodine in foods are commonly expressed by weight in terms of the metric system.

36. Because of variations in body weight and other factors, the minimum daily requirements of individuals for vitamins vary, even among persons in the same age groups; but in the cases of vitamins A, B_1, C, D, and riboflavin the variation within any age group is of such narrow range that a minimum daily requirement for any such vitamin can be prescribed for different age groups, and the ingestion of the quantity so prescribed will prevent any clinically significant manifestation of the deficiency disease characteristic of deficiency of such vitamin.

37. The minimum daily requirement for vitamin A is as follows:

For infants, 1,500 U. S. P. units.

For children more than 1 but less than 12 years of age, 3,600 U. S. P. units.

For any person 12 or more years of age, 4,000 U. S. P. units.

38. The minimum daily requirement for vitamin B_1 is as follows:

For infants, 0.25 mg. (83 U. S. P. units).

For children more than 1 but less than 6 years, 0.5 mg. (167 U. S. P. units).

For children 6 or more but less than 12 years old, 0.75 mg. (250 U. S. P. units).

For a person 12 or more years old, 1 mg. (333 U. S. P. units).

39. The minimum daily requirement for vitamin C is as follows:

For infants, 10 mg. (200 U. S. P. units).

For children more than 1 but less than 12 years old, 20 mg. (400 U. S. P. units).

For a person 12 or more years old, 30 mg. (600 U. S. P. units).

40. The minimum daily requirement for vitamin D is 400 units for any person, irrespective of age, except as hereinafter noted in respect of vitamin D contained in cows' milk and evaporated milk.

41. The minimum daily requirement for riboflavin is as follows:

For an infant, 0.5 mg.

For a person 12 or more years old, 2.0 mg.

42. The minimum daily requirement for riboflavin for children one year or more but less than 12 years of age has not been established.

43. A given quantity of vitamin D consumed in cows' milk or evaporated milk is more efficacious in the prevention of rickets than the same quantity of vitamin D consumed in other carriers, but the minimum daily requirement of vitamin D when consumed in cows' milk or evaporated milk has not been established.

44. Cows' milk containing 135 units of vitamin D per quart, and evaporated milk containing 7.5 U. S. P. units of vitamin D per avoirdupois ounce, usually will prevent clinical rickets when fed to normal infants in customary quantities.

45. Cows' milk and evaporated milk with increased vitamin D content are customarily marketed at two levels of vitamin D content, 400 U. S. P. units and 135 U. S. P. units per quart in the case of milk, and 22.2 U. S. P. units and 7.5 U. S. P. units per avoirdupois ounce in the case of evaporated milk.

46. In the absence of established fact as to the minimum daily requirement for vitamin D carried in cows' milk and evaporated milk, information essential to the purchaser concerning the value of such milk and evaporated milk for special dietary use based on its vitamin D content includes at least a statement of the number of
1955 U. S. P. units of vitamin D in a specified quantity of such milk or evaporated milk.

47. The prevalence of rickets among infants and children is such that information essential to purchasers concerning the value of cows' milk for special dietary use based on a vitamin D content increased to less than 135 U. S. P. units per quart, includes at least the statement that additional vitamin D should be supplied from other sources.

48. Because of variations in body weight, in the quantity of food ingested, and in other factors, it is impracticable to establish minimum daily requirements applicable to the needs of infants generally for calcium, phosphorus, iron, and iodine.

49. Because of variations in the body weight and other factors, individuals other than infants have varying minimum daily requirements for minerals. In the cases of calcium, phosphorus, iron, and iodine, the variation is of such narrow range that a minimum daily requirement for any such mineral can be prescribed, and the ingestion of the quantity so prescribed will prevent any clinically significant manifestation of the deficiency disease characteristic of a deficiency of such mineral, except as specified in Finding 50 with respect to pregnant and lactating women.

50. During pregnancy and lactation the requirements of women for calcium, phosphorus, and iron are increased.

51. The minimum daily requirement for calcium and for phosphorus is 750 milligrams for any person more than one year of age, except any pregnant or lactating woman for whom 1.5 grams is the minimum daily requirement.

52. The minimum daily requirement for iron is 7.5 milligrams for a child more than one but less than six years of age, 10 milligrams for a person six or more years of age, except any pregnant or lactating woman for whom 15 milligrams is the minimum daily requirement.

53. The minimum daily requirement for iodine is 0.1 milligram for any person more than one year of age.

54. In order fully to inform purchasers of the value of a food purporting to be or represented for special dietary use by pregnant or lactating women based in whole or in part on its mineral property in respect of calcium, phosphorus, or iron, a statement of the proportion of the minimum daily requirement furnished thereby must include the proportion for such women.

55. Simple goiter is endemic to certain geographical areas in the United States, because of the inadequacy of the iodine content of the water and other foods in those areas.

56. Federal and state public health authorities seek to encourage and increase the consumption of iodine in those areas.

57. As a means of supplying adequate quantities of iodine to the diet in those areas, such authorities have induced the manufacturers of salt, inasmuch as salt is common to all adequate diets, to produce iodized salt by the addition to salt of 0.023 percent by weight of potassium iodide, equivalent to 0.0176 percent iodine.

58. The distribution of iodized salt has resulted in a great decrease in the incidence of simple goiter in those areas.

59. Under the program so agreed upon between health authorities and salt manufacturers, the quantity of iodine in the usual daily intake of iodized salt is approximately 10 times the minimum daily requirement for iodine of persons other than infants.

60. The statement on the label of iodized salt that the usual daily intake thereof contains 10 times the minimum daily requirement for iodine would be reasonably calculated to result in a decrease in the consumption of iodized salt, even in those areas where goiter is endemic, and thus cause an increase in the incidence of simple goiter.

61. It is the established practice of manufacturers of iodized salt to declare on the label the percent by weight of potassium iodide in the iodized salt.

62. Purchasers of iodized salt are adequately informed of its value in the prevention of simple goiter by the declaration on the label of the percent by weight of potassium iodide present therein.

63. In the consumption of vitamins and minerals it is desirable to have a safety factor above the minimum daily requirements, and fractional proportions of requirements above the minimum daily requirements for vitamins and minerals may be regarded as such a safety factor.

64. Such fractions may be disregarded in label statements without depriving the purchaser of essential information.

65. The dietary requirements of age groups other than adults are usually estimated by reference to adult intakes as a standard.

66. A statement of the proportion of the minimum daily requirements of adults for vitamins and minerals suffices to furnish full

information as to such requirements for persons generally; but, where the food is for the use of a specific age group or groups, full information as to its value for such use includes a statement of the proportion of the minimum daily requirement for such vitamin or mineral for such age group or groups.

67. A food may have special dietary use by reason of its content of some vitamins other than A, B_1, C, D, or riboflavin, or some minerals other than calcium, phosphorus, iron, or iodine. The minimum daily requirements and, in some cases, the need in human nutrition for such other substances have not been established by the opinion of experts qualified by scientific training and experience to determine such facts; but in the cases of some such other substances there is substantial, though inconclusive, support in the opinions of such experts of a determination of one or both of such facts.

68. When the need for such a substance has not been so established, information necessary fully to inform the purchaser of the value for special dietary use of a food containing it includes a statement that the need for such substance has not been established.

69. When the need for a vitamin or mineral has been so established, it is frequently still unknown what is the minimum daily requirement therefor.

70. When the minimum daily requirement for such a substance has not been established, whether or not evidence of human need therefor is conclusive, purchasers must rely on the best available scientific information or professional advice; and in order to evaluate such food in terms of such information or advice, it is necessary that the purchaser be informed of the quantity of the vitamin or mineral present in a specified quantity of such food suitable for daily consumption.

71. The quantity of such a vitamin or mineral necessary to prevent a disease resulting from a dietary deficiency of such substance, is usually unrelated to the quantity necessary for use in treating the disease; when such a vitamin or mineral purports to be or is represented for use in treating such a disease, in addition to adequate directions for use, a statement of the quantity of the substance present in a specified quantity of the food is information necessary for the purchaser to evaluate the food for such use in terms of the best available scientific information or professional advice.

72. The value of a food for special dietary use may depend on its suitability as a food for infants.

73. The diet of infants is more restricted than that of normal persons of other age groups and the suitability of a food for infant use depends on its ingredients or character.

74. Information necessary fully to inform the purchaser of the value of a food for such use includes the common or usual name of each ingredient thereof.

75. Infants are more susceptible to allergies resulting from plant or animal substances than persons of other age groups.

76. Information concerning the source of a food of plant or animal origin for use by infants is necessary properly to evaluate its suitability for use by particular infants.

77. The value of an infant food may depend upon its simulation of, or suitability as a complete or partial substitute for, human milk.

78. Normal human milk contains adequate quantities of all the factors essential to infant nutrition, except that its content of vitamin C, vitamin D, and iron is insufficient in many cases to prevent scurvy, rickets, and nutritional anemia, respectively.

79. The value of a food as a complete or partial substitute for human milk in infant feeding depends on its content of such factors as moisture, protein, fat, carbohydrates, crude fiber, calcium, phosphorus, iron, and vitamins A, B_1, C, and D, and the calories supplied by such food.

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80. Information necessary to evaluate a food as a complete or partial substitute for human milk in infant feeding includes a statement of the percent by weight of moisture, protein, fat, available carbohydrates, crude fiber, calcium, phosphorus, and iron, a statement of the number of available calories, and a statement of the number of units of vitamin A, vitamin B_1, vitamin C, and vitamin D supplied by the food.

81. The most common dietary deficiency diseases in infants are scurvy, rickets, and nutritional anemia, caused respectively by deficiencies of vitamin C, vitamin D, and iron in human milk or in preparations used as substitutes for human milk, including, among others, cows' milk and evaporated milk in which the quantities of such substances have not been increased.

82. Many purchasers are unaware of the deficiencies in these respects of such substitutes.

83. Such substitutes are customarily diluted and mixed with a soluble carbohydrate for infant feeding. In the proportions usually recommended by pediatricians each 100 calories of the mixed substitute must contain 30 U. S. P. units of vitamin C, 50 U. S. P. units of vitamin D, and 0.75 milligram of iron to supply the minimum daily requirements of infants for such substances.

84. Where a food for use as a complete or partial substitute for human milk in infant feeding contains less than such quantities of vitamin C, vitamin D, or iron, information necessary for the purchaser to determine the value of the food includes a statement that such factors must be supplemented from other sources.

85. The value of cows' milk and evaporated milk used as a complete or partial substitute for human milk in infant feeding is sufficiently well known that, aside from their deficiency in vitamin C, iron, and vitamin D when the quantity of vitamin D has not been adequately increased, a statement relative to their constituents is not necessary to inform the purchaser of their value for such use.

86. 135 U. S. P. units of vitamin D per quart of cows' milk and 7.5 U. S. P. units per avoirdupois ounce of evaporated milk, the equivalent of 135 units per quart of milk when the evaporated milk is reconstituted by the addition of water, being usually sufficient, when fed in customary quantities, for the prevention of clinical rickets in normal infants due to its greater efficacy in milk, a statement that vitamin D must be supplied from other sources is not necessary when the milk or evaporated milk contains such quantities of vitamin D.

87. The value of a food for special dietary use may depend on its suitability for use in the control of body weight through regulating the intake of protein, fat, carbohydrates, or calories.

88. The quantity and relative proportions of protein, fat, and carbohydrates, and the number of calories consumed, are important factors in the regulation of body weight.

89. The value of a food for special dietary use may depend on its suitability for use in dietary management with respect to disease through regulating the intake of protein, fat, carbohydrates, or calories; such management is an important factor in the treatment of many diseases.

90. Some carbohydrate substances are not digested or assimilated by the human organism and supply no food energy. Only the carbohydrates which may be digested and assimilated are available to the metabolic processes of the organism.

91. Carbohydrates which are non-available to the metabolic processes have a theoretical caloric value but supply no calories to the human organism.

92. Information necessary for the purchaser to evaluate a food for use in the control of body weight, or in dietary management with respect to disease, includes a statement on the label of the percent by weight of protein, fat, and available carbohydrates in such food and a statement on the label of the number of available calories supplied by a specified quantity of the food.

93. The value of a food for special dietary use may depend on the presence therein of a constituent which is not utilized in normal metabolism and which consequently has no nutritive value.

94. Its use may be for the reduction of caloric intake, as in the case of mineral oil; for the promotion of laxation, as in the case of fibrous plant matter; or for the satisfaction of taste desires without increasing food value, as in the case of saccharin.

95. Information necessary to inform the purchaser of the value of a food for special dietary use by reason of its content of such a constituent includes a statement of the percent by weight of the constituent in the food, preceded or followed by the word "nonnutritive," except as hereinafter noted in Finding 98 with respect to saccharin.

96. If such constituent is fibrous plant matter it is commonly determined as and expressed as crude fiber.

97. Saccharin, alone or in combination in a saccharin salt, is a nonnutritive, synthetic sweetening substance sometimes used to satisfy the psychological desire for sweets in the diets of persons who must restrict their intake of carbohydrates. It has not other use as a food and is not utilized in normal metabolism.

98. Information necessary to inform the purchaser of the value of a food for special dietary use by reason of its saccharin content is a statement that it contains a specified percent by weight of saccharin, a nonnutritive, artificial sweetener which should be used only by persons who must restrict their intake of ordinary sweets.

99. The value of a food for special dietary use may depend on its hypoallergenic property; that is, the absence or, or greatly reduced quantity of; a substance which causes allergic reaction.

100. Allergic effects are abnormal, toxic tissue disturbances and may be produced by any food constituent.

101. Decrease of an allergenic constituent may be accomplished by treatment or processing of the constituent.

102. When a food or ingredient is a plant or animal substance the allergenic property thereof is usually based on a specific factor, most frequently a protein, derivable only from the plant or animal which is its source.

103. Persons subject to gastrointestinal allergic effects can avoid them only by elimination of the allergenic substances from their diets or by such a reduction thereof that the quantity is insufficient to produce the toxic disturbances, and in some cases by hyposensitization measures.

104. Information necessary to inform the purchaser of the value of a food for hypoallergenic use includes the following: The common or usual name and the quantity or proportion of each ingredient, in case it is fabricated from two or more ingredients; a qualification of the name of the food, in case it consists of a single ingredient, or of the name of each ingredient, in case it is fabricated from two or more ingredients, to reveal the specific plant or animal which is the source of such food or such ingredient, if such food or such ingredient consists in whole or in part of plant or animal matter and such name does not clearly reveal the specific plant or

animal which is such source; a statement indicating the nature and effect of any treatment or processing, if the changed allergenic property results from such treatment or processing.

On the basis of the foregoing detailed findings of fact it is found and determined that the label of a food which purports to be or is represented for special dietary uses by man should bear the information concerning the vitamin, mineral, and other dietary properties of such food prescribed in the regulations hereinafter set forth, and that such information concerning such properties of such food is necessary in order fully to inform purchasers as to its value for such uses.

It is therefore, ordered, That the following regulations be and they hereby are promulgated:

Regulations

Sec.

125.01 Definitions and interpretations of terms.
125.02 General label statements.
125.03 Label statements relating to vitamins.
125.04 Label statements relating to minerals.
125.05 Label statements relating to infant food.
1957 125.06 Label statements relating to certain food used in control of body weight or in dietary management with respect to diseases.
125.07 Label statements relating to nonnutritive constituents.
125.08 Label statements relating to hypoallergenic food.

§ 125.01 *Definitions and interpretations of terms.* (a) The definitions and interpretations of terms contained in section 201 of the Act shall be applicable also to such terms when used in these regulations.

(b) Any requirement of the regulations in this part with respect to the quantity of vitamin A means the biologically measured activity of vitamin A and its precursors; but if any such precusor is sold as such or is added to a food the label shall designate such precursor by its common or usual name and not as vitamin A.

(c) Specification in the regulations in this part of a quantity of any vitamin, mineral, or other dietary property as a minimum daily requirement shall not be construed as a determination that such quantity is sufficient for the treatment of any disease resulting from a deficiency in such vitamin, mineral, or other property.

(d) For the purposes of the regulations in this part, the terms "infant," "child," and "adult" mean persons not more than 12

months old, more than 12 months but less than 12 years old, and 12 years or more old, respectively.

§§ 125.01 to 125.08, inclusive, issued under the authority contained in secs. 403 (j), 701 (e), 52 Stat. 1048, 1055, 53 Stat. 561; 21 U.S.C., Sup. 343 (j), 371 (e), 5 U.S.C., Sup., 133-133t, and Reorganization plans I, IV, 53 Stat. 1423, 54 Stat. 1234; 4 F.R. 2727, 5 F.R. 2421.

§ 125.02 *General label statements.* (a) If a food (including food to which any one or more of §§ 125.03 to 125.08, inclusive, of the regulations in this part is applicable) purports to be or is represented for any special dietary use by man, its label shall bear a statement of the dietary properties upon which such use is based in whole or in part. Such statement shall show the presence or absence of any substance, any alteration of the quantity or character of any constituent, and any other dietary property of such food upon which such use is so based.

(b) If a food (including food to which any one or more of §§ 125.03 to 125.08, inclusive, of the regulations in this part is applicable) purports to be or is represented for special dietary use by reason of its use for treating any disease resulting from a dietary deficiency in man, its label shall bear, in addition to the information required under paragraph (a) hereof, adequate directions for such use.

§ 125.03 *Label statements relating to vitamins.* (a) (1) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property in respect of—

Vitamin A or its precursors,
Vitamin B_1 (thiamine),
Vitamine C (ascorbic acid),
Vitamin D, or
Riboflavin (vitamin B_2, vitamin G),

the label (except as hereinafter provided with respect to cows' milk and evaporated milk, and unless the exemption under subparagraph (4) of this paragraph applies) shall bear a statement of the proportion of the minimum daily requirement for such vitamin supplied by such food when consumed in a specified quantity during a period of one day. If such purported or represented special dietary use is for persons within two or more age groups for which minimum daily requirements are set forth in paragraph (b), such statement shall include such proportion for each such group; but if such use is for persons irrespective of age groups, such statement may be limited to the proportion of the minimum daily requirement set forth in paragraph (b) for an adult. The quantity specified as above re-

quired shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. When such proportion is a whole number and a fraction it may be expressed as the whole number and the fraction may be disregarded. The foregoing requirements of this paragraph shall not apply to cows' milk and evaporated milk which purport to be or are represented for special dietary use by reason of their content of vitamin D; but in the case of cows' milk in which the vitamin D content has been increased by any means, and in the case of evaporated milk with increased vitamin D content as prescribed in the definition and standard of identity for evaporated milk (§ 18.520), the label shall bear a statement of the number of U. S. P. units in a specified quantity of such milk or evaporated milk. In the case of cows' milk in which the vitamin D content is increased to less than 135 U. S. P. units to each quart, the label shall also bear a statement that additional vitamin D should be supplied from other sources.

(2) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property in respect of any vitamin not listed in subparagraph (1) of this paragraph, the label shall bear a statement of the quantity of such vitamin in a specified quantity of such food. The quantity of food specified as required herein shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. If the need in human nutrition for such vitamin has not been established, the label shall also bear the statement "The need for ..... in human nutrition has not been established," the blank to be filled in with the name of such vitamin.

(3) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property, and any such use is for treating any disease resulting from a dietary deficiency of any vitamin, the label shall bear a statement of the quantity of such vitamin in a specified quantity of such food. If the represented special dietary use of such food is solely for treating any such disease, such food shall be exempt from the labeling requirements of subparagraphs (1) and (2) of this paragraph when otherwise applicable.

(4) Compliance with the provisions of subparagraphs (2) and (3) of this paragraph shall not be construed as relieving any food which purports to be or is represented for special dietary use by reason of its vitamin property from the application of sections 403 (a) and 201 (n) of the Act, as in the case where the need for such vitamin in human nutrition is not substantially supported by the opinion of experts qualified by scientific training and experience to determine such needs.

(b) For the purposes of the regulations in this section the following are minimum daily requirements:

(1) For vitamin A, 1,500 U. S. P. units for an infant, 3,000 U. S. P. units for a child, 4,000 U. S. P. units for an adult.

(2) For vitamin B_1 (thiamine), 0.25 milligram (83 U. S. P. units) for an infant, 0.5 milligram (167 U. S. P. units) for a child less than six years old, 0.75 milligram (250 U. S. P. units), for a child six or more years old, 1 milligram (333 U. S. P. units) for an adult.

(3) For vitamin C (ascorbic acid), 10 milligrams (200 U. S. P. units) for an infant, 20 milligrams (400 U. S. P. units) for a child, 30 milligrams (600 U. S. P. units) for an adult.

(4) For vitamin D, 400 U. S. P. units for an infant, child, or adult.

(5) For riboflavin (vitamin B_2, vitamin G), 0.5 milligram for an infant, 2.0 milligrams for an adult.

§ 125.04 *Label statements relating to minerals.* (a) (1) If a food purports to be or is represented for special dietary use by man by reason of its mineral property in respect of—

Calcium,
Phosphorus,
Iron, or
Iodine,

the label (except as hereinafter provided with respect to iodized salt, and unless the exemption under subparagraph (4) of this paragraph applies) shall bear a statement of the proportion of the minimum daily requirement for such element supplied by such food when consumed in a specified quantity during a period of one day. If such purported or represented special dietary use is for persons within two or more age groups or other groups having special dietary requirements, for which minimum daily requirements are set forth in paragraph (b), such statement shall include such proportion for each such group; but if such use is for persons irrespective of such groups, such statement may be limited to the proportion of
1958 minimum daily requirement set forth in paragraph (b) for an adult other than a pregnant or lactating woman. The quantity specified as above required shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. When such proportion is a whole number and a fraction it may be expressed as the whole number and the fraction may be disregarded. The foregoing requirements of this paragraph shall not apply to iodized salt which purports to be or is represented for special dietary use by reason of its iodine content, if the label bears a statement of the quantity or proportion of iodine, or salt thereof, in the iodized salt and the quantity of iodine present therein is not more than 0.2 percent by weight.

(2) If a food purports to be or is represented for special dietary use by man by reason of its mineral property in respect of any element not listed in subparagraph (1) of this paragraph, the label shall bear a statement of the quantity of such element in a specified quantity of such food. The quantity of food specified as required herein shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. If the need in human nutrition for such element has not been established, the label shall also bear the statement "The need for ..... in human nutrition has not been established," the blank to be filled in with the name of such element.

(3) If a food purports to be or is represented for special dietary use by man by reason of its mineral property, and any such use is for treating any disease resulting from a dietary deficiency of any element, the label shall bear a statement of the quantity of such element in a specified quantity of such food. If the represented special dietary use of such food is solely for treating any such disease, such food shall be exempt from the labeling requirements of subparagraphs (1) and (2) of this paragraph when otherwise applicable.

(4) Compliance with the provisions of subparagraphs (2) and (3) of this paragraph shall not be construed as relieving any food which purports to be or is represented for special dietary use by reason of its mineral property from the application of §§ 403 (a) and 201 (n) of the Act, as in the case where the need for such element in human nutrition is not substantially supported by the opinion of experts qualified by scientific training and experience to determine such needs.

(b) For the purposes of the regulations in this section, the following are minimum daily requirements:

(1) For calcium (Ca), 750 milligrams for a child or an adult, except a pregnant or lactating woman in which case the minimum daily requirement is 1.5 grams.

(2) For phosphorus (P), 750 milligrams for a child or an adult, except a pregnant or lactating woman in which case the minimum daily requirement is 1.5 grams.

(3) For iron (Fe), 7.5 milligrams for a child less than six years old, 10 milligrams for a child six or more years old or for an adult, except a pregnant or lactating woman in which case the minimum daily requirement is 15 milligrams.

(4) For iodine (I), 0.1 milligram for a child or an adult."

§125.05 *Label statements relating to infant food.* If a food which purports to be or is represented for special dietary use is a food for infants, the label shall bear, in case such food is fabricated from two or more ingredients, the common or usual name of each such in-

gredient including spice, flavoring, and coloring; if such food, or any ingredient thereof in case it is fabricated from two or more ingredients, consists in whole or in part of plant or animal matter and the name of such food or ingredient does not clearly reveal the specific plant or animal which is its source, such name shall be so qualified as to reveal clearly the specific plant or animal which is such source. If such use of the food is by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk, the label shall also bear,

(a) a statement of the percent by weight of moisture, protein, fat, available carbohydrate, crude fiber, calcium (Ca), phosphorus (P), and iron (Fe) contained in such food;

(b) a statement of the number of available calories and of U.S.P. units of vitamin A, vitamin B_1, (thiamine), vitamin C (ascorbic acid), and vitamin D supplied by a specified quantity of such food; and

(c) If less than 30 U.S.P. units of vitamin C (ascorbic acid), less than 50 U.S.P. units of vitamin D, or less than 0.75 milligram of iron (Fe), is supplied by the quantity of such food which, as customarily or usually prepared for consumption, supplies 100 available calories, a statement that additional quantities of such vitamin or iron, as the case may be, should be supplied from other sources.

The provisions of paragraphs (a) and (b) of this section shall not apply to cows' milk and evaporated milk. The provisions of paragraph (c) of this section with respect to vitamin D shall not apply to cows' milk or evaporated milk in which the vitamin D is increased by any means to not less than 135 U.S.P. units to each quart in the case of cows' milk and not less than 7.5 U.S.P. units to each avoirdupois ounce in the case of evaporated milk."

§125.06 *Label statements relating to certain food used in control of body weight or in dietary management with respect to disease.* If a food purports to be or is represented for special dietary use by man by reason of its use as a means of regulating the intake of protein, fat, carbohydrate, or calories, for the purpose of controlling body weight, or for the purpose of dietary management with respect to disease, the label shall bear a statement of—

(a) the percent by weight of protein, fat, and available carbohydrates in such food; and

(b) the number of available calories supplied by a specified quantity of such food."

§125.07 *Label statements relating to nonnutritive constituents.* If a food purports to be or is represented for special dietary use by man by reason of the presence of any constituent which is not utilized in normal metabolism, the label shall bear a statement of the percent by weight of such constituent, and, in juxtaposition with the name of such constituent, the word "nonnutritive". If such constituent is

fibrous plant matter, it shall be considered to be crude fiber and its percent expressed as such. But if such constituent is saccharin or a saccharin salt, the label shall bear, in lieu of such statement and word, the statement "Contains .... saccharin (or saccharin salt, as the case may be), a nonnutritive, artificial sweetener which should be used only by persons who must restrict their intake of ordinary sweets", the blank to be filled in with the percent by weight of saccharin or saccharin salt in such food. The provisions of this section shall not be construed as authorizing the use of saccharin or its salts in any food other than one for use by persons who must restrict their intake of carbohydrates, or as relieving any food from compliance with any requirement of sections 402 (b) or (d), 403 (g), or other provisions of the Act."

§ 125.08 *Label statements relating to hypoallergenic food.* If a food purports to be or is represented for special dietary use by man by reason of the decrease or absence of any allergenic property, the label shall bear

(a) the common or usual name and the quantity or proportion of each ingredient including spices, flavoring, and coloring in case the food is fabricated from two or more ingredients;

(b) a qualification of the name of the food, or of the name of each ingredient thereof in case the food is fabricated from two or more ingredients, to reveal clearly the specific plant or animal which is the source of such food or of such ingredient, if such food or such ingredient consists in whole or in part of plant or animal matter and such name does not clearly reveal the specific plant or animal which is such source; and

(c) a statement indicating the nature and effect of any treatment or processing of the food or any ingredient thereof, if the changed allergenic property results from such treatment or processing."

These regulations shall be effective from and after the 180th day from this day.

WATSON B. MILLER,
Acting Administrator.

NOVEMBER 18, 1941.

[F. R. Doc. 41-8701; Filed, November 21, 1941; 11:48 a.m.]

1959 PLAINTIFF'S EXHIBIT 9

In reply refer to 82-031/33 H, 82-036 H, Drugs.

Federal Security Agency
FOOD AND DRUG ADMINISTRATION
Los Angeles Station

NOTICE OF HEARING

June 18, 1947

Mytinger & Casselberry
194 Park Avenue
Long Beach, California

Investigation by this Administration indicates that violation of the Federal Food, Drug, and Cosmetic Act has occurred, as shown in the attached charges, with respect to the following:

See Attached Sheet.

The facts in our possession indicate your responsibility for the violation. An opportunity will be given you on Thursday, June 26, 1947, at 2:00 P.M., in Room 514, California Medical Building, 1401 South Hope Street, Los Angeles 15, California. *(Hearing postponed to 7-14-47.)*

to present informally your views with respect to the charges before a decision is reached as to whether the matter should be referred to the Department of Justice for prosecution. You may appear in person or by attorney, or you may submit your response to this notice in the form of a letter in lieu of personal appearance. If written response is made, please submit your letter and all accompanying documents in quadruplicate. Documents submitted at personal appearance should be in quadruplicate. If no response is received on or before the date of the hearing, the matter will be decided on the evidence at hand.

By direction of the Administrator of the Federal Security Agency:

(S.) R. B. BORN,
Asst. Chief of Station.

Enclosures: Legal Status Form; Charge Sheet.

1960 OBJECT OF THE HEARING

Before any violation of the act is reported by the Administrator for the institution of a criminal proceeding the party or parties who appear to be responsible, are through this notice, given the opportunity to explain *voluntarily* any incidents connected with the preparation or handling of the shipment mentioned which would indicate that prosecution should not follow for the violation specified in the charge sheet attached. *If the shipment has been seized such action does not preclude prosecution of those responsible for the violation; the hearing concerns the possible criminal action and not the action involving the seizure of the article.* A circular giving the text of the act and regulations for its enforcement may be had upon request.

NATURE OF THE HEARING

This hearing is informal and confined to questions of fact. For your convenience in submitting required information concerning the status of your firm both on date of response to this notice and on the date of shipment the attached legal status forms may be filled out and returned with your answer. Your answer may consist of the disclosure of any pertinent facts, letters, files, guaranties, shipping documents, analyses, arguments, etc., which you feel may disclose valid reasons why you should not be prosecuted. *Documents to be submitted at the hearing to support your statements should be prepared in quadruplicate.*

In the case of articles that are adulterated or misbranded when introduced in interstate commerce the Federal Food, Drug and Cosmetic Act places responsibility on the interstate shipper, even though he may be only the distributor and not the manufacturer. Distributors may relieve themselves of responsibility if they hold a legal guaranty under section 303 (c) of the act. If the goods were sold to you by a party residing in the United States and guaranteed by such party to comply with the provisions of the act, you should submit in response to this notice evidence of that fact, and a statement as to whether the product at the time of the apparent violation by you was in the identical condition and bore the same labels as when received by you from the guarantor and the full name of the facts as you represent them.

RESULT OF THE HEARING

If, after the hearing has been held and consideration given to all the facts, it is the conclusion of the Federal Security Administrator that prosecution should be recommended, the facts in the case will be transmitted to the Department of Justice for appropriate action.

1961 List of Violations

Sample No.	Product	Shipped to:	Date Shipped (On or About)
82-031 H	"Bone-Meal Calcium Lozenges*** Contents: More than 31 34-grain Lozenges*** Price $1.00***"	Ernest C. Stapenhorst 2810½ Oakes St. Everett, Washington	1/3/47
82-032 H	"Nutrilite Capsules No. 10*** Contents 31 5½ grain capsules*** Price $10.00**" "Mineral Supplement Tablets*** Contents: 62 6½ grain tablets***"	Same	Same
82-033 H	"Nutrilite B & E Concentrate*** Contents 1 fluid oz. (25 grams)** Price $3.59**"	Same	Same
82-036 H	"Nutrilite Sales Kit***"	Douglas C. Hansen Wing Point Winslow RFD, Wash.	2/26/47

1962 CHARGE SHEET

sample nos. 82-013 33 H

Prohibited Act: The introduction or delivery for introduction into interstate commerce of any food or drug that is adulterated or misbranded.

Misbranded: Statements in the labelings of the articles, namely: Manual entitled, "How to Get Well and Stay Well", Circular entitled, "Your Body Will Thank You", Card headed, "Purchaser's check of disorders at start of program", Sales Manual for Nutrilite Products Company entitled, "Sales Ideas for Increasing Earnings", Circular entitled, "Read this First", Deficiency Disease Chart containing alphabetical list of diseases, Circular entitled, "Suggested Use of Nutrilite Products", Circular entitled, "What's Wrong With You", are false and misleading, since they create the impression that the products are effective in the treatment of the diseases and abnormal conditions mentioned therein, whereas they are not effective in the treatment of such diseases and abnormal conditions.

The labels of the articles fail to bear adequate directions for their use in the treatment of the diseases and abnormal conditions mentioned in the above-listed labelings.

Bone-Meal Calcium Lozenges (82-031 H). The name, "Bone-Meal Calcium Lozenges", is false and misleading as applied to a lozenge containing bone meal without added calcium.

Nutrilite Capsules No. 10, Mineral Supplement Tablets) (82-032 H). Its label fails to bear the common or usual names of each ingredient of which it is fabricated. Its label fails to reveal the material fact that potassium and magnesium salts of citric, hydrochloric, and sulfuric acids contained in the article contribute nothing to its nutritive properties. The name, "Mineral Supplement Tablets", creates the false and misleading impression that the

article is an effective mineral supplement when used as directed, whereas it does not effectively supplement the diet with calcium, phosphorus, or iron.

1963 *Nutrilite B & E Concentrate.* The name "B & E Concentrate" is false and misleading as applied to a product which supplied only one of the B vitamins. The designation "Concentrate" is false and misleading since the article is not a concentrate but rather a weak solution of vitamin B_1 and alpha-tocopherol. Its label fails to reveal that the need for vitamin E in human nutrition has not been established. Information required by and under the authority of the act to appear upon the label, namely, the list of its ingredients, the proportion of the minimum daily requirement for vitamin B_1 supplied by a specified amount of the article, the fact that the need for vitamin E in human nutrition has not been established, and the declaration of quantity of contents of the package, does not appear conspicuously so as to be likely to be read by the purchaser; and label space which might be used for this purpose is used for other purposes.

WBR:AGM:mae

1964 82-036-H.

Nutrilite Capsules No. 15.
Mineral Supplement Tablets.
Bone-Meal Calcium Lozenges.
Nutrilite B & E Concentrate.

CHARGE SHEET

Prohibited Act: The introduction or delivery for introduction into interstate commerce of any food or drug that is adulterated or misbranded.

Misbranded: Statements in the labelings of the articles, namely:

Manual entitled, "How to Get Well and Stay Well", Circular entitled, "Your Body Will Thank You", Card headed, "Purchaser's check of disorders at start of program", Sales Manual for Nutrilite Products Company entitled, "Sales Ideas for Increasing Earnings", Circular entitled, "Read This First", Deficiency Disease Chart containing alphabetical list of diseases, Circular entitled, "Suggested Use of Nutrilite Products", Circular entitled, "What's Wrong With You", are false and misleading since they create the impression that the products are effective in the treatment of the diseases and abnormal conditions mentioned therein, whereas they are not effective in the treatment of such diseases and abnormal conditions.

The labels of the articles fail to bear adequate directions for their use in the treatment of the diseases and abnormal conditions mentioned in the above-listed labelings.

Nutrilite Capsules No. 15. The label fails to list the proportions of the minimum daily requirements for vitamins A, B_1, C, D, and riboflavin supplied by one capsule.

Mineral Supplement Tablets. Its label fails to bear the common or usual names of each ingredient of which it is fabricated. Its label fails to reveal the material fact that potassium and magnesium salts of citric, hydrochloric, and sulfuric acids contained in the article contribute nothing to its nutritive properties. The name "Mineral Supplement Tablets" creates the false and misleading impression that the article is an effective mineral supplement when used as directed, whereas it does not effectively supplement the diet with calcium, phosphorus, or iron.

Bone-Meal Calcium Lozenges. The name "Bone-Meal Calcium Lozenges" is false and misleading as applied to a lozenge containing bone meal without added calcium.

1965 *Nutrilite B & E Concentrate (82-033 H).* The name, "B & E Concentrate", is false and misleading as applied to a product which supplies only one of the B vitamins. The designation, "Concentrate", is false and misleading since the article is not a concentrate but rather a weak solution of vitamins B_1 and alpha tocopherol. Its label fails to reveal that the need for vitamin E in human nutrition has not been established. Information required by and under the authority of the act to appear upon the label, namely, the list of its ingredients, the proportion of the minimum daily requirement for vitamin B_1 supplied by a specified amount of the article, the fact that the need for vitamin E in human nutrition has not been established, and the declaration of quantity of contents of the package, does not appear conspicuously so as to be likely to be read by the purchaser; and label space which might be used for this purpose is used for other purposes. The article is materially deficient in vitamin B_1.

(S.) RWW
RWW/fei

1966 PLAINTIFF'S EXHIBIT 10

Los Angeles, California, July 23, 1947
Date of Hearing: July 15, 1947

82-031, et al — Mytinger & Casselberry
Drugs — Long Beach, California

RECORD OF HEARING

Present: Mr. Lester L. Lev, Mr. Lee S. Mytinger, Mr. Lee J. Myers, Mr. C. F. Rehnborg, Dr. Wm. S. Casselberry.

Mr. F. Leslie Hart, Acting Chief, Los Angeles Station.

Response was made to citation by Messrs. Lee S. Mytinger and Dr. William S. Casselberry of Mytinger and Casselberry, Mr.

C. F. Rehnborg representing Nutrilite Products, and Mr. Lee J. Myers and Lester L. Ley, attorneys. Response was in the main made by Mr. Myers. Mr. Myers stated that the citees are not the manufacturers. These products are manufactured by Nutrilite Products and are distributed by the Nutrilite Products under the Nutrilite labeling. These products were bought under a continuing guarantee embodied in a contract dated September 1, 1945. The thiamin which is an ingredient of 82-033 H was crystalline thiamin purchased from Merck under invoice guarantee, copies of these two guaranties will be supplied us in quadruplicate.

Nutrilite Products has been in business some 15 years. Up to five years ago they had been bringing labeling to this office for comment and there has been no change in the labeling in the past five years. Mr. Myers said while he does not admit definite violation the labels can, of course, be materially improved and this he intends to do. The accompanying literature mentioned in the charge sheet was written by Mytinger and Casselberry. Since citation issued, they have retained Mr. Myers who will revise this labeling.

The specific charges were then discussed. 82-033-36 H, Nutrilite B and E Concentrate—Mr. Myers was told there was approximately a 30% shortage in thiamin. He will formally request a portion of this product for assay. He has no further answer until assay on this sample has been concluded. I informed Mr. Myers that we have very little sample left but I would endeavor
1967 to get him a portion of the sample as soon as his request was received.

In discussing the labeling charges on this product, Mr. Myers said that the labeling will be completely revised so that to make the quantity of contents more conspicuous and to bring the remainder of the label in harmony with the Act in line with the charges.

82-031 H—These Lozenges were first made entirely from bone meal and later, because of the fluorine content, it was diluted with dicalcium phosphate. I stated that while we did not charge it the fluorine content was still, in my opinion, rather high. Mr. Rehnborg said that he will try to use dicalcium phosphate or bone meal from another source so that he will lower the fluorine content.

82-032 H—In discussing the charge on this number that potassium and magnesium salts of citric, hydrochloric and sulfuric acids failed to contribute anything in it's nutritive properties, Mr. Myers stated that this will be modified in his revision of the label. As a response to our charge that the product does not supplement the diet with calcium, phosphorus, or iron, it was pointed out that the directions call for the use of this product along with the Bone-

Meal Calcium Lozenges and that the intake of the combined products does furnish material amounts of these three elements.

Dictated in presence of respondents.

Mr. Hart: Does this summary, gentlemen, fairly summarize your response to this citation.

Answer: Mr. Myers stated that all labeling including literature will be revised by him.

Answer: I think that is a fair statement.

Mr. Myer-: I will ask that you send a copy to me at my office, 608 South Hill, Los Angeles 14.

F. Leslie Hart, Hearing Officer, Los Angeles Station.

(Here follows Photolithograph, side folio 1968)

1024A

PLAINTIFF'S EXHIBIT 11

DOMESTIC SERVICE
Check the class of service desired; otherwise this message will be sent as a full rate telegram

FULL RATE TELEGRAM		SERIAL	
DAY LETTER		NIGHT LETTER	

$
S
E

WESTERN UNION

1207

JOSEPH L. EGAN, PRESIDENT

INTERNATIONAL SERVICE
Check the class of service desired; otherwise this message will be sent at the full rate

FULL RATE		DEFERRED	
CODE		NIGHT LETTER	

NO. WDS.-CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED
				6:39 PS Time

Send the following message, subject to the terms on back hereof, which are hereby agreed to

To _____ 10/11/48 19__

Street and No. _____

Care of or Apt. No. _____ *Place* _____

INFORM ALL AGENTS AND DISTRIBUTORS IN YOUR GROUP IMMEDIATELY THAT PENDING COURT RULING PAGES 37 TO 58 INCLUSIVE OF CUSTOMER BOOK COMMA AND NUTRILIFE CIRCULARS NOS. ONE AND THREE MUST NOT BE USED IN SELLING NUTRILITE. REMOVE PAGES 37 TO 58 BY CUTTING ALONG FOLD WITH SHARP KNIFE. WRAP, SEAL AND PLACE DISPUTED MATERIAL IN THIRD PARTY'S HANDS TO BE HELD PENDING FINAL RULING. BOOKS AND CIRCULARS IN HANDS OF PROSPECTS, JUNIOR DISTRIBUTORS AND CUSTOMERS TO BE TREATED SAME WAY. FULL EXPLANATION WILL APPEAR WITH NUTRILITE NEWS BUT FOLLOW ABOVE INSTRUCTIONS AT ONCE.

(*Signed*) MITTINGER & CASSELBERRY, INC.

A NEW CURTIS SERVICE

Telegraph your order for America's favorite magazines—HOLIDAY, 1 yr., $5 • the Post, 1 yr., $6 • LADIES' HOME JOURNAL, 1 yr., $3. All prices U. S. only. No charge for wire. Pay Western Union clerk for subscription or when billed by publisher.

Publisher will, on subscriber's request, refund full amount paid for copies not previously mailed. Prices subject to change without notice.

Sender's name and address (For reference) *Sender's telephone number*

1968

1969 PLAINTIFF'S EXHIBIT 12

MATERIAL TAKEN OUT OF CUSTOMER BOOK

By this time you should have received notice from your Sponsor to take pages 37 to 58 inclusive out of your present Customer Books and to continue to use the Customer Book in your work without these pages.

Since this word was sent out by telegram to Potentates and top Agents and also relayed to members of their groups, there has been much speculation. The following is the explanation.

As you know, we have always endeavored to comply with the regulations of the Food and Drug Administration. As soon as we found that part of our original Customer Book was controversial, we made important changes at once and rewrote the book as fast as we could, so that the old Customer Book has not been published for many months.

We got the best advice we could, when we rewrote the Customer Book but now we find there is a difference of opinion as to what may be said. Anyway, we now have an expression of opinion from the Food and Drug Administration and they object to the last part of the Customer Book. Regardless of whether they are right or wrong, we want to comply with their views. Consequently, we are instructing you, as an Agent or Distributor, to remove from all Customer Books in your possession, pages 37 to 58 inclusive.

We suggest you do this by removing the cover and simply cut along the fold with a sharp knife, removing pages 37 through 58 in this way with one cut. Then the cover may be put back on the book and you may continue to use it.

As fast as you pick up books from prospective customers, be sure to make this change and if you have any books in the hands of customers, who are assisting you in getting leads, change their books too.

At the same time, discontinue the use of Nutrilifes Nos. 1 and 3, which are also, rightly or wrongly, criticized by the Food and Drug Administration. Put all your Nutrilifes Nos. 1 and 3 and all pages 37 through 58 from the Customer Books in a package, wrap, seal and get into the hands of some person who will keep them for you until the matter is settled.

In the meantime, we shall send you some additional pages to be put in the back of your revised Customer Books, following page 36, as soon as the material can be written and printed. This material will include a revised epilogue, which will fit the new book.

1970 PLAINTIFF'S EXHIBIT 13

LEE J. MYERS

Attorney and Counselor at Law
608 South Hill Street
Los Angeles 14
TUcker 8930

Federal Security Agency
Food and Drug Administration,
Washington 25, D. C.

October 12th, 1948.

Gentlemen:

Yesterday, my clients, Mytinger & Casselberry of Long Beach, California received a copy of the Libel filed against certain of their products in the United States District Court for the District of New Jersey. I was immediately called into conference and it was decided to immediately discontinue the use of the leaflets entitled "Nutrilife Vol. 1, No. 3" and "Nutrilife Vol. 1, No. 1", and to delete from the booklet "How to get Well and Stay Well" all pages after page 36. This eliminates all statements and material to which objection was made in the Libel of Information.

Telegrams were sent to all general agents instructing them accordingly, and urging them to issue similar instructions to all of their sub-agents. Bulletins confirming these telegrams have also been sent to all agents in order that there may be no misunderstanding on their part.

In this connection I want to say that the filing of this Libel in New Jersey was the first intimation that we had received that any of the literature we are using at present was objectionable to your office. In the future I will appreciate it if you will advise me if you find anything in our literature that you take exceptions to. Mytinger & Casselberry are a reputable firm, and are desirous of co-operating with your Agency in every possible way. I need not point out that the offense of "misbranding" is not a well-defined one in the light of present day scientific knowledge, and it is very easy for a firm in the nutritional supplement field to make statements in the best of faith which do not "square" with the views of your office. In this case a letter from your Agency pointing out your objections would bring about a correction without the necessity of court action.

"Nutrilite" is an excellent food supplement, and thousands of persons have been benefitted by it. I am sure that it is not the intention of your Agency to prevent the public from using it. With mutual co-operation, I believe that much trouble and expense can be saved for all parties concerned.

Yours very truly,

(S.) LEE J. MYERS.

1971

MEMORANDUM

UNITED STATES GOVERNMENT

LOS ANGELES STATION

DATE: Nov. 5 1948

Nutrilite Prods Inc.
Los Angeles Cal (AF 28-002)

TO: Mr. Robert S. Roe

FROM: Administration

SUBJECT:

Dear Bob,

I am enclosing a self-explanatory letter from Mr. Lee J. Myers and our proposed answer. At Mr. Goodrich's suggestion we would like to have you and Arthur Dickerman ~~review this~~ letter in view of the fact that you are probably negotiating with the attorneys for this firm with respect to disposition of the pending case. It is our belief that our answer to Mr. Myers' letter may be injected into the court case and it seems very desirable that you people have an opportunity to see our proposed answer before we issue it. Please return enclosures.

(S.) RALPH F. K. KNEELAND JR.

Enclosures: Ltr dtd 10-12-48; R/D ltr to Lee J. Myers

AIR MAIL

Kneeland
Admin—

We think that this is OK.—Dickerman has suggested some minor changes as indicated in the draft—

RSR

Enclose—*Draft* Myers ltr.

1972

Nutrilite Prods Inc
Los Angeles Cal (AF 28-002)

9-082 K et al

Mr. Lee J. Myers
608 S. Hill Street
Los Angeles 14, California

Dear Mr. Myers:

We regret that through inadvertence your letter of October 12 concerning a libel action filed in the United States District Court for the District of New Jersey against certain products distributed by your clients, Mytinger and Casselberry of Long Beach, California did not receive a prompt reply.

In your letter you state that in the future if any objectionable labeling is encountered dealing with products distributed by this firm, you would appreciate receiving a letter from this agency pointing out the objections and appropriate corrections would be undertaken by the firm. As you are aware, the FFDC Act places the responsibility for compliance upon those who bring products within the jurisdiction of the federal law. There is no provision in the federal act for the approval of labeling. Experience of more than forty years in the enforcement of the FFDC Act and its predecessor, the Food and Drugs Act of 1906, has demonstrated that a procedure such as you suggest is not effective in affording consumers the protection Congress intended when these laws were enacted.

We recognize the desirability of discussing in advance labeling and other problems which arise under the federal laws which we enforce with manufacturers and distributors and have for many years followed a policy of offering freely our advice and cominents when requested. This procedure does, of course, prevent many violations. We cannot, however, assume the burden of taking these questions up with manufacturers in an informal fashion when misbranded or adulterated articles are encountered within the jurisdiction of the Act. We have likewise learned through long experience that
1973 when litigation is pending against a firm, discussions with the manufacturer or distributor concerning the same or similar issues which are involved in the pending cases have led to serious misunderstandings and ineffective enforcement operations.

Since there are both a prosecution action and several seizure actions pending against Mytinger and Casselberry and products distributed by that firm, we are not in a position at this time to discuss the propriety of the labeling which it is using or which it may contemplate using in the future. When the present cases have been terminated, we will be pleased to discuss with complete frankness our

views as to the requirements of the FFDC Act as they relate to the firm's business.

Very truly yours,

cc LA, cc Div Med, RFK: vqm, 11-4-48; AGM, 12/28

1974 AF 28002 Nutrilite Prods. Los Angeles.

Memo re Lee J. Myers ltr Oct 12th 1948.

This letter comes up for Answer Dec 28 1948 Myers is an astute attorney specialist in F & D cases. He is thoroly aware of procedure. He well knows the scheme of Nutrilite is not in our opinion a slight matter to be settled by talk or correspondence. He really doesn't say anything in his 10-12-48 letter that requires an answer. Our failure to answer cannot prejudice any finding or future action. The letter may be filed without answer with this memo.

(S.) John P. Harvey
Dec. 28-1948

1975 PLAINTIFF'S EXHIBIT 14

COMPARATIVE SALES VOLUME FIGURES

MONTH	SALES VOLUME
August 1948	$518,706.50
September 1948	519,653.50
October 1948	487,610.00
November 1948	466,145.50
December 1948	401,617.50
January 1949	443,832.00
February 1949	413,256.50
March 1949	455,144.00
April 1949	421,071.00
May 1949	423,749.50
June 1949	408,840.50
July 1949	398,246.50
August 1949	466,001.00

1976 PLAINTIFF'S EXHIBIT 15

Monthly List of Distributors

	No. Distrs. Beginning of Month	No. Distrs. Added During Month	No. Distrs. Cancelled During Mo.	Total End of Month
August, 1948	4,622	1,025	261	5,386
September, 1948	5,386	1,308	310	6,384
October, 1948	6,384	911	349	6,946
November, 1948	6,946	758	543	7,161
December, 1948	7,161	559	619	7,101
January, 1949	7,101	499	655	6,945
February, 1949	6,945	481	644	6,782
March, 1949	6,782	684	906	6,560
April, 1949	6,560	558	936	6,182
May, 1949	6,182	544	711	6,015
June, 1949	6,015	570	563	6,022
July, 1949	6,022	512	642	5,902
August, 1949	5,902	691	558	6,035

(Here follow 3 Photolithographs, side folios 1977, 1978, 1979)

10304

PLAINTIFF'S EXHIBIT 16

STANDARD FORM NO. 64

5-31-49

Office Memorandum • UNITED STATES GOVERNMENT

TO : DIVISION OF FIELD OPERATIONS DATE:

FROM : Administration (Interstate)

SUBJECT: Nutrilite

Mytinger & Casselberry Inc
Long Beach Calif (AF 28-002)

As you know, the Administration plans to keep a sustained pressure against this company until an injunction is granted or the criminal case goes to trial. Since we are assuming for the purposes of the seizure actions we are taking, that the composition of the product is that claimed on the label and are basing our seizures principally on the accompanying labeling, we suggest it will be sufficient in the future to collect documentary samples only.

We have prepared a set of mimeographed copies of the principal labeling, the booklet "How to Get Well and Stay Well" for transmitting to the District Attorneys with request for seizure. We have also prepared mimeographed copies of the pertinent portions of the labels on the packages of Nutrilite. Perhaps when you report shipments for sampling, if the plan meets with your approval, you can enclose with the request one of the mimeographed copies of the booklet and package label. The inspector can compare those exhibits with the stock of Nutrilite and its labeling and wire the Administration if they are identical. The seizure recommendation to the General Counsel can then be prepared ~~and held in readiness for the receipt of the documentary sample from the Inspector~~ on the basis of the wire information as to date of shipment, amount, etc.

We hope such procedures will enable us to effect seizure more quickly and will save the cost of the physical samples, which is $19.50 each.

W B Murray

Encl— Ex. A. "How to Get Well & Stay Well
Ex. B - labels (copies)

10308

PLAINTIFF'S EXHIBIT 17

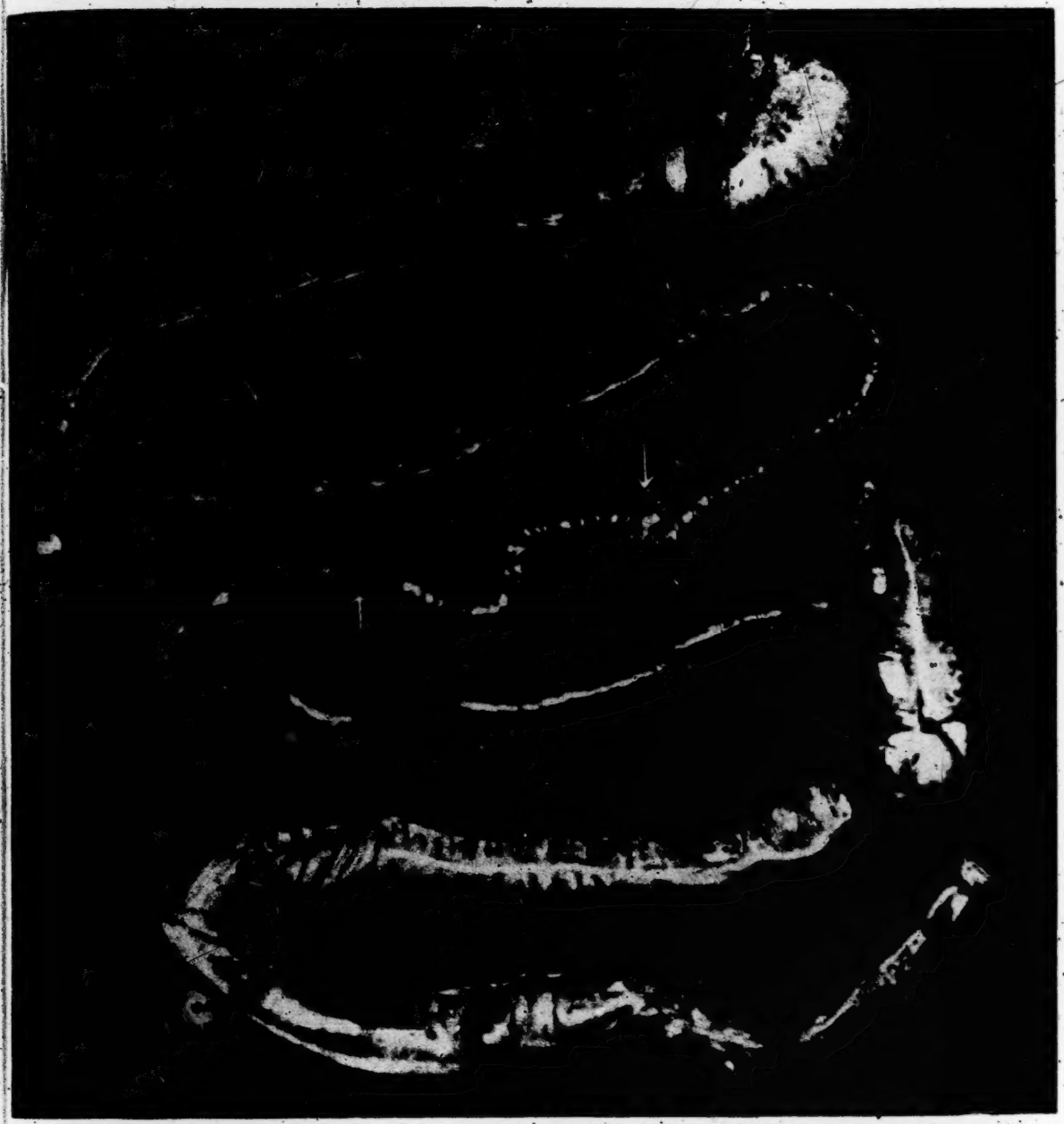


FIG. 42.—Photograph of gastro-intestinal tract of monkey (No. 22, Table II), fed exclusively for a period of 67 days on autoclaved food and onion. The animal (an adult female) died on the same day as her young, which was similarly fed. Note dilatation of empty stomach, also of cæcum and large bowel. Large ileal intussusception is indicated by arrows. Note inert appearance of greatly dilated colon. Intense colitis was present throughout the whole length of the viscus. The subserous ecchymosis, especially at lower part of the colon, can just be made out in the photograph. Compare with Fig. 41.

PLAINTIFF'S EXHIBIT 17

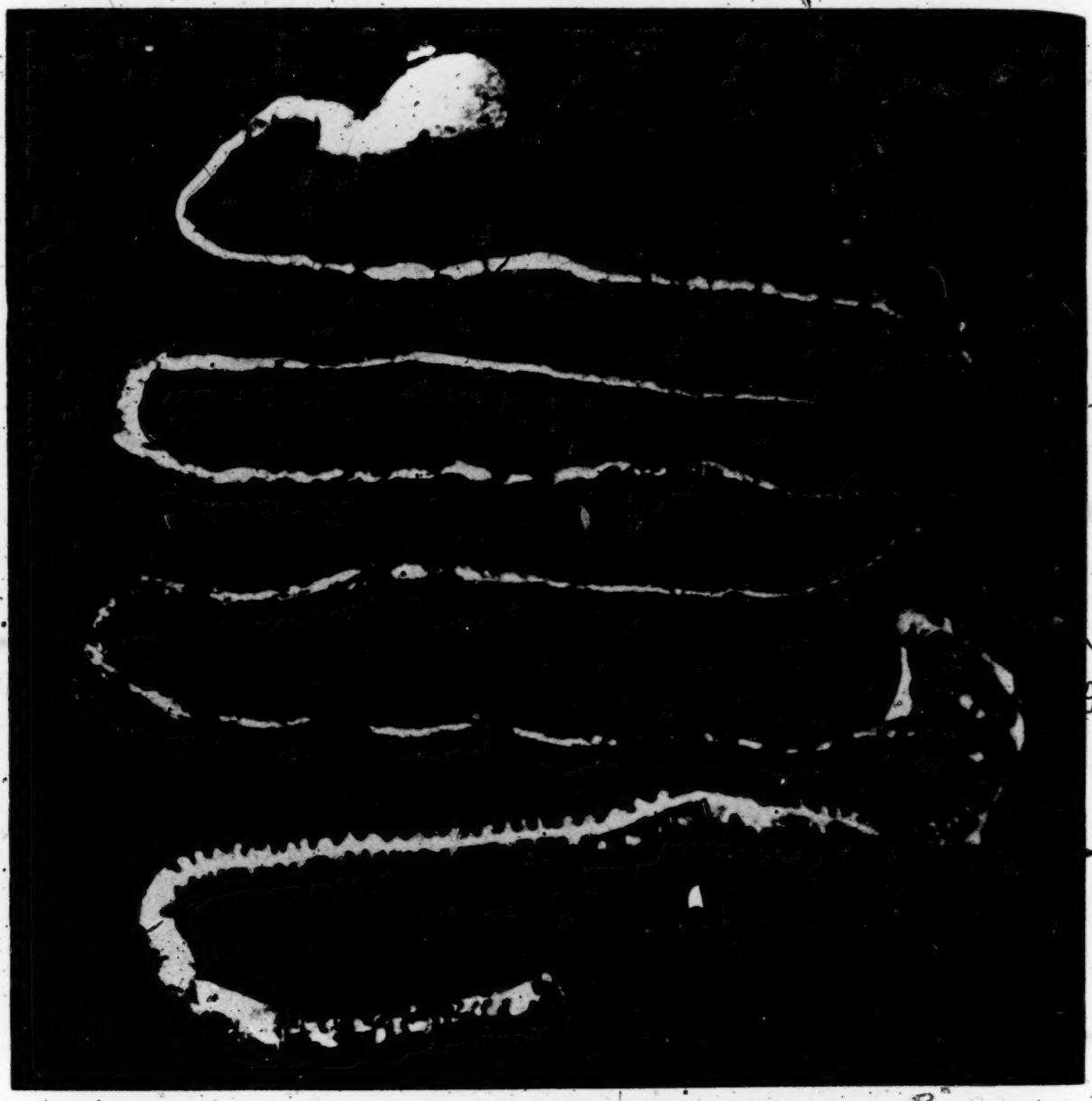


FIG. 41.—Photograph of gastro-intestinal tract of control monkey (No. 18, Table II). Killed on 104th day of the experiment, 15 hours after last meal. Stomach and mid-colon empty, cæcum loaded, lower bowel contains small amount of fæcal matter. Bowel evacuated before death. Same scale as Fig. 42, with which compare.

1980-1981 PLAINTIFF'S EXHIBIT 19

October 4th, 1947

Food & Drug Administration
1401 South Hope Street
Los Angeles 15, California

Re. 82-031/33 and 83-036H.

Gentlemen:

Pursuant to my telephone conversation with your Mr. Born, I submit herewith a written response to the Citation issued under the above number to Lee S. Mytinger and William S. Casselberry.

1st. I request that the response made July 15th, 1947, at the hearing before F. Leslie Hart, Acting Chief of Los Angeles Station, be made a part of this response, and that the information contained herein be added to the response of that date.

2nd. At the hearing held July 15th, 1947, respondents stated that the literature referred to in the Citation had been written by them without benefit of counsel, and that since the receipt of the Citation they had retained the writer to guide them in a revision of all of their labeling, including material not listed in the Citation. Rewriting of the literature used commenced promptly after the hearing of July 15th, 1947, and has progressed as rapidly as possible, considering the quantity of material involved, and corrections required by the writer. The revision of some of the pamphlets has been approved by me, while others are being rewritten to meet objections and criticisms made by me. When finally completed, I am sure that none of the literature will be objectional to the Administration.

3rd. The Deficiency Disease Chart has been discontinued, and all charts on hand have been destroyed.

4th. Labels for all Nutrilite Products have been revised, and proofs have been furnished you by Nutrilite Products Co.

5th. The revision of the labeling has been built around one theme which can be summarized as follows:

"Nutrilite Products are foods for use as a supplement to the regular diet; they do not cure, and are not offered as a cure for anything; their chief purpose is that of a food—to nourish

the body and to provide it with materials for its proper growth and function."

Respectfully submitted,

(S.) LEE J. MYERS,
Attorney for Lee S. Mytinger and
William S. Casselberry.

1982 PLAINTIFF'S EXHIBIT 20

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA—CENTRAL DIVISION

HONORABLE BEN HARRISON, JUDGE PRESIDING

No. 20,289—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE S. MYTINGER, ET AL.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, June 6, 1949

APPEARANCES:

For the Plaintiff: T. G. Klinger, Esq.
For the Defendant Mytinger: J. E. Simpson, Esq.
For the Defendant Caselberry: Lee J. Myers, Esq.

1983 Los Angeles, California, Monday, June 6, 1949. 10:00 A. M.

THE COURT: You may proceed.

THE CLERK: United States of America, plaintiff, vs. Lee S. Mytinger and others, No. 20,289 Criminal.

Mr. KLINGER: Ready for the plaintiff.

Mr. MYERS: May it please the Court, I am Lee Myers. My associate counsel informs me that your Honor gets an impression from a reading of the affidavits, and I am addressing myself to the motion to suppress, that there is a conflict as to whether the defendants submitted to search, as we call it, and the government calls it an inspection of our records, prior to the time we demanded identification and authority from Inspector Gray, or whether we opened our records and then asked him who he was.

I didn't get that impression from reading these affidavits. I thought we were in agreement that the demand was made immediately upon Mr. Gray's coming into the office.

I wanted to make that observation, that if your Honor feels that there is a conflict raised by the affidavits, then I appreciate that you probably did not pass upon this motion.

THE COURT: Counsel, one of the authorities cited to me, that it was within the discretion of the court to pass upon this at the time of trial, I think one of the authorities cited holds something
1984 to that effect. I felt, however, that the motions had to be made in advance of trial to protect your record. I also felt that this is a matter that I could handle better at the time of trial after hearing the evidence. If I hold with you, then I can dismiss those counts and eliminate that from the picture. That is the way I felt. There may be no conflict—I don't know—but I felt I could take better care of it at the time of trial than I could in advance.

Mr. MYERS: Very well, we don't object to that.

THE COURT: I wasn't making any final ruling. The fact of the matter is, I felt there probably was some merit to your position but I felt that I would pass on it at the time of trial. Of course you have asked me to order a return of something to somebody in Washington or Oregon, some merchandise that was bought and paid for at that place.

Mr. MYERS: That is right. I think if your Honor granted the motion to suppress——

The Court: If I suppressed it, they still would have the information but as I say I think that is a matter for the court's discretion and to pass upon at the time of trial.

Mr. MYERS: Very well.

THE COURT: And if I feel at the time of trial that the information was wrongfully obtained, the court can easily take care of those two points.

Mr. Myers: Very well.

Now, we have another matter that I want to bring to your
1985 Honor's attention.

You will recall that in our conference in chambers a few weeks ago I made the suggestion, in the interest of shortening the trial time, that your Honor determine a question which we propose to raise, and that is whether certain literature, which never goes to the customer, can be considered labeling and made the basis of a misbranding count.

I thought we had agreed upon a stipulation and an accounting upon that assumption. I have already brief the questions involved and I have my briefs here. However, we have been unable to agree upon a stipulation. Counsel for the Food and Drug Administration insists upon inserting into the stipulation some controversial matters,

namely, as to what is in these pieces of literature that we say they admit do not go to the customer but go to the salesmen.

They want us to stipulate as to what they contain, and it is our position that it doesn't make any difference what they contain if they cannot be construed as labeling under the Act on the basis that they never go to the customer.

THE COURT: Counsel, I don't want to interrupt you, but you were not present when Mr. Simpson and I had a discussion a few days ago, when I made the statement that the government would have the burden of establishing the use of that literature that went to the salesmen and was not available to the customer or consumer. I told him that they might as well brief that question in advance of trial; and I want to say frankly that I haven't seen the literature that went to the consumer or the literature that went to the salesmen, but I got the idea that there was going to be a dispute as to the meaning of the literature that did go to the consumer. In other words, they make one interpretation and you make another. It is similar to an innuendo in a slander or libel suit.

The thought occurred to me, and I don't know whether it is worth anything or not, but if that dispute does arise it might be that the meaning could be explained by the circulars themselves.

As I say, I have never seen the literature but you say by indirection it may be good—it has curative value for certain things, and leave that impression, and you say it doesn't leave that impression.

Mr. MYERS: May I interrupt? Are you talking about the literature that goes to the customer?

THE COURT: Yes. That might be admissible to explain the meaning of the circular that was sent to the consumer.

Mr. MYERS: You mean the literature that never goes to the customer?

THE COURT: That is just a question or a thought that has come to my mind since discussing the matter in chambers with Mr. Simpson. This subject should be briefed. I realize that it presents a very serious legal question, and when I see the literature I may say, "Well, the literature speaks for itself and the other is immaterial."

As I told counsel for the government, I expect him to brief it and he is going to have the heavy burden of convincing me that that could be used.

Now, that is the way the thing stands.

MR. MYERS: I was hoping we could have a stipulation to the effect——

THE COURT: The question should be briefed and both pieces of literature submitted to the court, and then the court will be able to pass upon the question intelligently when it comes up and during the course of the trial I can rule.

Mr. MYERS: Very well. I have already briefed it.

THE COURT: You may have briefed it but it hasn't done me any good and I haven't had the benefit of the government's brief because I felt the government should have the burden of proof and that their brief should come first.

Mr. MYERS: Very well.

THE COURT: In any event I can't try it until fall. I am not sure just when I can try it.

Mr. MYERS: Then your Honor is perfectly willing to let us submit authorities on that point without a stipulation?

THE COURT: Not only willing but I want to invite it.

Mr. MYERS: Fine. Our only thought was we might shorten
1988 the time of trial considerably.

THE COURT: I realize that, but it presents a very serious question and it might mean the difference; so far as you are concerned, between placing the importance that you do upon it—it may mean the difference of there being a case against your client and not a case, and a ruling on that question is going to be vital to the case.

Mr. MYERS: We feel it will be.

THE COURT: And I would a good deal rather have an opportunity to study it in advance and try to give an intelligent ruling—at least satisfy myself I am ruling on it to the best of my ability—rather than give snap judgment. As a matter of fact, if I were to make snap judgment at the moment I would probably rule against the government, as I told counsel the other day, and you might have been better off to await the time of trial. At that time he may be able to convince me it can be used.

Mr. MYERS: Then the government will submit their points and authorities on that first and then we will reply.

THE COURT: I don't care how you submit them. All I want is the points and authorities.

Mr. MYERS: We have our own.

THE COURT: You might as well submit them and the government will submit theirs within 15 days. Maybe he has his ready. I don't know.

1989 Mr. KLINGER: Not yet, your Honor.

Mr. MYERS: We will serve counsel and file these with your clerk.

THE COURT: Is there anything further you want to add? You wanted to make a speech, didn't you, Mr. Simpson?

Mr. SIMPSON: No; I wanted to try to clarify some matters here which I think will be helpful if we go to trial on this, in settling the issues.

Your Honor has seen the objections that we had filed and the motions to strike from the files the affidavit of Mr. Rowe on our question of guaranty.

THE COURT: Yes.

Mr. SIMPSON: An objection to considering Mr. Rowe's affidavit upon several grounds—one that it was incomplete and lifted excerpts from letters supposedly written by Mr. Myers which were clearly hearsay.

THE COURT: I don't know that I can recall seeing all of those affidavits, but the point that was raised, as I viewed it, was that you have, you might say, two groups of defendants in this case, have you not?

Mr. SIMPSON: Manufacturers and distributors.

THE COURT: Manufacturers and distributors. Now, if this literature was put out by the manufacturer, that would present one picture as far as I am concerned. On the other hand, if this literature,
1990 assuming that it is objectionable, was put out by the distributor, that presents another picture, and I take the position that could not be fully developed in advance of the trial.

Of course our discussions here and the record in court is only partially complete because we have had so many conferences in chambers concerning the trial of this case. As I understand it, the government makes no contention that the product in dispute is not in accordance with the label as to its contents.

Mr. SIMPSON: The labels on the containers themselves. That is my understanding.

THE COURT: And that the government's case is predicated upon a false representation of the curative values of the product.

Now, if the manufacturer had nothing to do with that false representation I don't think the guaranty makes any difference. There is a question as to whether the product conforms to the guaranty—as to its chemical contents—and for that reason I felt that the guaranty in this case, under the facts as they have been represented to me, may or may not be a defense that I couldn't pass on until time of trial.

Mr. SIMPSON: This is what I have been trying to get clear. There is no question about the fact that there is a guaranty contained in this contract.

1991 THE COURT: I understand that, but that doesn't allow you to go out and cause a man to say: "This is common, ordinary table salt," and, because he guarantees that salt, to go out and say that it will cure a person of tuberculosis or something else.

Mr. SIMPSON: Now, here is the point I am trying to get at. This guaranty, which is referred to here, is dated the 1st of September, 1945, and, as I read it, it will protect the person guaranteed that the product is not misbranded within the meaning of the Food and Drug Act.

Now, the point that I am concerned about, and I think counsel for the government should also be, is this: They are seeking here

to hold the manufacturer, and yet they turn right around and attempt to show that the manufacturer isn't liable. They quote from a letter of Mr. Myers in which they say that the manufacturer didn't have anything to do with preparing or delivering the labeling which is involved. If he didn't, then the manufacturer should be eliminated from the case.

Now, let us turn it around the other way. They say in the same affidavit that the distributors prepared the literature which is involved in the case. Now, let us assume that that is true. The question is, When did they prepare that literature and when did the manufacturer have knowledge of it?

Now, my point is this: If this guaranty protects us for
1992 the labeling which was used in connection with the sale of this product as to literature which was prepared before the date of the guaranty—that is the question—are we protected if this literature was prepared before September 1, 1945? In other words, isn't that literature or labeling which was within the knowledge of the manufacturer at the time that he gave the guaranty, and if it was then aren't we protected by the guaranty?

THE COURT: Well, Mr. Simpson, I can't help but think that your experience on the other side of the fence would make it possible for you to easily understand what is happening. Both sides are working against the middle to eliminate the other, and thereby hoping to eliminate both. The trial will develop the facts, and probably at the trial one side is going to fall. If I had my way they would all fall.

Mr. SIMPSON: That would be fine with us.

THE COURT: I feel it is a waste of government money, but as long as the government wants to throw its money away I can't stop it. The new literature that is out cannot be affected by this case, but that is neither here nor there. But having been on both sides of the fence as you have, you can readily appreciate that the first thing you want to do is eliminate the manufacturer, and when he gets through, then he will help the distributor to eliminate himself. That being true, there is only one thing to do and
1993 that is put the whole matter before a jury and if the evidence develops the fact that the manufacturer didn't have anything to say about that, he will go out the door before it ever gets to a jury. But if he did have something to do with it, the jury may well convict them all. They may all be responsible.

Mr. SIMPSON: And that something that he did have to do with it, if he did, was before the date of the guaranty. That being true, then where do we stand? I represent a distributor and not a manufacturer.

THE COURT: I think the label refers to the chemical contents. I think you are trying to work both ends against the middle and I think further it is a question of fact for a jury.

Mr. SIMPSON: I am trying to clarify a question that may be partly factual and may be legal. I don't think the government can ever prove in this case that any of the literature which they are claiming was misbranded was ever prepared subsequent to the date of the guaranty.

Now, my point is that. If I am correct in that assumption, what we want to know is, aren't we protected by the guaranty? and if we are, there is no use in trying the lawsuit as to those people because they would be out.

We think that the guaranty protects us as to literature which was prepared prior to the date of the guaranty. That is part of your general law of guaranty in addition to bring covered
1994 by the scope of the Food and Drug Act itself. That is the point,

THE COURT: According to your contention the manufacturer would be responsible.

Mr. SIMPSON: I am not contending that he is. I am contending the distributor is not. That is the point.

THE COURT: But how can we tell until we get the facts, counsel?

Mr. SIMPSON: If we can get an indication from your honor——

THE COURT: And I am not going to make any.

Mr. SIMPSON: No; what I mean is this. I am not trying to get you to commit yourself, but suppose your Honor in considering the question here involved should say that (if the literature involved in this case and which the government claims constitutes the misbranding) was prepared prior to the date of the guaranty that is involved, then it will be covered by the guaranty.

THE COURT: And yet you ask for no commitment on my part.

Mr. SIMPSON: No. I would probably ask the government for a bill of particulars on the date that they claim the literature was prepared, because, according to my information, it was prior, and if it was, then if your Honor takes the view of the law which we think is correct, the distributors would be out.

1995 THE COURT: I thought you were asking for no advance ruling or commitment.

Mr. SIMPSON: I am only asking for an indication of it and then it would be covered by a bill of particulars.

If your Honor on the other hand says: "Well, you are not protected by your guaranty"——

THE COURT: What difference would it make as long as you are not asking for a commitment?

Mr. SIMPSON: It might have a little persuasive effect.

THE COURT: If what I have said hasn't any persuasive effect, I don't believe my ruling would.

Mr. SIMPSON: I think they are on the wrong track and I think in clarifying some of these things for them they might help, and if they had to sit down and find out specifically the dates that

we are talking about here and they knew that anything written before a given date was protected by the guaranty, they would soon find out whether they think they have a lawsuit and want to spend the taxpayers' money.

THE COURT: You are so far in the clear. I don't know what you are worrying so much about.

Mr. SIMPSON: Well, your Honor, as one who is always urging the saving of time and trying to clarify matters, I think certainly this would clarify it one way or the other.

THE COURT: These are matters that you and counsel will have to settle between yourselves.

1996 If there are any legal problems you want to brief in advance, you may do so and I will rule on them like on the question involved.

Mr. SIMPSON: There is a legal problem that is before your Honor right now and that is this, that we set up a guaranty.

THE COURT: I know that.

Mr. SIMPSON: A continuing guaranty.

THE COURT: After all, what we are doing here is more or less a pretrial. You are asking the government to disclose its hand and maintaining the position that you do not have to disclose anything.

Mr. SIMPSON: I am saying they have to disclose what they claim to——

THE COURT: I don't think so.

Mr. SIMPSON: —and what they show constitutes a defense against the guaranty. That is the basis of our motion to dismiss.

THE COURT: I told you the other day what I was going to do with it.

Mr. SIMPSON: I know you did.

THE COURT: I told you I would listen to you today, or you could hire a hall.

Mr. SIMPSON: Well, I am not hiring a hall. The illustration which we made the other day was a case of an advertising

1997 agency that was hired to write literature, and after it had been written they decided that the manufacturer——

THE COURT: Pardon me, counsel, but the only thing you are asking me to do is to virtually grant a summary judgment.

Mr. SIMPSON: No, I have a motion to dismiss here.

THE COURT: It would have the same effect and that would be a one-sided approach and the defendants wouldn't have to say anything. They wouldn't have to commit themselves. All you are asking for is something from the government. As I told you, I think it should be tried and it is going to be tried. It is my duty to try the case. I am not the United States Attorney. Probably, if I was, you wouldn't be here today or I wouldn't be the United States Attorney very long, one or the other. But that is neither

here nor there. I have to try the case and if there is a violation of the law the chips will have to fall where they may. I feel that this case in many respects is moot, but I will try it and rule the best I can. The facts will be up to a jury unless there is a ruling that is vital to the case, then I would have to grant a motion.

Mr. SIMPSON: That was the purpose of this motion, your Honor.

THE COURT: But you are asking me to do something in advance and I am not going to do it. You are asking me to pre-judge and pre-try a case, and I am not going to do it.

1998 Mr. SIMPSON: We are asking you to pass on this motion to dismiss on the grounds of the guaranty.

THE COURT: And I told you I wasn't going to do it.

Mr. SIMPSON: Then what are you going to do?

THE COURT: Deny your motion. You knew that Friday when you talked to me when you were in chambers with Mr. Klinger.

Mr. SIMPSON: So we may have the record clear, your Honor, will you now rule upon the objections which we made to Mr. Rowe's affidavit?

THE COURT: I will deny the motion to dismiss.

Mr. KLINGER: Before the denial, there were objections to Mr. Rowe's affidavit because I didn't quote from an entire letter. We did that in an effort to keep the document to a minimum, but in order to cure that defect, if such it be, we are prepared to prepare a supplemental affidavit which I will give to Mr. Simpson and Mr. Myers that has duplicate originals of the letters in their entirety, and I ask leave to file this supplemental affidavit at this time.

THE COURT: Did you furnish copies to counsel?

Mr. KLINGER: Yes.

Mr. SIMPSON: We agree the objections heretofore filed may be applied to this affidavit?

Mr. KLINGER: Yes.

THE COURT: I am simply denying the motion.

Mr. SIMPSON: Then I take it your Honor is also overruling
1999 the objections and the motion to strike the Rowe affidavit?

THE COURT: It is covered by your general motion, your motion to dismiss.

Mr. SIMPSON: No. There should be a subsidiary ruling on that.

THE COURT: I will deny it.

Mr. SIMPSON: If the affidavit of Mr. Rowe is not in the file, then we would have an uncontradicted motion which your Honor —I don't know that he would grant it or deny it in view of the state of the record.

THE COURT: I am still going to deny the motion.

Mr. SIMPSON: Then both motions will be denied?

THE COURT: Yes; three of them if necessary, counsel.

Mr. SIMPSON: I don't know of any others.

Mr. KLINGER: May I ask, was there a ruling that we would have 15 days to file authorities on the other subject? We would like a little more time.

THE COURT: I am starting tomorrow morning on a case that will take three weeks to try, and I will not have time to consider them before that time.

Mr. KLINGER: We would like at least 30 days.

THE COURT: I told you before, it will be after the summer vacation before this case can be tried, so there is no reason why anybody should be rushed.

Mr. KLINGER: Will your Honor set a date for the setting?

2000 THE COURT: I am not going to set a date until the second Monday in September.

Mr. KLINGER: It will be on for setting at that time?

THE COURT: Yes.

Mr. KLINGER: What date is that?

THE COURT: The Clerk will give you the date.

Mr. SIMPSON: And may we have 10 days to answer?

THE COURT: Yes.

THE CLERK: That is September 12th, the second Monday in September.

(Whereupon, at 3:00 o'clock p. m., the above-entitled matter was concluded.)

2001-2002 CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17 day of June, A. D. 1949.

J. D. AMBROSE,
Official Reporter.

2003 PLAINTIFF'S EXHIBIT 21

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Civil Actions
No. C 11705—F.D.C. 25789
No. C 11878—F.D.C. 26123

UNITED STATES OF AMERICA, *Libelant*,

v.

91 PACKAGES, MORE OR LESS, LABELED IN PART: "NUTRILITE FOOD SUPPLEMENT . . .", ETC., *Respondent*,

89 PACKAGES, MORE OR LESS, LABELED IN PART: "NUTRILITE FOOD SUPPLEMENT . . .", ETC., *Respondent*,

MYTINGER AND CASSELBERRY, INC., A CALIFORNIA CORPORATION, 1724 SANTA FE AVENUE, LONG BEACH, CALIFORNIA, *Claimant*.

[Hearing on motion to consolidate and remove case to California.]

Newark, N. J., Monday, September 19, 1949.

Before THE HONORABLE GUY L. FAKE, U.S.D.J.

APPEARANCES:

Roger M. Yancey, Assistant United States Attorney, and Alvin Gottlieb, Attorney for Federal Security Agency, for Libelant.

Stryker, Tams & Horner, by Walter F. Waldau; and Charles S. Rhyne [Of Washington, D. C.], for Claimant.

2004 Mr. WALDAU: If the Court please, I have a motion which was on the list this morning. It had originally been on your list and was taken off pending proceedings in the United States Supreme Court. We were waiting in Judge Meaney's court and he has asked me if I could make an application to yo if you would hear it because he has just started a motion which counsel assures him will take two hours.

THE COURT: Very good, I will hear it. Take a recess for a minute.

(At this point a short recess was taken.)

THE COURT: What is the nature of this?

Mr. WALDAU: This is the removal of a case from this District to California.

THE COURT: Proceed.

Mr. WALDAU: If the Court please, in these motions in two matters, the motion is identical, and Mr. Charles Rhyne, of the Washington Bar, also a member of the Bar of the Supreme Court, is going to argue this matter for the defendant.

THE COURT: Very good.

Mr. WALDAU: May I introduce him and have him admitted in this cause?

THE COURT: Very glad to have you speak in the cause, sir. What is the title of this?

THE CLERK: There are two motions, No. 35 and No. 37, to be argued, as I understand it,——

2005 Mr. WALDAU: As one.

THE CLERK: As one motion.

Mr. WALDAU: As one motion. It is the same motion for both cases. The United States of America——

THE COURT: 35 and 37?

Mr. WALDAU: That's right.

Mr. YANCEY: If your Honor please, before we proceed I would like at this time to present to the Court Mr. Alvin Gottlieb, of the Federal Security Agency, a member of the District of Columbia Bar, who may participate in this hearing.

THE COURT: Very glad to have the gentleman speak in the cause.

Mr. WALDAU: May I submit our brief (handing up)?

Mr. RHYNE: May it please the Court, in this case, in these consolidated motions, the question is whether ten libel actions filed by the Government in nine different federal courts throughout the country should be consolidated for one trial and removed to Los Angeles, California, within twenty-five miles of our principal place of business. Our position is that since we have fifty witnesses who will be called and it will take about a month to try the case, and all of those witnesses are within this Los Angeles area; where our principal place of business is located, and since the Government worked up its entire case against us in Los Angeles and we believe that nearly all of their witnesses are there, that is the logical and
2006 most convenient place both for the parties and in the interest of justice to have the trial of this case.

Now, in a moment I will call your attention to the provision of the statute which gives us a right to a consolidation and to removal, so the only question before your Honor is the place of removal. I don't know just exactly what the Government's contention will be on that but I assume that they will make a contention which they have made in other cases, that these can only be consolidated and removed to the adjacent district, federal district, which in this instance would be five hundred miles away, in San Francisco, California, or five hundred miles in the other direction, in Phoenix, Arizona. I don't know whether that is the argument they will make but it is an argument they have made in other cases, so I assume

they will make it here; and it is our position, of course, that the trial should be in Los Angeles.

I would like to give your Honor just a word as to the background and the facts in these cases. The Government does not contend there is anything wrong with our product. Their entire attack is on our advertising pamphlet. The first seizure was made in Belleville, New Jersey, on October 6, 1948, and in that seizure they said that pages 37 through 58 of our pamphlet, containing certain testimonials, were false and misleading, and then they proceeded to make certain other seizures, in Spokane, Washington, St. Petersburg,
2007 Florida, Hastings, Nebraska, Clarkfield, Minnesota, Buffalo, New York, New York City, and Chicago, Illinois, and then another one here at Belleville, New Jersey.

The reason there are two motions is that when we received notice of the first seizure and what the Government was objecting to we notified all our salesmen to tear pages 37 through 58 out of the pamphlet and we would sell only with the first 36 pages. Then the Government made a finding that those 36 pages were misleading and started making more seizures, and then we added six pages to try to round out the pamphlet a little bit and they said that was misleading, too; and so then we conferred in Washington with them as to what we could do to try to comply with the law and they said that since we are in litigation, there was no advice they could give us. So we brought an action for an injunction in Washington and at the present time we are before a three-judge court in Washington and that court has enjoined the Government from making further seizures. We had claimed oppressive conduct in that they had deliberately planned these seizures so as to get us a long ways from our home in Long Beach, California, and we also attacked the constitutionality of one phase, one part, of the act that allowed the administrator of the Federal Security Agency to make a decision condemning our literature without giving us a hearing.

Now, they gave us this injunction, and then the reason the
2008 motion was taken off your Honor's calendar before was that the Government went to the Supreme Court of the United States, asking a writ of prohibition or mandamus and vacation of the injunction. The matter was argued at great length before the Supreme Court on the 16th of May and then they summarily denied the Government's petition asking that the injunction be vacated and set aside before we have a full hearing on the merits in this case——

THE COURT: Well, why can't everything be stayed until that issue in Washington is decided?

Mr. RHYNE: The contention of the Government, your Honor, is that that court can only hear the issue of oppressive conduct and constitutionality; that it can't hear the issue as to the nature of our label.

THE COURT: Yes, but why then can't everything be held? Why should there be so many suits?

Mr. RHYNE: Well, of course, the suits were stopped, you see, by the injunction, and we thought that we should move as expeditiously as possible to get these consolidated and removed out to Los Angeles for trial.

THE COURT: Aren't these suits all stayed now?

Mr. RHYNE: Yes, they are, your Honor; they are prohibited from doing anything.

THE COURT: What are you seeking now? Why are you seeking consolidation?

2009 Mr. RHYNE: The reason we are seeking consolidation and removal to Los Angeles is this, your Honor: The Government has advised us that they are going to file an injunction action out there against us, raising all the same issues that are involved in these libel actions. They contend that this issue of the misleading character of our pamphlet is not before the three-judge court, and of course——

THE COURT: Well; now, if they bring that action out there in Los Angeles, all these other actions will be stayed pending decision there—not actually stayed, but they wouldn't proceed with them, would they? or is it the Government's intention to proceed in all these different districts at about the same time?

Mr. RHYNE: Well, of course, the injunction keeps them from proceeding in these particular libel actions except the first one, they can proceed with that, and that is set for trial here or would be set for trial here in New Jersey, you see, and of course we want that one removed out to the Pacific coast, because we want a jury trial in these cases, and of course if they go by injunction we don't get a jury trial.

THE COURT: Why shouldn't this court stay its hand until the issue of constitutionality is disposed of? Why shouldn't all the courts wait, when so important an issue as that is being argued before the United States Supreme Court and in which they have refused

2010 to discontinue their injunctive order? Why shouldn't all the courts wait, including this one, holding everything in status quo?

Mr. RHYNE: Well, if the Government would agree as to the issues that are to be tried before that three-judge court—you see, the three-judge court has fixed two issues: one, the oppressive conduct of the Government, and two, the constitutionality——

THE COURT: Well, the three-judge court sits on the constitutionality of the statute primarily, doesn't it?

Mr. RHYNE: Yes, your Honor.

THE COURT: Nothing else.

Mr. RHYNE: They can consider——

THE COURT: Aside from factors that are necessary to——

Mr. RHYNE: —To pass on it.

THE COURT: —raise the issue.

Mr. RHYNE: That's right, your Honor. So we still have got to find out what we can do about this advertising pamphlet. Otherwise, when the three-judge court is finished, why, we still have this issue to be decided. So we would like to get it removed——

THE COURT: If the three-judge court decides the act is unconstitutional, that would set you free all around, wouldn't it?

Mr. RHYNE: No, your Honor, it wouldn't, I don't believe; because they don't pass on this issue——

2011 THE COURT: Well, then, there wouldn't be any act under which they can do what they are doing now.

Mr. RHYNE: There would be because the part that we attack is only the part that allows them to condemn our label——

THE COURT: Oh, yes

Mr. RHYNE: —at an administrative hearing without giving us a hearing, you see. They had an ex parte hearing and made this decision and our attack is on that, that they didn't give us a hearing before they made the decision that our label was bad, this pamphlet. So we still have the issue of what we can do and whether or not we are right or whether the Government is right about this advertising pamphlet.

This statute provides specifically for consolidation of this type of case and removal to a district——

THE COURT: What is the language of the statute on that?

Mr. RHYNE: It says, "When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings upon application of the claimant seasonably made to the court of one such jurisdiction shall be consolidated for trial by order of such court and tried in (1) any district selected by the claimant where one of such proceedings is pending or (2) a district agreed upon by stipulation between the
2012 parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried."

And of course, as I say, your Honor, we say that Los Angeles, the district court there, is a district of reasonable proximity to claimant's principal place of business because it is twenty-five miles away.

THE COURT: And I suppose they take the position that "proximity" means outside that jurisdiction.

Mr. RHYNE: Yes, they do, your Honor; which, as I understand, would be San Francisco, five hundred miles away, or Phoenix, Arizona, five hundred miles in the other direction. Now, I think that the situation on proximity—we think that on this very language we are entitled to have it moved to Los Angeles but there is something that has happened since that language which we think governs now; that is, the new judicial code, which your Honor may be familiar with; section 1404, that provides for removal of any civil action, to any district court where it might have been brought,
2013 and of course this could have been brought in California; and the Supreme Court of the United States in three very sweeping decisions on the 31st of May held that that language, "any civil action," means exactly what it says. And the Government participated in one of those cases. This is the case of United States vs. National City Lines. There the Supreme Court on the 7th of June, 1948, held that since the anti-trust law gives the plaintiff his option of where to maintain his suit, you couldn't remove a case from Los Angeles to Chicago, under the doctrine of forum non conveniens, because there was no statutory provision allowing it. As quick as this new judicial code went into effect in September, 1948, they again moved to move it to Chicago and an order was so entered by the district court out in California, and then the Government contended that since the anti-trust laws were not named in the new judicial code, you couldn't make such an order, that still the anti-trust laws controlled; and the Supreme Court of the United States said this:

"In taking the position that the District Court lacked authority to enter its order of transfer, the Government has advanced many of the arguments which we have already considered today—and rejected—in Ex parte Collet, ante, * and Kilpatrick v. Texas and Pacific R. Co., ante, * in which we held that actions under the Federal Employers' Liability Act were now subject to the
2014 doctrine of forum non conveniens. The Government contends, for example, that Congress intended § 1404 (a) to apply only to actions the venue provisions of which were formerly contained in Title 28, rather than to 'any civil action' "—and they point out that ("the venue requirements in antitrust cases are defined in 15 U. S. C. § 22; in Liability Act cases, 45 U. S. C. § 56); and that the legislative history establishes very clearly that Congress had no desire substantially to change the law—indeed, the Government urges us to disregard the reviser's notes which were printed in the House Reports. We cannot accept this position for the reasons discussed in our previous decisions today."

And in those previous decisions the court simply said that when they said that a district court could transfer any civil action for the

convenience of parties and witnesses, in the interest of justice, it meant just what it said, and their argument that Congress didn't understand what they were talking about was all wrong, simply because they didn't refer to anti-trust cases.

Now, there is one other provision of law I would like to call to your Honor's attention; I think it is very important here. It is in section 1404 subsection (b), the second sentence. It provides this:

"Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request
2015 transfer."

And of course we are the only party and we do request transfer.

And so we believe, if your Honor please, that this is a case where, as I say, all the witnesses and records are in Los Angeles, are near Los Angeles, at our plant, twenty-five miles away, and we think that for the convenience of the parties and witnesses and in the interest of justice, there is where the trial should take place. It will take over a month to try the case. It is a very complicated case. I haven't gone into——

THE COURT: What is it; a health product?

Mr. RHYNE: No, your Honor, it is a vitamin product.

THE COURT: A vitamin.

Mr. RHYNE: And as I say, they don't say there is anything wrong with the product; they say that a pamphlet we use is false and misleading; and as I explained to you, when they first pointed out the parts of it they objected to, we took them out, and then we tried to go ahead with the other and when we did that, they said they couldn't talk to us while the litigation was on. So there is nothing else we can do but try the issues; we are just right up against it. And we think, if your Honor pleases, that aside from the argument that they will try to make about this Food and Drug Act only letting us come to the adjacent district—and I am not going
2016 into that in detail; I have a complete answer to that, I think, because the words "a district of reasonable proximity" would certainly mean twenty-five miles rather than five hundred miles. There has never been a case—they have won three cases holding it is the adjacent district there but there has never been a case involving the great distance we have here, and there has never been an appellate court case. Three district courts have made that holding that it is the adjacent; but aside from that, as your Honor can see, this new judicial code superseded the anti-trust law, superseded the Federal Employers' Liability Act, and certainly it superseded that, and it simply means that your Honor does have the authority to move this case where it will be most convenient for the parties and witnesses, in the interest of justice.

Mr. YANCEY: May it please the Court, the Government objects to the motion made by counsel for removal and consolidation of these cases to its home district in Long Beach, California. I might say at the outset, sir, that the history of this case as outlined by Mr. Rhyne really has no place at this particular hearing. Whether or not there are suits pending in Washington before a three-man court, whether the Government's actions were arbitrary and oppressive and what-not, has no place in the issue which is brought squarely before your Honor this morning.

There are two things, it seems to me, which should disclose
2017 and bring clearly to this Court the reasons why this suit or these suits should not be consolidated and removed to the Southern District of California at Los Angeles, which as I understand it, is about twenty or twenty-five miles from the place of business of the claimant company. In the first place, as counsel stated, for the claimant, some of these suits were instituted back in October of 1948, and one of the provisions of the act says that the application for removal should be "seasonably" made. It is our understanding that, as a matter of fact, when one of the seizures now pending in the District of Nebraska is ready to go to trial, they have made no effort at all to proceed seasonably with this motion.

Number two, it points up very clearly to us that if we do not consent, and we have refused to stipulate, that this be taken to any particular district, upon application to the court and good cause being shown, the court can order the removal for trial to a district of reasonable proximity.

Now, I might call to your Honor's attention that the Food and Drug Act did not——

THE COURT: Proximity to what?

Mr. RHYNE: To the place of business of the claimant.

A careful study, sir, of the legislative history of this act points up clearly the reasons for it. We didn't write the act; we simply
2018 are attempting to carry out the legislative intent of Congress; and with your Honor's permission, during the debate on this bill, in discussing what is reasonable proximity, one of the members of the House stated, Mr. Houston: "Then as I understand it, under the provisions of this bill, it is providing for what might be called neutral ground."

Mr. Lee, another member of Congress, said "That is the object."

THE COURT: Well, apparently from what counsel on the other side said, those notes were stricken out; the Court paid no attention to them, the United States Supreme Court.

Mr. YANCEY: That is correct, sir.

Mr. RHYNE: I beg your Honor's pardon?

THE COURT: Read it

Mr. RHYNE: The Supreme Court left the injunction in effect and——

THE COURT: No, in the course of your argument I think you read something to the effect that the committee members' notes were disregarded by the Supreme Court and they took the language for what it actually meant.

Mr. RHYNE: That's true; I did read that language, your Honor.

THE COURT: That appeared in the Supreme Court opinion.

Mr. RHYNE: That appeared in the Suupreme Court opinion.

THE COURT: Read that. Do you have it there.

2019 Mr. RHYNE: Yes, I do, your Honor.

Mr. YANCEY: But may I say this? unless you want to get——

THE COURT: Don't waste any time on those notes. The Supreme Court has rejected them.

Mr. YANCEY: But they were considering two separate items. What he is talking about, the legislative notes, were the ones regarding the 28 U. S. C. 1404, which have nothing to do with the enactment of the Food and Drug Act.

THE COURT: Well, all right; the United States Supreme Court went so far as to say that it applied to any and all actions, and that was with specific reference to Government bureaus.

Mr. YANCEY: We have an answer to that, sir. That simply means the moving of a civil action from one division to another. In section 1404 it says here, "For the convenience of parties and witnesses, in the interest of justice, a district Court may transfer any civil action to any other district or division where it might have been brought." But you must remember, sir, that this is an action in rem. You only bring it where the goods are seized, and when the seizure has been made upon an order of court, the monition issued, that court takes jurisdiction. Even in an admiralty proceeding, not a civil action, such as contemplated by this particular section, you couldn't——

THE COURT: I suppose these booklets have been libeled; 2020 is that it?

Mr. RHYNE: Yes.

THE COURT: Proceed.

Mr. YANCEY: That's right. Now (b), section (b) of 1404 says this:

"Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature, or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district."

Now, you see, if Congress——

THE COURT: Well, we don't have any such thing as a division.

Mr. YANCEY: That's what I am going to say now. So you see, if Congress had intended——

THE COURT: Some of the western States have divisions, but we don't have them.

Mr. YANCEY: That's right, sir, we don't have them. But let me point this out to you: If Congress had intended that an action of this kind could be moved from one district to the other it would have been put in (a) rather than in (b).

THE COURT: It seems to me to be founded in good, sound logic and commonsense that a case should not be commenced in New Jersey where all the witnesses come from California. It
2021 seems to me to be the equivalent of what our ancestors fought against when they complained about trials beyond the seas, and our Congress has apparently taken notice of that and made provision for bringing the suit in the vicinage where it can more conveniently and inexpensively be dealt with. Now if the place of business with which we are concerned here is Los Angeles, it seems to me an outrageous thing that fifty or sixty witnesses should be brought from Los Angeles, be kept in hotels at the expense of those parties for perhaps thirty days, while a case is being tried, when it could be tried right where they are.

Mr. YANCEY: Now just one minute, your Honor. May I make this objection? We are not opposing this from the point of view of having the case stay here in New Jersey. We are simply following the law. The law says, in accordance with the statute and everything else, the forum of reasonable proximity. Now, we will stipulate, agree, that this case be tried in Arizona. The law says that it should not be tried in the district in which the company is located; that's clear. But——

THE COURT: Just a moment on that. You read the statute to me or gave me the substance of it a moment ago and I asked you "Proximity to what?" and you said "Defendants here—proximity to their place of business."

Mr. YANCEY: At the adjacent district. That is what is
2022 meant.

THE COURT: Now the nearest approximation to their place of business is Los Angeles, twenty-five miles away, isn't it?

Mr. YANCEY: Well, they live in that district, sir. That's the very thing that the Congress attempted to get around when it passed this law; it said "reasonable proximity," and I was reading to you, sir, the excerpt from the debate and I didn't get a chance to finish it.

THE COURT: Well, I take it from what you say now that if you were to take all of the nine cases and consolidate them and bring them in that district, you would consent to it.

Mr YANCEY: No, no; we would be willing to consent to the consolidation of all nine cases and letting them take it to Phoenix, Arizona. Now the reason that we are not——

THE COURT: Now just a moment.

Mr. YANCEY: Yes.

THE COURT: Is the other side satisfied with that?

Mr. RHYNE: No, your Honor. That's five hundred miles away. We would still have to move our fifty witnesses. I don't know how many they have but they must have that many; they worked this case up against us in Los Angeles. There is where all of their records are; there is where all of our records are. We are twenty-five miles from Los Angeles. We can bring our people in each day.

Mr. YANCEY: Now, may I say this, too, your Honor? that
2023 in the Northern District, the next one so far as we are concerned will be the Northern District of California——

THE COURT: Have you any cases? Have you any cases?

Mr. YANCEY: I haven't gotten a brief prepared, sir. I was only served with a brief this morning in it. But may I say this? Now the Northern District of California——

THE COURT: Just a moment. We will save some time.

Do you have a brief?

Mr. RHYNE: Yes.

Mr. WALDAU: I gave your Honor our brief.

THE COURT: All right; did you give them a copy?

Mr. WALDAU: Yes, we gave them a copy this morning. I understand the Department at Washington had a copy of that same memorandum some months ago.

Mr. YANCEY: I didn't see it, sir.

THE COURT: Mr. Yancey, how much time do you want to answer it?

Mr. YANCEY: What is that, sir?

THE COURT: How much time do you want to answer it?

Mr. YANCEY: Well, I think we ought to have—there isn't any rush about this thing, as far as I can see.

THE COURT: You could answer it in what—twenty days, ten days?

Mr. YANCEY: May I make one observation, your Honor? I would like very much for Mr. Gottlieb to answer just one angle that
2024 I think we ought to try to make clear to your Honor, if you will hear it.

THE COURT: I will be glad to hear it.

Mr. YANCEY: Then we will take about twenty days to answer. I think he could perhaps emphasize one point that we would like very much to make clear to you.

THE COURT: Yes; I will be glad to hear him.

Mr. GOTTLIEB: If the Court please, there have been many statements made this morning which are not precisely correct and I should like this opportunity to correct them.

In the first place, the injunction that stands against the administrator of the Federal Security Agency, the Attorney General, and several subordinate officials of the Food and Drug Administration

is not on the basis of harassment of the claimant here. I should like to point out that the issues, incidentally, which Mr. Rhyne kept referring to as the Government's issues, were drawn up by the Court, the three-judge court, in a pre-trial proceeding, and that one issue deals only with the constitutionality of one portion of the act, purely a point of law.

THE COURT: What point is that? What section?

Mr. GOTTLIEB: 304(a).

THE COURT: That doesn't mean much to me.

Mr. GOTTLIEB: Well, the section provides that if, without hearing, the administrator of the Federal Security Agency determines
2025 that reasonable cause exists to believe that a product, a product label, is materially misleading, to the injury or damage of the purchaser or consumer, he then has the authority to provide for multiple seizures, which is more than one seizure, which happened in this case. The administrator has determined, or his subordinates have, that this product, Nutrilite, is materially misleading, to the injury or damage of the purchaser or consumer, and then went about making ten seizures.

THE COURT: Apparently the issues that would be raised here would not be the same as they would be if the mails were involved; is that right? May I say this: Where the mails are involved, as I remember it, dealing with a medicine or a system of treatment for disease, the United States Supreme Court held in, I think it is called, the Magnetic Healing case, out in California, that where the Government was proceeding before the Postmaster General's authorities upon opinion evidence, it had no jurisdiction; that there had to be a plenary suit and a trial to a court where there was a difference of opinion among specialists, scientists and the like. Do you remember that case?

Mr. GOTTLIEB: Yes, sir; I am very well acquainted with that case.

THE COURT: Does this case fall in the same category?

Mr. GOTTLIEB: The Government does not believe so, sir,
2026 because this product is a simple vitamin and mineral preparation, something that is not unknown or experimental.

THE COURT: It is complained in this case that they put out false statements. Are those statements of experts or are they statements by users of the formula, whatever it is?

Mr. GOTTLIEB: Several of the libels were based upon so-called testimonial letters incorporated into the booklet which they disseminated.

THE COURT: Where someone, a user, said he was cured by it?

Mr. GOTTLIEB: Users, that is correct.

THE COURT: Now it was that individual's opinion that he was cured, wasn't it?

Mr. GOTTLIEB: That's right. It has absolutely no value before the law, so far as competency is concerned. An individual cannot testify as to his illnesses, as to what he has—he is not competent to; and he cannot repeat what his doctors told him on the ground of being hearsay.

THE COURT: What is supposed to be the virtue of this thing we are talking about?

Mr. GOTTLIEB: The Government's position is this: They put out a multi-vitamin and mineral preparation which contains practically every known vitamin and mineral there is. Now that's perfectly fine except that it is sold in connection with a certain booklet,
2027 certain booklets, I might say, pamphlets, and the Government has alleged that these pamphlets represent and suggest that this Nutrilite, this vitamin and mineral preparation, will cure almost everything, every disease known to mankind, right from cancer and tuberculosis down to I don't know what, but anything. They also represent that almost every disease that any individual in this country has is due to a diet deficiency, every common disease is due to simple diet, and if you take vitamins and minerals, you won't get those illnesses because the body will just throw them off. Now this company has in the past two years——

THE COURT: Well, in that Magnetic Healing case it was worse than that. It was a philosophy that the Court sustained—a mental attitude, with no medicine at all, scientific, Christian or Biblical teachings and the like, philosophies of cure that have nothing to do with Materia Medica, and they held people can advertise those things.

Mr. GOTTLIEB: Well, I might point your, your Honor,——

THE COURT: Take, particularly, such religions as Christian Science, and you have many of them out there in Los Angeles; it seems to be headquarters for that sort of thing.

Mr. GOTTLIEB: They are not selling a drug, your Honor. You may have a philosophy of life——

2028 THE COURT: That would seem to be a complete answer: they are not selling a drug; but they are selling a teaching, and if that is false, on the same theory as you say the teaching of the use of medicine is false, it would fall pretty close to being equal to each other.

Mr. GOTTLIEB: Well, I don't know in whose jurisdiction that would be. I can only say, in answer to that, that the Food and Drug Act, the Federal Food, Drug and Cosmetic Act, is only for the sale of drugs, foods and cosmetics, and even if somebody were disseminating a false philosophy——

THE COURT: I interrupted you. You wanted to make some special point.

Mr. GOTTLIEB: Well, your Honor I just wanted to point out that the issue in the three-judge court case in the District of Columbia is not that we are harassing these people; it is that we have been

oppressive and arbitrary in not affording them a hearing before we took this action; and what we say is simply that the act by its terms specifically says the administrator may make these findings without a hearing. But it has absolutely no bearing upon the various libel actions. The question there isn't a question of the merits.

THE COURT: The question there is whether the act of the Congress can rise higher than the Constitution, isn't it, that is before them?

2029 Mr. GOTTLIEB: Well, that's purely a constitutional point. I really don't want to go into it here; but the only thing I am trying to distinguish is the issues in that case and the issues in these various libel cases. There are two issues only in the various libel cases: (1) Does the booklet say what the Government says it does? (2) if it does say what the Government says it does, will the drug be beneficial in those respects? That——

THE COURT: Will you show me a page of what you are objecting to? I just want to see a page of it so that I will better understand these arguments. Let me have a copy of the booklet with the six or seven pages which you struck out.

Mr. RHYNE: Your Honor, I do not have a copy of the pamphlet. I would be glad to submit it. I will say to you this: It was presented to the Supreme Court and several other courts it has been before, and every statement by Mr. Gottlieb about its contents was seemingly rejected by those courts when they rejected the arguments made by the Government, because they looked at the pamphlet in question.

Mr. GOTTLIEB: I should like to point out, your Honor, that when this case first came before the three-judge court, they acted under the erroneous assumption that they were to try the merits of the case; that is to say, that they were to determine whether this stuff was any good for what they claim it to be good for. And

2030 so we went to the Supreme Court for a writ of prohibition only on the basis that they had no jurisdiction to try that issue. That was the issue pending before the various libel courts. Now on the return that the three judges made on the writ to show cause, they said that they weren't going to try that at all, that we were mistaken, and so the Supreme Court said, and there is no extraordinary remedy required. And then after they returned the writ to show cause in the Supreme Court, they put out these two issues, and if your Honor would like to look at them, you will see that the issues are entirely different (handing to the Court), that the merits have not been questioned, have not been inquired into, and will not be.

[At this point a short interruption in the hearing occurred.]

THE COURT: How far does that injunction issued by the three-judge court in the District of Columbia go? Does it have the effect of staying all litigation everywhere?

Mr. GOTTLIEB: All but the first seizure made, I believe.

THE COURT: Now what case is this before me now? Is it the first seizure made?

Mr. RHYNE: Yes, it is the first one.

THE COURT: Then you say that one is not stayed.

Mr. RHYNE: No, your Honor.

THE COURT: Why isn't it?

2031 Mr. RHYNE: Because under the statute they have an absolute right to bring one.

THE COURT: As it is now?

Mr. RHYNE: As it is now. It is only when they make multiple seizures that they have to make——

THE COURT: Well, if they make two, then why doesn't it stay also the first?

Mr. RHYNE: The injunction was not so written, your Honor. They go, I believe, perhaps——

THE COURT: I am concerned now on reading this with whether or not this Court isn't stayed. It would seem to me that immediately where there is shown a multiple of suits, no one could be excused from the operation of the injunction and they would all be stayed. I am very much afraid of that.

Mr. RHYNE: Do you want to explain it?

Mr. GOTTLIEB: Yes. Your Honor, the way we interpret that, the Federal Food, Drug and Cosmetic Act provides that the Government may make a seizure at any time. It isn't required to do anything as a prerequisite to making one seizure. That had been made in this case. Then before we made——

THE COURT: When you made No. 2, then you had a multiple, and it seems to me everything would be stayed. You couldn't

2032 have the issue until there was a multiple of suits.

Mr. GOTTLIEB: Well, the only things that we are concerned with are the multiples, not the original one. Those that come after the one are——

THE COURT: Well, the one becomes a part of the multiple. I don't know why the whole thing isn't stayed. I can't see any logic for saying that one is free of the injunction and all the rest are not simply because it happened to be the first suit started when, as a matter of fact, you couldn't have any multiple suits without others, and the minute you have, the one must be brought in with the multiple. Cover that in your brief, both of you.

Mr. GOTTLIEB: Very well. I would just like to go over very briefly the Supreme Court case Mr. Rhyne cited and the provision of the new Title 28. I would like to point out section 1404, Title 28, which Mr. Rhyne has quoted. He quoted the second sentence, paragraph (b). It says, "Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States"—under this sec-

tion; but the first sentence refers to the removal, the transfer, in the same district between divisions. Section (a), however, says that "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action
2033 to any other district or division where it might have been brought." Now it is our contention that the second sentence of section (b) is connected to the first sentence of section (b), referring to the transfer between divisions in the same district; that if it were meant to come under (a) it would have been put under (a) and not connected with (b) in the second sentence. I should like to point out in section (a) it says that the court may transfer any civil action to any district where it might have been brought. As Mr. Yancey has pointed out, this is an in rem action. The jurisdiction of the court——

THE COURT: Now being in rem, how can the libel against goods from Belleville, New Jersey, be effective in California?

Mr. GOTTLIEB: It cannot; the Court has no jurisdiction.

THE COURT: Therefore you conclude that the Court has no jurisdiction, because these particular pamphlets could not be seized in California.

Mr. GOTTLIEB: Precisely; and I should like——

THE COURT: You make that argument, do you?

Mr. GOTTLIEB: Yes, sir; and I should like to cover that in the brief. I notice——

THE COURT: Cover that in your brief.

Mr. GOTTLIEB: I notice they cite section 1395 (c). No, I beg your pardon. (a): "A civil proceeding for the recovery of a
2034 pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found." Therefore, they say the defendant is found in the Southern District of California; but they neglect to cite paragraph (b): "A proceeding in admiralty"—which this is—"for the enforcement of fines, penalties and forfeitures against a vessel"—in this case a drug—"may be brought in any district in which the vessel is arrested."

THE COURT: That has always been so.

Mr. GOTTLIEB: That is correct. It is the old in rem theory. The court has no jurisdiction to try an in rem case unless the res is in that jurisdiction.

THE COURT: What relief are you seeking here in this court in the suit you instituted here?

Mr. GOTTLIEB: We have instituted a suit for the condemnation and destruction of certain drugs which are contraband, illegitimate——

THE COURT: Of the drugs or of the pamphlet?

Mr. GOTTLIEB: Both. They have both been libeled.

Now, there are ten cases throughout the country. The act specifically says that they may remove, consolidate and remove,

under certain limited conditions. Now they say, "But section 1404 overrides that," and they cite Ex parte Collet in the Supreme Court. Well, I submit, your Honor, that Ex parte Collet does not so hold, and I would like to quote from the opinion. It says here:

2035 "Section 1404(a) does not limit or otherwise modify any right granted in paragraph 6 of the Liability Act or elsewhere to bring suit in a particular district." The Liability Act had no provision for removal in it. Therefore, the Supreme Court said they now have a provision for removal by virtue of Title 28; but they said "We agree"—the Code, therefore, does not repeal paragraph 6 of the Liability Act——

THE COURT: Well, I will tell you what you gentlemen do. You get these arguments in the form of a brief. I will give you twenty days. They have handed you their brief this morning.

Mr. GOTTLIEB: Yes, sir.

THE COURT: Very good.

Mr. WALDAU: We will have an opportunity to reply to their brief, your Honor?

THE COURT: Yes.

2036 The Los Angeles Times, Saturday Morning, June 30, 1945.

Third of W.A.C. Applicants Fail to Pass Physical Test

New York Times.

Washington, June 29.—Physical rejection, rates for Army women, long withheld by the War Department and released for the first time today by the expiring committee on physical fitness of the Federal Security Agency, showed that about one-third of all applicants for enlistment in the Women's Army Corps were rejected for medical reasons.

Mental and nervous causes led to 22 per cent of the rejections.

"The record of 33 per cent rejections for women indicates an even more serious health situation for women than the 40 per cent rejection rate did for men," said Dorothy La Salle, who has been in charge of the girls and women's program of the committee on physical fitness.

"It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.," she said. "I am sure that if we could have a complete cross-section of the women between the ages of 20 to 50 a much higher rejection rate would be found."

Copyright, 1945, New York Times.

(Here follow 3 Photolithographs, side folios 2037, 2037a, 2038)

10584

DEFENDENT'S EXHIBIT 1

D 1 1 K

Date _____

PURCHASER _____ Phone _____

ADDRESS _____

Purchaser's check of disorders at start of program:

__Abdominal Pain
__Acne
__Allergies
__Anemia
__Appetite Poor
__Arthritis
__Assimilation
__Asthma
__Biliousness
__Blood Count Abnormal
__Blood Pressure, Low
__Blood Pressure, High
__Boils
__Bone Conditions
__Breathing Disorders
__Brittle Nails
__Cancer
__Cold Tendency
__Colitis
__Constipation
__Cuts heal slowly
__Deafness
__Diabetes
__Dizziness
__Eczema
__Fatigue
__Gas in Stomach
__Hay Fever
__Headache
__Heartbeat Irregular
__Indigestion
__Infection Resistance Low
__Insomnia
__Menstrual Difficulties
__Mental Depression
__Migraine
__Miscarriage Tendency
__Muscle Disorders
__Nervousness
__Neuralgia
__Nosebleed
__Old Age
__Ovary Disorders
__Pellagra
__Pregnancy
__Prostate Trouble
__Pyorrhea
__Rheumatic Fever
__Rheumatism
__Rickets
__Sinus Trouble
__Thyroid Disorders
__Tissues Flabby
__Tonsilitis
__Tooth Decay
__Tuberculosis
__Tumors
__Twilight Vision Faulty
__Ulcers
__Weight __Under __Over

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62-036 H
3-18-47
D H

Exhibit G

(over)

2037

#_____ PURCHASE AGREEMENT DESIGNATION C-_____

Written Volume $

| | | |

Acne	Constipation	Gas in stomach	Overweight
Allergies	Cuts heal slowly	Hay fever	Poor appetite
Anemia	Deafness	Headache	Pyorrhea
Asthma	Easily tired	Migraine	Restlessness
Bad skin color	Eczema	Nervousness	Sinus trouble
Biliousness	Faulty memory	Neuritis	Tonsilitis
Boils	Faulty vision	Neuralgia	Ulcers
Colitis	Flabby tissues	Nosebleed	Underweight

Arthritis (rheumatism)	Hysterical tendency	Mental depression
Craving for sour foods	Insomnia (sleeplessness)	Muscular twitching
Bad Teeth	Irregular heartbeat	Night blindness
Rickets	Lack of Ambition	Sensitiveness to noise
Other bone conditions	Lack of Concentration	Subject to colds
High blood pressure	Low blood pressure	Worry (over small things)

82-056 M
3-13-47
Dr. M
EXHIBIT A

10581

2039 DEFENDANT'S EXHIBIT 4

The New York Times, Saturday, June 30, 1945.

Third Who Applied Rejected by WAC

Committee on Physical Fitness Reveals Ratios of Women Barred for Health Reasons

By Bess Furman. Special to the New York Times

Washington, June 29—Physical rejection rates for Army women, long withheld by the War Department and released for the first time today by the expiring committee on physical fitness of the Federal Security Agency, showed that about one-third of all applicants for enlistment in the Women's Army Corps were rejected for medical reasons.

"The record of 33 per cent rejections for women indicates an even more serious health situation for women than the 40 per cent rejection rate did for men," said Miss Dorothy LaSalle, who has been in charge of the girls and women's program of the committee on physical fitness.

Miss LaSalle had permission from the War Department to disclose percentages on the ten highest causes for medical rejections of Wac applicants.

As was the case with men turned away from the Army, psychiatric and neurological causes topped the list. With the civilian women who wanted to be Waes, 22 per cent were rejected for mental and nervous causes.

The next principal cause of women's rejections was gynecological and genito-urinary disorders, accounting for 17.9 per cent of rejections. Other causes in their order ran as follows:

Cardiovascular, 8.2 per cent; eye conditions, 7.9; overweight 6.6; ear, nose and throat conditions, 5; underweight, 4.7; venereal disease, 4.4; pulmonary tuberculosis, 4.1, and teeth, 3.1. Miscellaneous causes with lower percentages made up the remaining 16.1 per cent of medical rejections.

"It is very evident that physical fitness programs for girls and women are of equal importance to those of boys and men, and must be established if we are to have a strong nation," said Miss La Salle.

"With the men rejected it was found that a large proportion of their defects had been evident ever since they were in elementary schools," she added. "I am sure this would be also true of the women and girls rejected for service in the Wac."

The Committee on Physical Fitness will end its operations tomorrow because Congress cut off its appropriation. It has been in operation three years. Much of its educational and research materials will be turned over to the Office of Education.

DEFENDENT'S EXHIBIT 5

MEDICAL STATISTICS BULLETIN NO. 2

CAUSES OF REJECTION AND INCIDENCE OF DEFECTS

LOCAL BOARD EXAMINATIONS OF SELECTIVE SERVICE REGISTRANTS IN PEACETIME

ANALYSIS OF REPORTS OF PHYSICAL EXAMINATION FROM 21 SELECTED STATES

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
WASHINGTON, D.C.

AUGUST 1, 1943

CAUSES OF REJECTION AND INCIDENCE OF DEFECTS

LOCAL BOARD EXAMINATIONS OF

SELECTIVE SERVICE REGISTRANTS IN PEACETIME

AN ANALYSIS OF REPORTS OF PHYSICAL EXAMINATION FROM 21 SELECTED STATES

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Washington, D. C.
1943

ABSTRACT

During the period November 1940 through September 1941, approximately 3,000,000 registrants were examined at local boards. 1/ A typical group of 1000 registrants examined at local boards would be classified as follows:

438, or 43.8 percent, would be rejected at local board examinations.
90, or 16.0 percent of the remaining 562, would be rejected at induction stations.
Thus, of the original 1000 registrants examined, 528 registrants would be rejected, representing a combined rejection rate of 52.8 percent. 2/

Rejection rates increased steadily with age. For example, 41.6 percent of the 22-year-old registrants were rejected, either at local boards or induction stations, while 80.3 percent of the 36-year-old registrants were rejected.

Tooth defects were the leading cause of rejection, accounting for 16.5 percent of all rejections at local boards and induction stations. Other causes of rejection, and the percentages they constitute of all rejections are: eye defects, 11.7 percent; mental and nervous defects, 10.4 percent; cardiovascular defects, 10.0 percent; musculoskeletal defects, 8.9 percent; hernia, 5.9 percent; venereal diseases, 5.9 percent; ear, nose, and throat defects, 5.5 percent; tuberculosis and other lung diseases, 3.8 percent; educational deficiency, 3.8 percent; defects of the feet, 3.0 percent; underweight, 2.9 percent; other causes, 11.7 percent.

Negro registrants had higher rejection rates than white registrants at local boards and induction stations, 59.4 per 100 examined as compared with 51.9 per 100. Most of the difference in rejection rates was due to the higher rates of rejection for syphilis and for educational deficiency among Negroes, as Negroes had lower rates of incidence than whites for most other defects.

The average white registrant was 26.0 years old, was 68.5 inches tall, weighed 152.2 pounds, had a chest girth of 37.2 inches at inspiration and 34.3 inches at expiration, and had a waist girth of 30.8 inches.

The average Negro registrant was also 26.0 years old; he was 68.1 inches tall, weighed 150.8 pounds, had a chest girth of 36.1 inches at inspiration and of 33.6 inches at expiration, and had a waist girth of 30.0 inches.

SELECTION OF REGISTRANTS FOR EXAMINATION

The data on health defects presented in this bulletin were obtained from Reports of Physical Examination, Form 200, filled out at the local board physical examination of Selective Service registrants. 3/ The local board physical examination was only one stage in a systematic selective process by which men were drawn from their communities for training and service. At each earlier stage, certain classes of registrants were deferred and were not required to appear for physical examination. It may be helpful, therefore, to present a summary of the entire selective process as a means of defining the group of registrants who are under discussion here.

On October 16, 1940, 16,316,908 men aged 21 to 35 inclusive registered under the provisions of the Selective Training and Service Act of 1940. On July 1, 1941, an additional 773,536 men who had attained their 21st birthday in the meantime were enrolled in the second registration. In the first and second registrations combined, adding in men who registered belatedly there was by September 30, 1941 a total of 17,370,355 registrants in the continental United States.

Of this number, 974,304 registrants were in the armed forces by September 30, 1941; 783,351 by induction through the Selective Service System and 190,953 by direct enlistment. Reports of Physical Examination, Form 200, are available for registrants who entered the armed forces through the Selective Service System but not for registrants who enlisted through a recruiting station of the armed forces. This circumstance will be referred to in connection with the discussion of rejection rate data.

After registration, each registrant received an order number on the basis of the National Lottery. 4/ The order number determined the sequence in which each registrant was classified. As each registrant's order number was reached he was mailed a Questionnaire, Form 40. On the basis of his replies to the Questionnaire the local board considered his eligibility for deferment, and if he had grounds for deferment because of occupation, dependency, or other reasons, he was classified

---

1/ The present bulletin is based on tabulations of data from 21 representative states, representing local board physical examination of 121,700 registrants. These states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, Oklahoma, Oregon, Pennsylvania, Utah, and Wisconsin. The basis on which the states were selected, and details of the sampling procedure are explained in the Technical Appendix.

2/ Rejection rates and other data presented in this bulletin pertain to the period November 1940 through September 1941. Subsequently, changes were made in examining procedures and in physical standards which influenced rejection rates appreciably.

3/ A specimen of Form 200, Report of Physical Examination, filled out with the record of a hypothetical registrant is presented in figures 6 and 7 in the Technical Appendix.

4/ A description of this and other Selective Service procedures appears in Selective Service in Peacetime; First Report of the Director of Selective Service 1940-41. Government Printing Office, Washington, 1942.

accordingly and was not called up for physical examination. Figure 1 is a pictorial flow chart which shows the order in which each registrant was considered for the various classes of deferment and the percentages of all classified registrants who had been put in each deferred class by September 30, 1941.

It was only after the possibility of deferment had been eliminated that the registrant was ordered to appear before the local board physician for physical examination. Only 22 percent of the men who were processed during this period were ordered to appear for local board physical examination. The local board physician, and in many

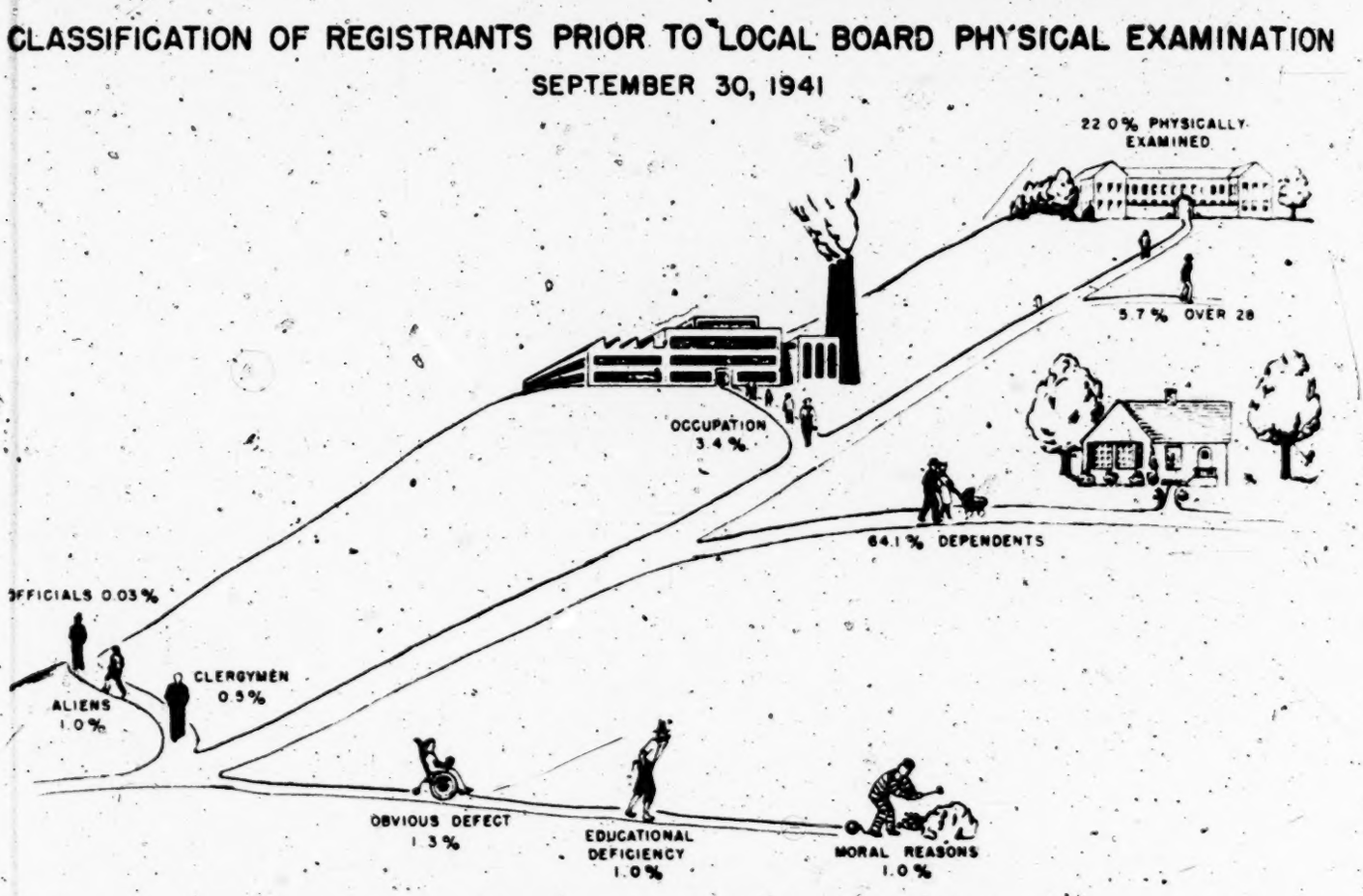


Figure 1. Pictorial flow chart showing the order in which a registrant was considered, successively, for deferred classifications. The percentage values show the percent of all classified registrants who had been deferred for the specified reason through September 30, 1941; data based on Accumulative Progress Report of Classification and Induction through September 30, 1941. These data are summarized in the Appendixes to Selective Service in Peacetime, pages 393-403, and 405. Selective Service Regulations governing classification of registrants may be found in Volume Three.

communities, the local board dentist, examined each registrant in accordance with physical standards prescribed by the War Department. 1/

Some indication of the nature of the local board physical examination can be obtained from the Report of Physical Examination reproduced as figures 6 and 7 in the Technical Appendix, and from the discussion which accompanies it. After the local board physician recorded his estimate of the physical fitness of the registrant the local board classified the registrant in one of three classes. 2/

Qualified for general military service, Class I-A;
Qualified for limited military service, Class I-B;
Disqualified for any military service, Class IV-F.

Registrants found to be qualified for general military service were forwarded to induction stations to fill calls levied on the local board. At

1/ Volume 6 of Selective Service Regulations includes Mobilization Regulations 1-9, Standards of Physical Examination During Mobilization, issued August 31, 1940. Further information on local board physical examinations appears in Selective Service in Peacetime, pages 205-218.

2/ A relatively small number of registrants who had complete physical examinations were not placed in I-A, I-B, or IV-F, either because of appeal or reconsideration by the local board for reasons other than physical or mental defect. Such cases are excluded from the tabulations reported here.

the induction station the registrant appeared before an examining board made up of Army physicians and civilian specialists who examined him in accordance with the same physical standards under which the local board examination was conducted.

This system, which involved two complete physical examinations, was discontinued January 1, 1942.

REJECTION RATES

From November 1940 through September 1941, 52.8 percent of all registrants physically examined at local boards were rejected either at local boards or at induction stations. Most rejections (43.8 per 100 registrants examined) took place at local boards. If the induction station rejection rate is computed on the basis of the number of registrants examined at induction stations it is 16.0 per 100 examined, as Table 1 shows. If induction station rejection rates are computed on the basis of the total number ordered to report for local board examination the rate becomes 9.0 per 100 registrants examined. 1/

Table 1. Rejection rates at local board and induction station, by race, November 1940 through September 1941

Racial group	Rejections per 100 registrants examined		
	Local board 1/	Induction station 1/	Local board and induction station
White and Negro combined	43.8	16.0	52.8
White 2/	43.3	15.1	51.9
Negro	47.2	23.1	59.4

1/ Rejected registrants include men classified as available for limited service (I-B) and men disqualified for any military service (IV-F).
2/ Includes all races other than Negro.

Rejection rates of this order of magnitude have been a matter of concern to everyone interested in the state of the public health as well as to those responsible for the administration of the Selective Training and Service Act of 1940. The great majority of these registrants had been drawn from useful occupations in civil life, which they had followed without apparent handicap. Furthermore, men aged 21 to 35 are below the age level at which degenerative diseases usually appear.

However, several pertinent factors have often been neglected in public discussion of these rejection rates. (1) A large number of physically fit registrants chose to enlist in the armed forces without awaiting induction through the Selective Service System. If they had entered the armed forces through Selective Service the records would show larger numbers of inductions, the same number of rejections, and lower rejection rates. (2) Failure to meet the relatively strict standards then in force did not necessarily mean that the rejected man was seriously handicapped for a useful role in civil life or for many kinds of noncombatant service in the armed forces. Approximately one-half of the rejected men were classified as available for limited military service. Subsequently, with changes in physical standards, many limited service men were reclassified and inducted. (3) During peacetime it was not merely possible but desirable to set higher physical standards than in wartime. At that time the problem was not to raise a large Army; the Selective Training and Service Act provided that no more than 900,000 men should be "in active training or service in the land forces of the United States at any one time." The objective was to select and train the nucleus of an Army composed of men physically fit for any type of service and the standards were set accordingly. As an example of the difference between peacetime and wartime standards, registrants with syphilis and gonorrhea were not accepted for training and service during peacetime; and this elevated the rejection rate, particularly among Negroes. Later, the standards were changed to permit acceptance of a considerable number of men with uncomplicated cases of syphilis and gonorrhea for treatment after induction. A further consideration that influenced the physical standards was the large number of claims for service-connected disability brought against the Government during and after World War I. In particular, the claims based on mental disorders, popularly but inaccurately termed "shell shock," had been so numerous and so costly that it was considered important to reject men who were likely to break down in service and become lifelong wards of the Government. (4) Under peacetime standards the proportion of registrants rejected because of failure to meet literacy standards, for moral reasons, or because they were aliens, was greater than under wartime standards.

Rejection rates for Negroes were higher than for whites at local boards and at induction stations. This is largely because of high rejection rates among Negroes due to syphilis and to failure to meet literacy standards, as Negroes had lower rejection rates than whites for most types of defects.

1/ These rates are slightly higher than the rates reported in Medical Statistics Bulletin No. 1 for the period November 1940 through May 1941. During the earlier period approximately 41 percent of all physically examined registrants were rejected at local boards and 15 percent of the registrants examined at induction stations were rejected. Of the total number examined at local boards through May 31, 1941, 50 percent were rejected, either at local boards or at induction stations. A considerable part of the difference between these rejection rates is attributable to the change in literacy standards effective May 15, 1941.

REJECTION RATES IN RELATION TO AGE

The regular increase in rejection rates with advancing age, shown in Figure 2 and in Table 2, had important consequences for the operations of the Selective Service System. The relationship may be illustrated by local board rejection rates for whites and Negroes combined. For men born in 1919, who were approximately 22 years old at the time of examination, the local board rejection rate was 32.8 per 100 registrants examined. With each additional year of age the local board rejection rate increased by about 2.5 percent. For men born in 1905, aged approximately 36 years, the local board rejection rate was 69.7 per 100 registrants examined. A similar, though less regular, relationship is evident in induction station rejection rates. Over the entire age range, induction station rejection rates increased by 1.8 per 100 for each additional year of age. Thus the combined local board and induction station rejection rate was 41.6 per 100 for men born in 1919 and increased by approximately 3.3 percent for each additional year of age until it reached 80.3 per 100 for men born in 1905.

The relation of age to classification after local board physical examination is shown in more detail in Figure 3, in which data for white and for Negro registrants are shown separately. Each bar shows the percentage in a single year of age who were classified as available for general military service, available for limited service, or disqualified for any service.

Table 2. Local board and induction station rejection rates per 100 registrants examined, by year of birth, November 1940 through September 1941

Year of birth	Local board	Induction station 1/	Combined local board and induction station
Total	43.8	16.0	52.8
1919	32.8	13.1	41.6
1918	35.9	8.0	41.0
1917	37.3	8.8	42.8
1916	39.5	10.7	46.0
1915	42.5	12.8	49.9
1914	45.7	13.1	52.8
1913	48.3	21.3	59.3
1912	51.3	28.1	65.0
1911	54.3	28.0	67.1
1910	57.4	30.6	70.4
1909	60.1	28.1	71.3
1908	61.4	33.1	74.2
1907	64.5	34.7	76.8
1906	68.2	36.1	79.7
1905	69.7	34.9	80.3
1904	74.2	47.5	86.5

1/ Estimated from data on age distribution of inducted registrants supplied by the Machine Records Section, The Adjutant General's Office, and data shown on Accumulative Progress Report of Classification and Induction through September 30, 1941.

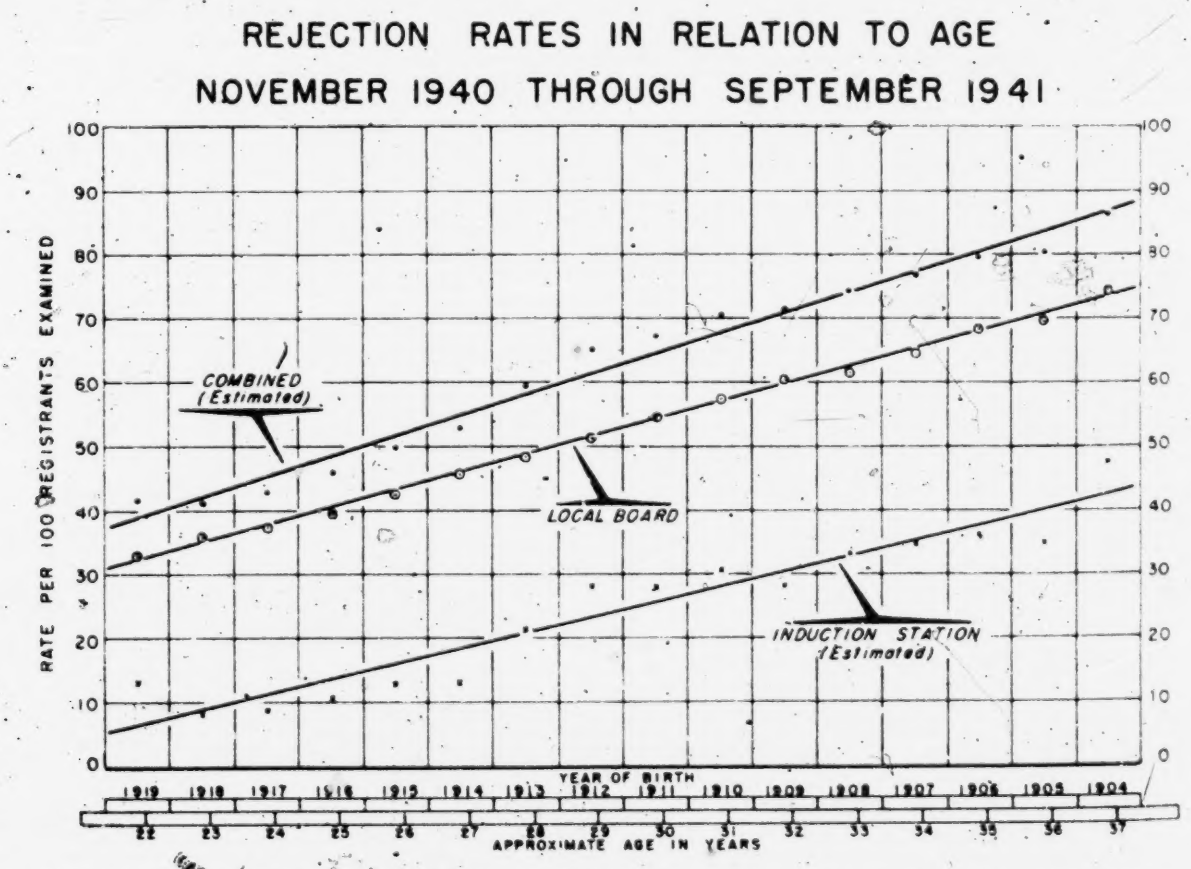
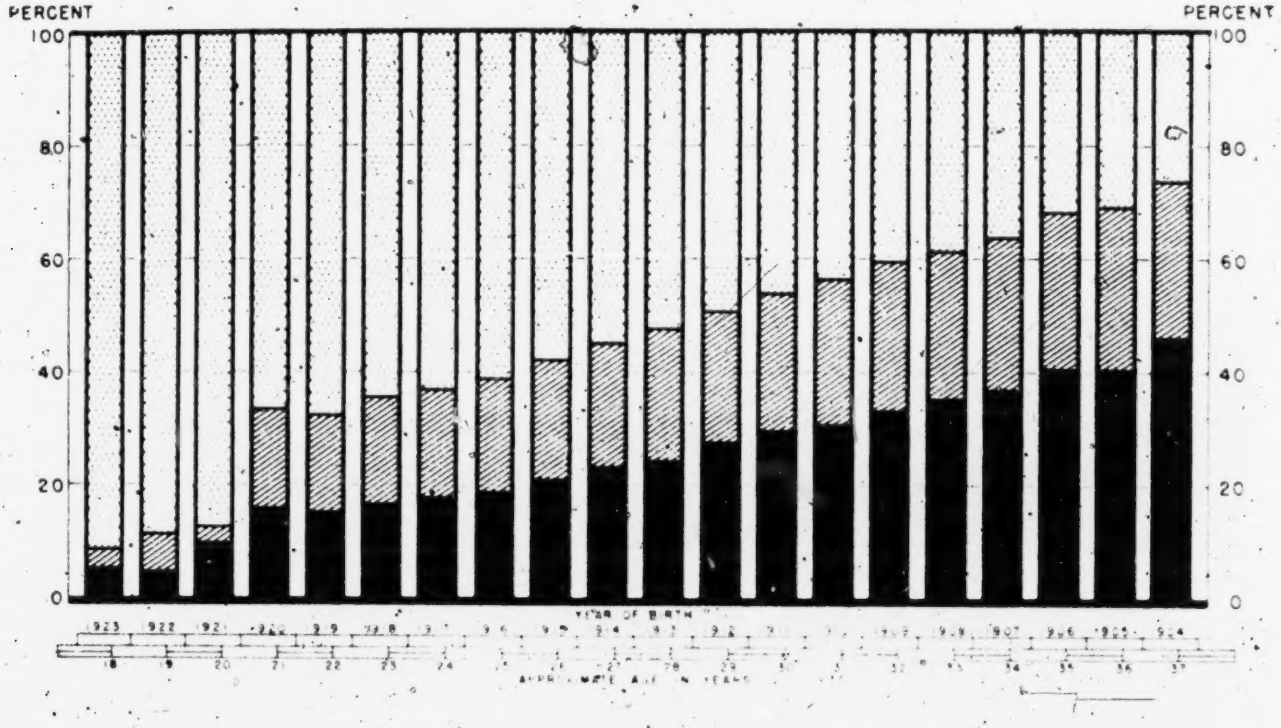


Figure 2. Rejection rates per 100 registrants physically examined at local boards and induction stations, by year of birth. Based on data of Table 2.

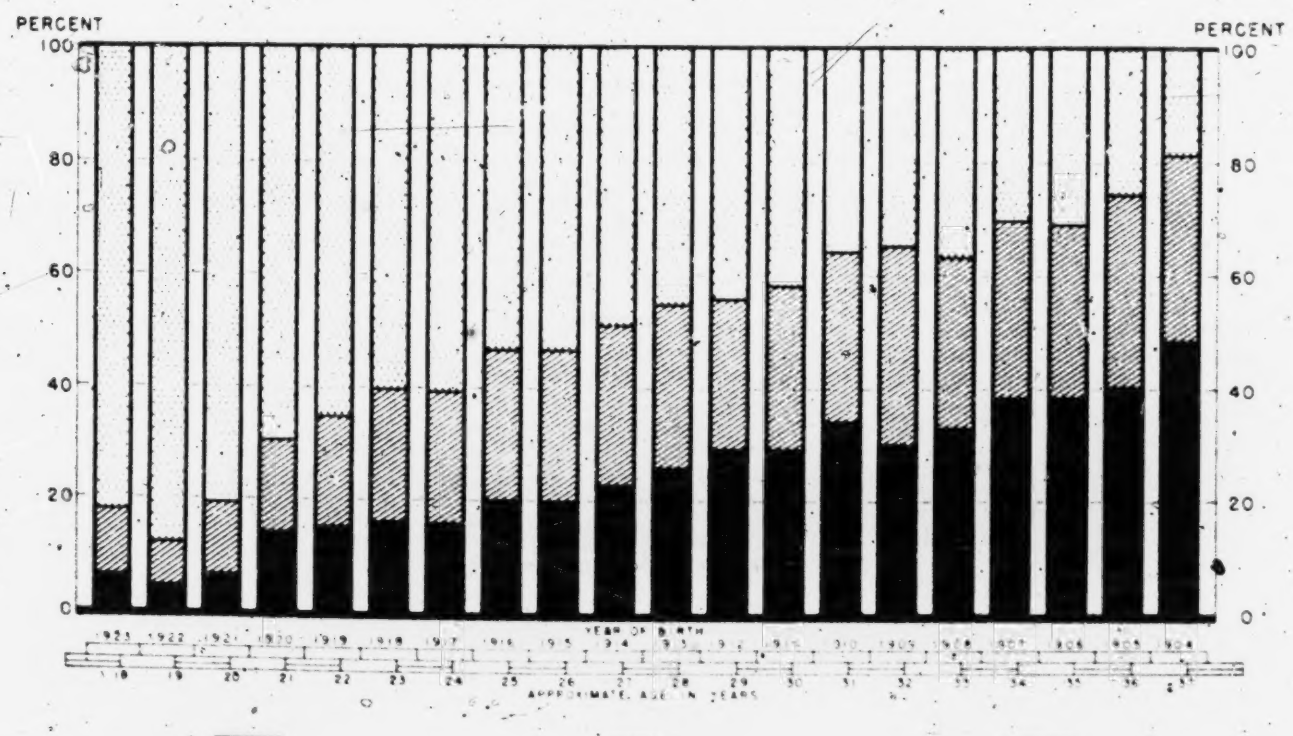
LOCAL BOARD CLASSIFICATION IN RELATION TO AGE

NOVEMBER 1940 THROUGH SEPTEMBER 1941

WHITE



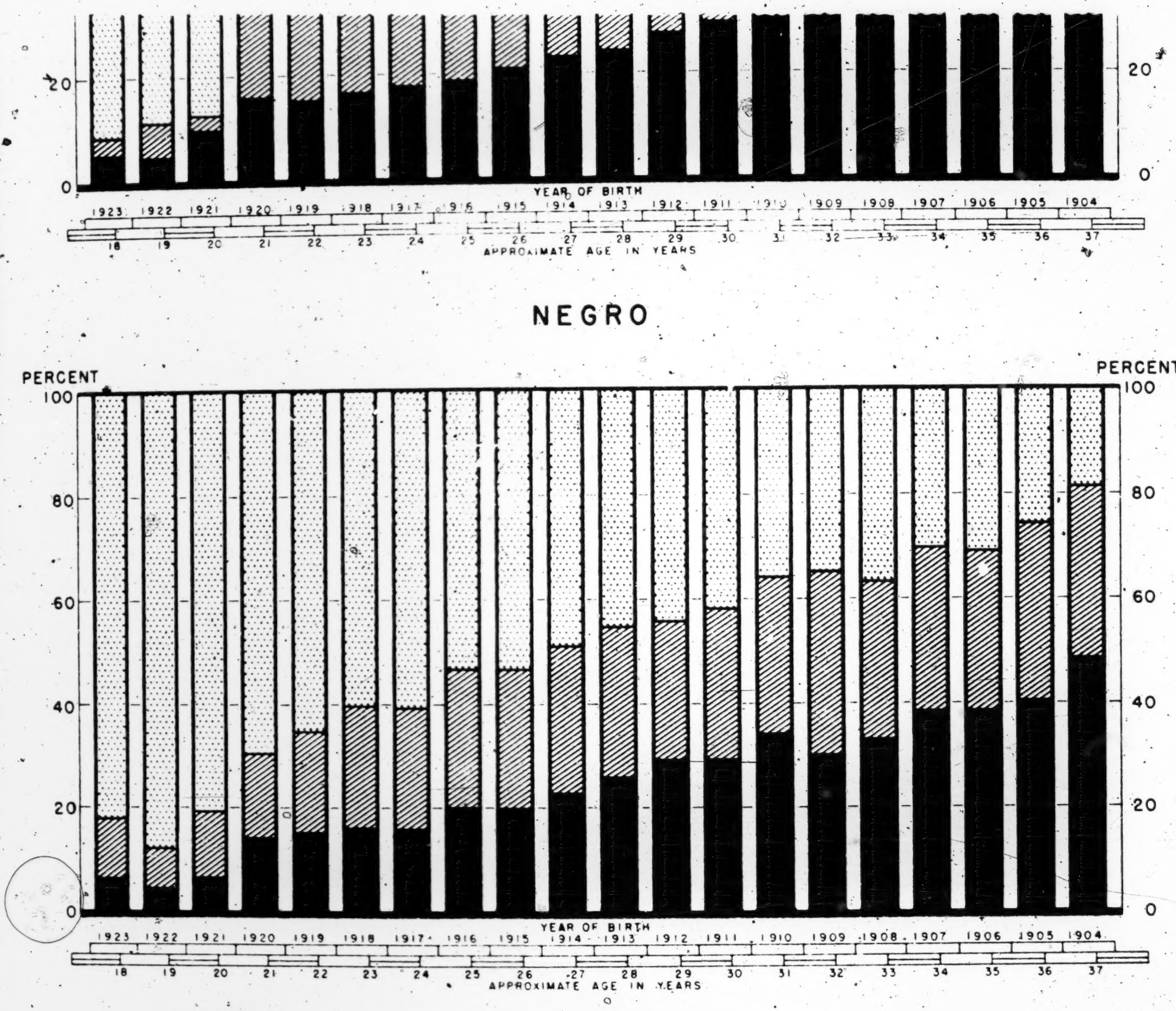
NEGRO



DISQUALIFIED

LIMITED SERVICE

GENERAL SERVICE



NEGRO

Figure 3. Bar diagram based on data in Table 1, Technical Appendix, showing classification of white and Negro registrants physically examined, in relation to age.

CAUSES OF REJECTION

Table 3 presents, in summary fashion, the principal causes of rejection at local boards and induction stations. In it broad groups of defects are arrayed in order of their importance as cause of rejection, tooth defects leading the list, followed by eye defects, mental and nervous disorders, and cardiovascular conditions. These four causes account for almost half of the rejections during the period under study. Following these in order of importance as causes of rejection come musculoskeletal defects, hernia, venereal disease, ear, nose and throat defects, tuberculosis and other lung diseases, educational deficiency, foot defects, and underweight.

Induction station examinations were made to a large extent by specialists, and conditions that present unusual diagnostic difficulty, such as mental and nervous disorders and tuberculosis, are relatively more important as causes of rejection at induction stations than at local boards.

Numerous cases of venereal disease appear to have been contracted in the interval between local board physical examination and induction station examination. This is reflected in the induction station rejection rate for venereal disease.

Table 3. Local board and induction station rejection rates per 100 registrants physically examined, by principal cause of rejection November 1940 through September 1941 1/

Principal cause of rejection	Local board 2/	Induction station 3/	Combined local board and induction station	Percent of all rejections at local board and induction station
All causes	43.8	16.0	52.8	100.0
Teeth	7.8	1.7	8.8	16.5
Eyes	5.3	1.6	6.2	11.7
Mental and nervous	3.7	3.2	5.5	10.4
Cardiovascular	4.4	1.6	5.3	10.0
Musculoskeletal	4.1	1.1	4.7	8.9
Hernia	2.6	0.8	3.0	5.9
Venereal disease	2.7	0.7	3.1	5.9
Ear, nose, and throat	2.3	1.1	2.9	5.5
Tuberculosis, lung diseases	1.3	1.2	2.0	3.8
Educational deficiency	1.9	0.1	2.0	3.8
Feet	1.4	0.4	1.6	3.0
Underweight	1.4	0.2	1.5	2.9
Other	4.9	2.3	6.2	11.7

1/ Induction station rejection rate based on tabulations released by the Office of the Surgeon General, War Department.

2/ Based on 10-percent sample of Reports of Physical Examination through September 30, 1941 for 21 selected states.

3/ Rate for all causes based on Accumulative Progress Report of Classification and Induction through September 30, 1941. Rates for each cause based on report of rejections at induction stations for the period March 1941 through December 1941 as reported by the Office of the Surgeon General, War Department, and prorated to sum to a total rejection rate of 16 percent.

CAUSES OF REJECTION AT LOCAL BOARDS

The bar diagrams in Figure 4 show the ten leading causes of rejection of white and of Negro registrants at local boards, and are based on the data of Table 4. 1/

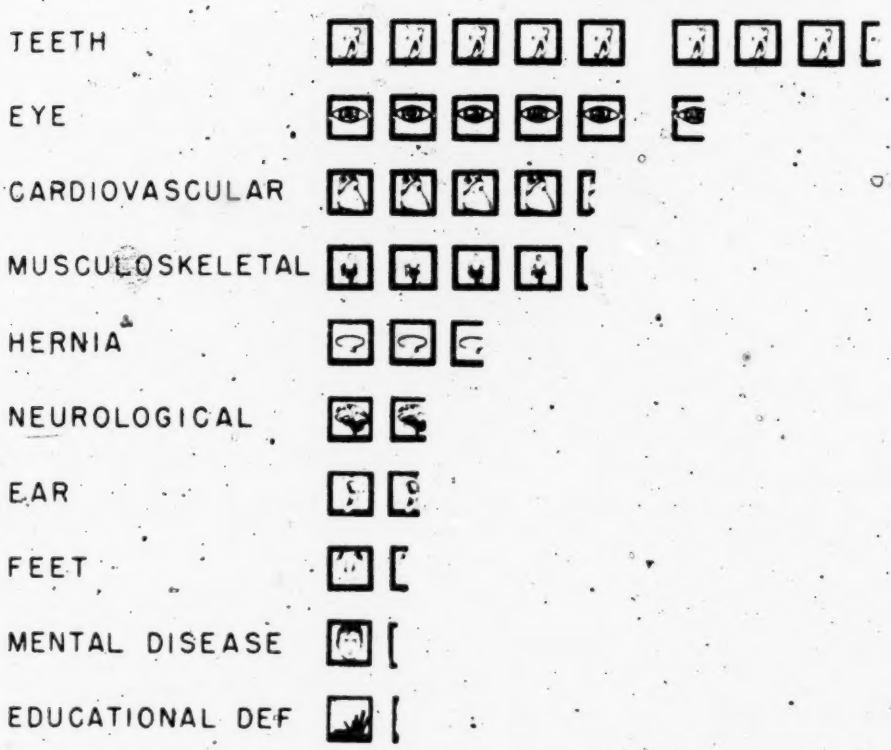
Teeth. Dental defects (missing teeth, dental caries, malocclusion, and allied conditions) were the leading causes of rejection at local boards and accounted for 17.7 percent of all local board rejections from November 1940 through September 1941. The rejection rate was more than 3 times as high for white registrants (84.1 per 1000 examined) as for Negro registrants (26.8 per 1000 examined). In both racial groups the majority of rejections for

1/ It should be noted that a defect tabulated in Table 4 as cause of rejection for any registrant was not necessarily the only disqualifying defect the registrant had. When more than one defect was recorded as cause of rejection in the section for classification by the local board (see Figure 5) the first defect listed was tabulated as the cause of rejection.

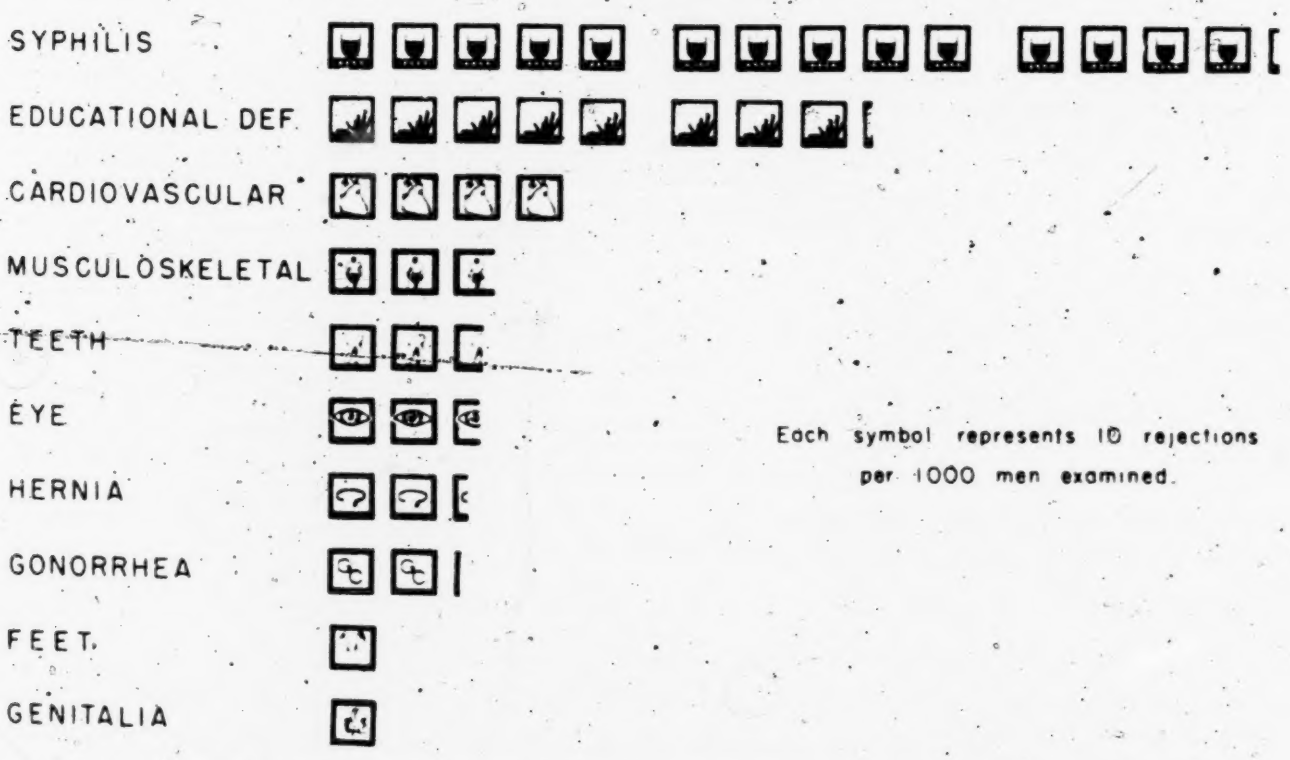
LEADING CAUSES OF REJECTION AT LOCAL BOARDS

NOVEMBER 1940 THROUGH SEPTEMBER 1941

WHITE



NEGRO



Each symbol represents 10 rejections per 1000 men examined.

Figure 4. Pictorial bar diagram showing the ten leading causes of rejection at local boards, among White and Negro registrants. Based on data in Table 4.

dental defects were due to failure to meet the following standards: "A minimum of 3 serviceable natural masticating teeth above and 3 below opposing and 3 serviceable natural incisors above and 3 below opposing. (Therefore, the minimum requirements consist of a total of 6 masticating teeth and of 6 incisor teeth.) All of these teeth must be so opposed as to serve the purpose of incision and mastication." 1/

Eyes. Defective or insufficient vision, refractive errors, and, less frequently, eye diseases or injuries were recorded as principal cause of rejection in 12.2 percent of all rejections. Again, the rejection rate was higher among white registrants, 56.9 per 1000 white registrants examined compared with 26.0 per 1000 Negroes examined. The standards for general military service then in force defined the lower limits of vision acceptable to the Army as "20/100 in each eye without glasses, if correctable with glasses to 20/40 bilateral." 2/

Cardiovascular. Defects of the heart and vessels were responsible for 10.0 percent of all rejections. The rates of rejection of whites and Negroes were 44.1 and 39.6 per 1000 examined, respectively. Specific causes of rejection were much the same.

Musculoskeletal. Defects of the bones, muscles, and joints were the basis of 8.9 percent of all rejections. Rejections for musculoskeletal defects amounted to 42.2 per 1000 white registrants examined and 28.5 per 1000 for Negro registrants. The disabling defect was usually described as the result of injury. The knee appeared to be the most vulnerable part of the body in this respect, injuries to leg (which may also include some knee injuries) were next in importance, and injuries to spine, foot, arm, and elbow followed in decreasing order of frequency.

Hernia. Rejections because of hernia amounted to 5.9 percent of all rejections. The rate for white registrants, 26.8 per 1000 examined, was not much higher than the rate for Negroes, 23.0 per 1000 examined. Inguinal hernias were most numerous. In about two rejections per 1000 the wording of the physician's entry was such as to suggest that relaxed inguinal rings rather than a true hernia was involved. Umbilical hernias were more frequently reported for Negroes than for whites.

Syphilis. Syphilis accounted for 5.3 percent of all local board rejections. It was the leading cause of rejection among Negroes, with a rate of 142.3 rejections per 1000 Negroes examined, and the fourteenth in order of importance among white registrants, with a rate of 7.5 per 1000 examined. Men with syphilis who were rejected for other reasons (eye defects, for example) would not be included in the foregoing.

Educational deficiency. Failures to meet literacy standards represented 4.2 percent of all rejections during this time period. It was the second most important cause of rejection among Negroes and the tenth in order of importance among whites. Between November 1940 and May 15, 1941 regulations 3/ stated that registrants were acceptable who "appear to have normal understanding, whose speech can be understood, who have no definite signs of organic disease of the brain, spinal cord, or peripheral nerves, and who are otherwise mentally and physically fit." During this period illiteracy was mentioned in the records of 3.6 registrants per 1000 examined. 4/

On May 15, 1941, the standards were raised to require that a registrant should be able to "read and write the English language as well as a student who has completed four years in an American grammar school." The latter standards were continued in force until August 1, 1942. 5/

Neurological. Organic defects of the brain or spinal cord resulting from disease, injury, or arrested development were listed as sole or principal defect in 3.8 percent of all rejected registrants. The rejection rate for whites was 17.7 per 1000 and for Negroes was 7.3 per 1000 examined. Among whites, the after-effects of infantile paralysis were the most frequently diagnosed neurological defect, followed by epilepsy, paralysis (other than infantile paralysis), deaf mutism, and cerebral symptoms described as the after-effects of head injury. Among Negroes none of these conditions was reported frequently; epilepsy, the after-effects of infantile paralysis, and deaf mutism were mentioned more frequently than other neurological disorders.

Ears. Among ear defects, which constituted 3.5 percent of all rejections, otitis media and perforated ear drum were most commonly specified as causes of rejection among white registrants, with defective hearing also a frequently mentioned cause. Among Negroes, on the other hand, only a few registrants were rejected because of otitis media or perforated ear drum, and defective hearing was given as the reason for rejection of most of the non-acceptable registrants.

Feet. Foot defects, which disqualified 3.1 percent of the rejected registrants, were ninth in order of importance for Negro registrants and eighth in order of importance for white. Flat foot was almost the only foot defect mentioned as cause of rejection. Registrants with flat feet were more

1/ Paragraph 31-a (2) of MR 1-9, August 31, 1940 edition, contained in Vol. 6 of Selective Service Regulations. These dental standards remained in force until February 13, 1942, when they were amended and lowered by Local Board Release 95.

2/ Paragraph 16b of MR 1-9, August 31, 1940 edition. These standards continued in force until February 13, 1942, when they were lowered by Local Board Release 95.

3/ Paragraph 75b, MR 1-9, August 31, 1940 edition.

4/ Medical Statistics Bulletin No. 1, page 25.

5/ Additional information on rejections for failure to meet literacy standards between May 15, 1941 and September 15, 1941 may be obtained from the results of a special survey summarized in Selective Service in Peacetime; pages 174-175 and Appendix 29. Appendix 29 shows the number and rate of rejections for educational deficiency, by state.

often accepted than rejected. Thus, flat feet were noted as present in 148 white registrants per 1000 examined but they were the cause of rejection in only 14 white registrants per 1000 examined. The longitudinal arch of the Negro foot is not as high as the arch in the feet of Caucasian races, and when a record of flat foot was made for a Negro registrant it was frequently accompanied by the notation "racial," or "physiological." It was the cause of rejection of 10 per 1000 Negroes examined. The only other foot defect important as a cause of rejection was club foot, which occurred relatively more frequently among whites than among Negroes.

The ten causes of rejection just discussed accounted for 74.6 percent of all rejections during this period.

Data on other causes of rejection may be obtained from Table 4 and may be supplemented by reference to Table 7, which shows the incidence of all recorded defects.

Table 4. Local board rejection rates, by cause and by race, November 1940 through September 1941

Rejections per 1000 registrants examined

Principal cause of rejection	White and Negro			White 1/			Negro		
	All rejections	Disqualified	Limited service	All rejections	Disqualified	Limited service	All rejections	Disqualified	Limited service
All defects	437.7	221.9	215.8	433.2	221.9	211.3	472.0	222.1	249.9
Eyes	53.3	15.9	37.4	56.9	16.8	40.1	26.0	9.2	16.8
Ears	15.3	11.2	4.1	16.8	12.3	4.5	3.6	2.4	1.2
Teeth	77.5	25.0	52.5	84.1	27.2	56.9	26.8	8.4	18.4
Mouth and gums	4.2	2.1	2.1	4.2	2.1	2.1	4.3	1.9	2.4
Nose	6.0	1.6	4.4	6.7	1.8	4.9	.8	.2	.6
Throat	1.4	.4	1.0	1.4	.4	1.0	1.4	.3	1.1
Lungs	5.4	3.1	2.3	5.7	3.3	2.4	3.0	1.6	1.4
Tuberculosis	7.4	6.9	.5	7.8	7.3	.5	3.8	3.6	.2
Cardiovascular	43.6	36.7	6.9	44.1	37.2	6.9	39.6	32.7	6.9
Blood and blood-forming	.4	.3	.1	.4	.3	.1	.1	.1	0
Hernia	26.4	5.9	20.5	26.8	6.0	20.8	23.0	4.5	18.5
Kidney and urinary	4.5	3.1	1.4	4.7	3.3	1.4	3.6	2.0	1.6
Abdominal viscera	4.7	3.1	1.6	5.2	3.5	1.7	.9	.3	.6
Genitalia	6.7	1.4	5.3	6.4	1.4	5.0	9.6	1.9	7.7
Syphilis	23.1	3.8	19.3	7.5	2.0	5.5	142.3	17.7	124.6
Gonorrhea and other venereal	3.9	.6	3.3	1.7	.4	1.3	21.1	2.4	18.7
Skin	2.7	1.1	1.6	2.8	1.2	1.6	2.0	.6	1.4
Hemorrhoids	2.3	.7	1.6	2.3	.7	1.6	2.4	.8	1.6
Varicose veins	4.8	2.7	2.1	5.0	2.8	2.2	3.7	2.1	1.6
Educational deficiency	18.6	18.4	.2	10.4	10.3	.1	81.5	81.1	.4
Mental deficiency	9.7	9.1	.6	10.0	9.4	.6	7.7	7.1	.6
Mental disease	10.7	8.7	2.0	11.6	9.4	2.2	3.7	3.0	.7
Neurological	16.5	14.8	1.7	17.7	15.9	1.8	7.3	6.4	.9
Musculoskeletal	40.6	24.1	16.5	42.2	24.5	17.7	28.5	20.8	7.7
Feet	13.7	4.5	9.2	14.2	4.6	9.6	9.8	3.1	6.7
Endocrine	6.0	4.9	1.1	6.5	5.3	1.2	1.8	1.6	.2
Neoplasms	1.7	.8	.9	1.9	.9	1.0	.9	.4	.5
Infectious and parasitic	.1	*	.1	.1	*	.1	0	0	0
Underweight, overweight, and other	26.1	10.7	15.4	27.8	11.3	16.5	12.4	5.7	6.7
Non-medical reasons	.4	.3	.1	.3	.3	*	.4	.2	.2
Number rejected	53,265	27,005	26,260	46,616	23,876	22,740	6,649	3,129	3,520

1/ Includes all races other than Negro.
* Less than 0.1 per 1000 examined.

INCIDENCE OF ALL RECORDED DEFECTS

The preceding tables showing causes of rejection have shown only one disease or defect per man. This does not mean that the defect listed in the table was the only impairment the rejected man had, but it does mean that the examining physician, when called upon to summarize defects in order of importance, put the specified defect at the head of the list. An average of 1.58 defects were recorded on each examination form.

In preparing Table 7 no distinction between disqualifying and non-disqualifying defects was made. Every defect recorded on Form 200 was coded and tabulated, subject only to the limitation that within each of the 28 broad groups of defects (for example, eyes, ears, teeth, etc.) only one defect was tabulated for any one man. Beyond that there was no limitation on the number of defects recorded.

Several broad groups of defects which did not appear among the ten leading causes of rejection in Figure 4 are among the ten most frequently recorded defects; namely, defects of the feet, skin, nose, and throat. The ten groups of defects most frequently recorded at local board examination follow:

White	Negro
Teeth	Feet
Feet	Syphilis
Eyes	Mouth and gums
Musculoskeletal	Teeth
Skin	Genitalia
Nose	Educational deficiency
Cardiovascular	Throat
Hernia	Musculoskeletal
Mouth and gums	Cardiovascular
Throat	Eyes

The discussion which follows deals with selected defects listed in Table 7. It is limited to defects which occurred with unusual frequency, to diseases that are important from the public health viewpoint, and to defects for which supplementary data are available. The rule that only one defect in each defect group could be tabulated for any one registrant has resulted in an underestimation of the frequency of occurrence of certain non-disqualifying defects, and the effects of this procedure will be pointed out. 1/

Eyes. All but 8 of the 88 cases of bilateral blindness shown in Table 7 represented registrants who were rejected by local boards because of obvious defect. 2/ Seven instances of bilateral blindness in addition to the 88 previously mentioned were tabulated in Table 7 in terms of the condition that caused blindness. Two cases resulted from cataract, two from diseases of the optic nerve, and one each from diseases of the cornea, eye injury, and from aphakia. Refractive errors or poor visual acuity accounted for approximately half the recorded eye defects 3/. The majority, however, were correctable to a visual acuity of 20/40 as measured on the Snellen chart.

Ears. One-half of the 86 cases of bilateral deafness reported in Table 7 represented rejections for obvious defect without physical examinations.

Teeth. The counts of missing teeth and of dental caries presented in Table 7 do not include many instances in which these defects were recorded only on the dental chart of Form 200. 4/ Frequently, a registrant was described as having both missing teeth and dental caries. In such instances, the term missing teeth was selected for coding and tabulation in preference to dental caries both because it represented the end-result of a pathological process and because it was the more important of the two conditions in determining a registrant's acceptability for military service.

Tuberculosis. Tuberculosis (all forms) was found twice as frequently (10.3 per 1000 examined) among white registrants as among Negro registrants (5.2 per 1000 examined). It may appear paradoxical that a disease in which the Negro death rate is higher than the white death rate should be found less frequently among living Negroes than among living whites but similar findings have been reported by several investigators, and have been confirmed by more recent Selective Service data. 5/

1/ Certain kinds of defects can be reported on Form 200 in either or both of two ways: (1) as words, phrases, or sentences written in lines 1 to 19 of page 2 (see Figure 7) or (2) as markings on the dental chart or as numbers representing the results of tests and measurements listed along the right-hand margin of page 2. Data presented in Table 7 have been obtained from the first of these two types of entry. In future publications data recorded on the dental chart and the results of tests and measurements will be presented and analyzed.

2/ Regulations provided that "The local board may put a registrant in Class IV-F without physical examination if he has an obvious physical or mental disability which permanently disqualifies him for any form of military service." Record of such an action was made on page 1 of Form 200.

3/ Until February 13, 1942, the lower limit of vision acceptable for general military service was defined in paragraph 16b of MR 1-9 dated August 31, 1940, as "20/100 in each eye without glasses if correctable with glasses to 20/40 bilateral." Local Board Release 95, February 13, 1942, reduced the visual standards for service in all noncombatant branches to 20/200 provided the vision was correctable to 20/40 in each eye.

4/ Counts of missing and carious teeth, coded from entries on the dental chart, which supplement the information presented here, have been carried on the punch cards from which these data were tabulated. At a later time, tables showing the total number of registrants with missing or with carious teeth will be prepared.

5/ West, J. B. An inquiry into the importance of the racial factor in the epidemiology of tuberculosis. Supplement to Amer. Rev. Tuberc. 41:114-130, 1940.

Robins, Arthur B. The development of tuberculosis in the apparently healthy adult. Amer. Rev. Tuberc. 47:1-10, 1943.

The difference in incidence of tuberculosis between Negroes and whites has been, in part, attributed to the more rapid course of tuberculosis in the Negro. 1/

Cardiovascular system. Cases of valvular heart disease have been classified, in Table 7, by the valve affected and the nature of the lesion. Excluding cases diagnosed as rheumatic heart disease, in the instances in which the valve was clearly specified, 79.0 percent involved the mitral valve, 13.7 percent the aortic valve, and 3.8 percent affected both the aortic and mitral valves. Lesions of the pulmonic and tricuspid valves were infrequent. There were, however, a large number of entries describing murmurs which did not specify both valve and phase and they have been classified under two titles in Table 7; "Systolic murmur, type unspecified," and "Murmur, type unspecified." A large proportion of the entries classified in the first of these two titles read "Systolic murmur at apex" or words of equivalent meaning.

Hypertension was a fairly frequent diagnosis among both whites and Negroes. Hypertension was not coded or tabulated when it was merely listed as one of the findings on which a diagnosis (such as rheumatic heart disease) rested. In one-fourth of the instances in which a diagnosis of hypertension was made the systolic blood pressure was under 150 mm. Hg. In 24.4 percent of the hypertension cases the pulse rate exceeded 100 beats per minute.

Transient hypertension includes instances in which high blood pressure was described as due to nervousness or excitement or in which it returned to normal levels after rest.

Hypertrophy was tabulated when it was used as a diagnosis. In 20.8 percent of the cases of hypertrophy the systolic blood pressure exceeded 150 mm. Hg and in 24.6 percent the heart rate exceeded 100 beats per minute.

Tachycardia, likewise, was tabulated when it appeared as a diagnosis. Persistent tachycardia represented heart rates in excess of 100 per minute in 93.2 percent of the cases tabulated. In cases not described as persistent the heart rate exceeded 100 per minute in 65.8 percent of the cases tabulated. In many individuals rapid heart rate was described as due to excitement or nervousness; they have been included in the title "Functional tachycardia."

Cardiorenal vascular disease was tabulated only when it was so diagnosed, and appeared in 0.3 men per 1000 examined. Many Forms 200 described several of the signs of cardiorenal vascular diseases but because a specific diagnosis was not made by the examining physician the defect was not coded as cardiorenal vascular disease. For example, 35.0 percent of the nephritis cases had systolic blood pressures in excess of 150 mm. Hg and 41.0 percent had diastolic blood pressures in excess of 90 mm. Hg. (Many of the individuals with high systolic blood pressures also had high diastolic blood pressures.)

Arteriosclerosis was not frequent in the age group under discussion, occurring in 0.6 men per 1000 examined. In 60.5 percent of the arteriosclerosis cases the systolic blood pressure exceeded 150 mm. Hg.

The term bradycardia appears to have been used rather broadly, since only 19.5 percent of the individuals so described had pulse rates slower than 60 beats per minute. Likewise, only 29.2 percent of individuals with arterial hypotension had a systolic blood pressure less than 100 mm. Hg.

Cardiovascular syphilis appears under the heading "Syphilis" and neurocirculatory asthenia appears under the heading "Psychoneurotic disorders."

Syphilis. Syphilis (or a positive serological test for syphilis without recorded clinical findings) was reported for 11.7 white registrants per 1000 examined, and for 176.7 Negro registrants per 1000 examined. Late syphilis and heart and nervous system complications were relatively infrequent in the age groups under discussion here. In approximately 80 percent of the 3,752 cases reported in Table 7 the diagnosis appeared to rest on a positive serological test for syphilis.

Mental and educational deficiency and mental disease. These defects have been classified into the six groups defined in special instructions issued to local boards and induction stations. 2/

Educational deficiency, the most frequent entry in Group I, has been discussed elsewhere in this bulletin. The term moron, as here used, was restricted to registrants with a mental age of less than 10 years. Individuals of higher mental age who were described as dull or sluggish mentally have been classified under the title "Dull normal." A large proportion of the entries describing mental deficiency did not specify mental age, i.e.,

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1/ Opie, E. L., F. M. McPhedran, and P. Putnam. The relative frequency of clinically manifest tuberculosis, open tuberculosis, asymptomatic lesions, and deaths in white and Negro persons. Amer. J. Hyg. 23:530-538, 1936.

McCain, P.P. Tuberculosis among Negroes in the United States. Amer. Rev. Tuberc. 35;25-35, 1937.

Pinner, M., and J. A. Kasper. Pathological peculiarities of tuberculosis in the American Negro. Amer. Rev. Tuberc. 26:463-491, 1932.

Cullen, V. F., and R. Hoffman. Tuberculosis in the Negro. Amer. Rev. Tuberc. 45:53-60, 1942.

Everett, F. R. The pathological anatomy of pulmonary tuberculosis in the American Negro and in the white race. Amer. Rev. Tuberc. 27:411-464, 1933.

Donnelly, J. Tuberculosis among Negro children with special reference to their resistance to the disease. Amer. Rev. Tuberc. 31:429-442, 1935.

Walsh, G., and H. M. Mason, Pulmonary tuberculosis in the American Negro; Do environment and the attitude of the patient affect his disease? Amer. Rev. Tuberc. 31:413-428, 1935.

2/ Medical Circular No. 1, Revised May 19, 1941, Selective Service System.

or other qualifying terms; such entries were classified as "Mental deficiency, unspecified."

Group II includes the disorders variously known as psychopathic personality, constitutional psychopathic state, and constitutional psychopathic inferiority, characterized by the record of certain types of recurrent social, sexual, or legal difficulties and by lack of adaptability for teamwork.

Group III disorders were less frequent than any of the other groups. They include individuals with abnormal fluctuations in mood and individuals who remain in a state of depression or in a state of elation.

Group IV, Psychoneurotic disorders, requires less definition. It includes two psychosomatic conditions; functional gastrointestinal syndrome and neurocirculatory asthenia. Stammering, stuttering, and tics are included in "Functional disorders of expressive movements."

Group V is typified by schizophrenia or dementia praecox, and their various manifestations.

Group VI comprises alcoholism and drug addiction.

Statements of institutional treatment for unspecified mental conditions and indefinite descriptions of mental or personality disorders were classified in "Mental defects and disorders not classifiable elsewhere."

Neurological disorders. The neurological disorder recorded most frequently was "Residuals of poliomyelitis," which were noted more frequently for white registrants than for Negroes. Next in order of frequency was epilepsy, reported for 4.0 white registrants and for 2.2 Negro registrants per 1000 examined. Numerous Forms 200 described convulsive seizures and other terms suggestive of epilepsy but not diagnosed as such; these were classified under the heading "Frequent attacks of fainting, unconsciousness, or convulsions, not further specified." The title "Progressive degenerative diseases of the spinal cord and nerves" includes such conditions as multiple sclerosis, amyotrophic lateral sclerosis, myasthenia gravis, and syringomyelia.

Musculoskeletal system. In Table 7 most musculoskeletal defects are classified in terms of the type of defect (amputation, ankylosis, atrophy, etc.) and in terms of the part of the body affected. 1/

The term "injury" as used in Table 7 includes after-effects of injury such as malunion of a fracture, limitation of function of a joint, or a scar that resulted in contracture or deformity. Acute injuries, such as unhealed fractures, were not coded and tabulated unless they were described as leading to permanent disability.

1/ Occasionally a registrant was recorded as having two or more musculoskeletal defects. In such cases the following rules were observed in selecting the defect to be coded and tabulated: (a) Birth injury, osteomyelitis, and rickets and its residuals were coded in preference to all other musculoskeletal defects; (b) If two types of defects were mentioned preference was given to the one mentioned first in the following list: amputation, ankylosis, arthritis, atrophy, shortening of an arm or leg, head or skull injury, semilunar cartilage injury, residuals of injury, and other and unspecified musculoskeletal defects; (c) If two or more parts of the body were affected, preference was given to the part named first in the following list: spine, hip, upper and lower extremities, shoulder, upper extremities, and lower extremities.

HEIGHT, WEIGHT, CHEST GIRTH, AND UMBILICAL GIRTH

Average values. The average white registrant was 68.5 inches tall, weighed 152.2 pounds, had a chest girth of 37.2 inches at inspiration and of 34.3 inches at expiration, a chest expansion of 2.9 inches, and had a waist girth of 30.8 inches.

The average Negro registrant was 68.1 inches tall, weighed 150.8 pounds, had a chest girth of 36.1 inches at inspiration and of 33.6 inches at expiration, a chest expansion of 2.5 inches, and had a waist girth of 30.0 inches.

The foregoing data are taken from Table 5; they are based on measurements of all registrants physically examined at local boards, and include men certified as available for general military service, for limited service, and as disqualified for any service. In Table 5, data are presented separately for men who were classified as available for general military service and for men who were rejected.

Table 5. Height, weight, chest girth, and umbilical girth of registrants examined at local boards, by race and by availability for military service 1/
November 1940 through September 1941

Measurement	Average			Standard deviation 2/		
	White and Negro	White 3/	Negro	White and Negro	White 3/	Negro
Height, inches						
All men examined	68.43	68.47	68.08	2.800	2.798	2.845
General service	68.49	68.53	68.20	2.678	2.667	2.749
Rejected	68.32	68.37	67.92	2.976	2.973	2.967
Weight, pounds						
All men examined	151.99	152.15	150.77	22.65	22.97	19.99
General service	152.15	152.32	150.77	20.53	20.74	18.69
Rejected	151.74	151.87	150.77	25.59	26.06	21.70
Chest girth, inspiration, inches						
All men examined	37.09	37.22	36.09	2.524	2.530	2.238
General service	37.12	37.25	36.08	2.334	2.327	2.122
Rejected	37.05	37.17	36.12	2.794	2.821	2.395
Chest girth, expiration, inches						
All men examined	34.23	34.30	33.55	2.441	2.715	2.248
General service	34.19	34.27	33.49	2.300	2.307	2.122
Rejected	34.26	34.35	33.64	2.782	2.818	2.415
Chest expansion, inches						
All men examined	2.82	2.88	2.50	.789	.798	.711
General service	2.89	2.94	2.55	.736	.731	.670
Rejected	2.74	2.78	2.43	.883	.891	.758
Umbilical girth, inches						
All men examined	30.68	30.76	29.99	2.982	3.032	2.450
General service	30.54	30.62	29.86	2.680	2.715	2.257
Rejected	30.89	30.98	30.18	3.391	3.463	2.691
Number measured 4/						
All men examined	112,314	99,712	12,602			
General service	68,176	60,783	7,393			
Rejected	44,138	38,929	5,209			

1/ Based on measurements of registrants physically examined in 21 selected states.
2/ Approximately 68 percent of the measurements can be expected to lie within a range of one standard deviation below the average and one standard deviation above the average.
3/ Includes all races other than Negro.
4/ Number whose height was measured.

NUMBER OF REGISTRANTS WITH SPECIFIED HEIGHTS AND WEIGHTS

WHITE REGISTRANTS PHYSICALLY EXAMINED AT LOCAL BOARDS

NOVEMBER 1940 THROUGH SEPTEMBER 1941

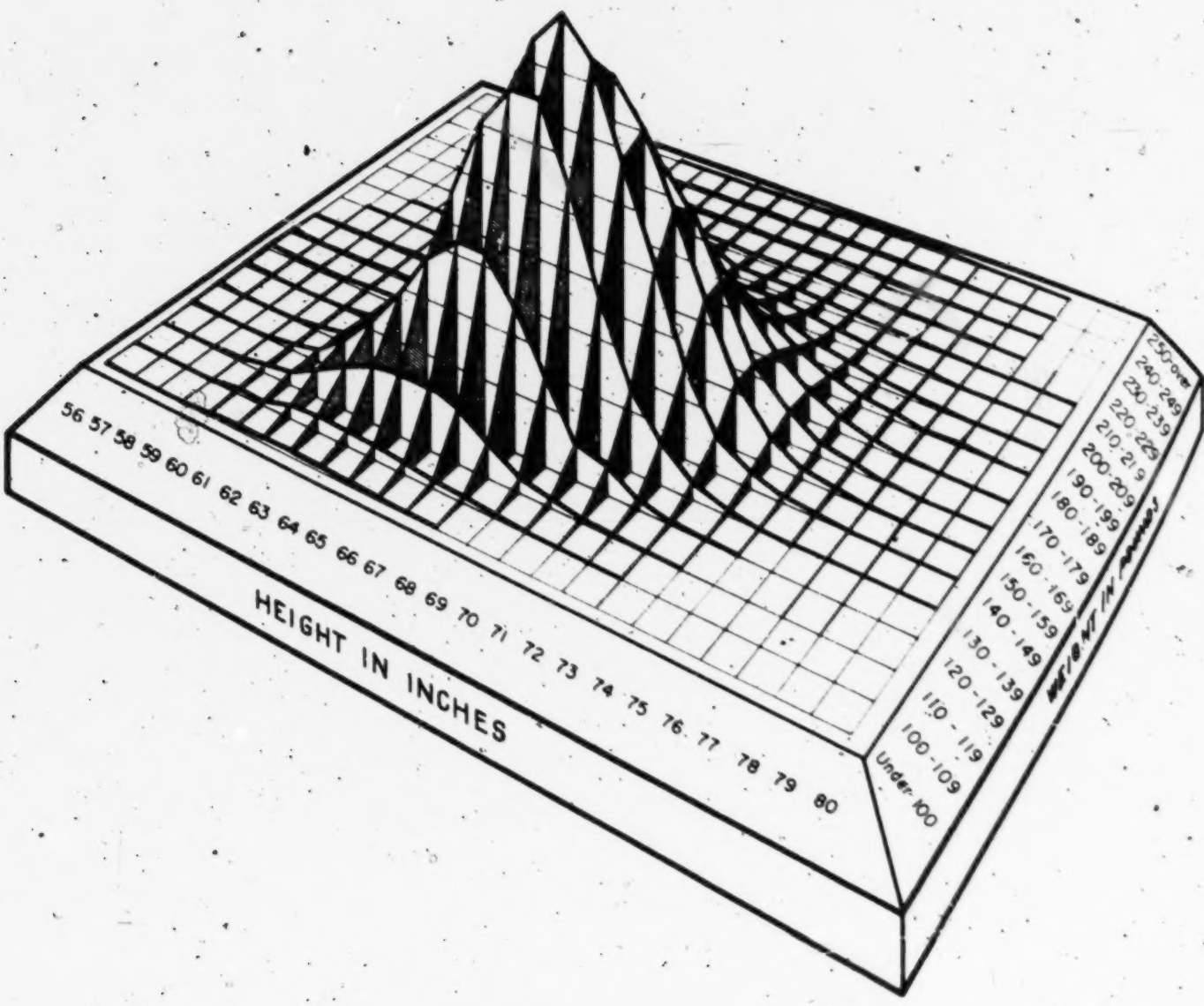


Figure 5. Three-dimensional chart showing distribution of heights and weights of white registrants physically examined at local boards. Based on data in Table 8.

The average height, weight, and chest girth of men examined at Army camps during 1917-1918 1/ are appreciably less than the corresponding data for men certified as available for general service (available for forwarding to induction stations), November 1940 through September 1941. In 1917-18, the average registrant forwarded for induction was 67.49 inches tall; in 1940-41, he was 68.49 inches tall, or an inch taller. In 1917-18, the average registrant forwarded for induction weighed 141.54 pounds; in 1940-41, he weighed 152.15 pounds, a

1/ Davenport, C. B., and A. G. Love, Army anthropology; Based on observations made on draft recruits, 1917-1918, and on veterans at demobilization, 1919. Washington, Gov't Printing Office, 1921.

difference of 10.61 pounds. In 1917-18, the average registrant forwarded for induction had a chest girth of 33.22 inches at expiration; in 1940-41, he measured 34.19 inches. Since the 1917-18 data included both whites and Negroes, the corresponding data from Table 5 have been used for comparative purposes.

Negro registrants were shorter in stature; had lesser chest and waist girths, smaller chest expansion, and weighed less than white registrants. All of these differences are statistically significant.

There was less variation among Negroes with respect to weight, chest girth, and waist girth than among whites, as shown by the standard deviations presented in Table 5. With respect to height, however, Negroes were slightly more variable than whites.

Men classified as available for general military service were taller, by 0.17 inch, than rejected men; heavier by 0.41 pound, had 0.15 inch greater chest expansion and 0.35 inch smaller waist. In addition, they were less variable than rejected men. For one thing, they were selected to meet certain standards of height, weight, and chest circumference and, for another, a number of the diseases and defects which resulted in rejection are associated with reduced chest expansion or with obesity.

In passing, it may be noted that the average height calculated from measurements of 112,314 registrants represented in the ten-percent sample of Forms 200 from 21 states, 68.43 inches, agrees within 0.04 inch with the average height of the 14,671 registrants for whom height measurements were available in a one-percent sample from the entire continental United States, 68.39 inches. 1/

Variation in height and weight. Among white registrants the height that was recorded most frequently was 68 inches and the weights that were recorded most frequently fell between 140 and 149 pounds; 3,562 of the 103,389 white registrants had this combination of height and weight. The frequency with which other combinations of height and weight were recorded for white registrants is shown in Table 8 in the Technical Appendix and is shown graphically in Figure 5. In general, combinations of height and weight close to this modal (or central) value of 68 inches and 140-149 pounds were recorded almost as frequently as the modal value, and combinations of heights and weights that differ widely from the modal value occurred relatively infrequently. 2/

Height values are distributed fairly symmetrically above and below the modal value. Weight values are not as evenly distributed and vary further on the overweight side than they do on the underweight side. The excess of overweight registrants over underweight registrants may be demonstrated by converting weight deviation to a percentage basis, as follows:

(a) 9.9 percent of all registrants were lighter than the average weight of men of their height by 15 percent or more.
(b) 78.2 percent of all registrants were within 15 percent of the average weight of men of their height.
(c) 11.9 percent of all registrants were heavier than the average weight of men of their height by 15 percent or more.

Deviations from average weight of 15 percent or more have been used for the purposes of this illustration because the experience of life insurance companies has shown that within a range of 15 percent above and below average weight the death rates are relatively low for men aged 20-29 and 30-39 at the time a life insurance policy is issued. Men who fall outside this range have higher death rates. 3/

1/ The average height of registrants included in the one-percent sample was given erroneously in Medical Statistics Bulletin No. 1 as 67.5 inches.

2/ It will be noted that registrants less than 60 inches tall have a rather wider distribution of weights than would have been predicted on the basis of the weight distributions of taller men. There is reason to believe that errors of transcription occurred in which, for example, the height of a man 5 feet 6 inches tall was recorded as 56 instead of 66 inches on the fifth line of the right-hand column of page 2, Form 200. An entry of 56, 57, 58, or 59 inches for a man qualified for general military service was plainly in error because men under 60 inches in height were not acceptable for general service. However, such inferences of error were not warranted for rejected men, and heights and weights were coded and tabulated as recorded.

3/ Data on the relation of death rates, defects, and diseases to weight deviation have been summarized by T. I. Edwards: A slide rule and two nomograms by which the percentage deviation of a man from the average weight of men of his height and age may be calculated. Amer. J. Hyg. 35:307-315, 1942.

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TECHNICAL APPENDIX

The tables, graphs, and explanatory text presented in earlier sections of this bulletin are largely limited to material most likely to be needed for reference purposes. This Technical Appendix presents notes on methodology and on certain special topics, such as age distribution, which it is hoped will be helpful to persons who wish to study the data critically.

REPORT OF PHYSICAL EXAMINATION, FORM 200

The data presented in this bulletin was obtained by coding and tabulating the entries recorded on Report of Physical Examination, Form 200, by local board clerks and board members, local board physicians, and medical advisory board members. Pages 1 and 2 of Form 200 have been reproduced as figures 6 and 7. To illustrate the use of the form and to facilitate discussion of coding procedures, the record of a hypothetical registrant has been recorded on the form.

When a registrant was notified to appear for physical examination the local board clerk typed in the identification data on the top of page 1 and affixed the local board date stamp in the box at the upper left. 1/

The registrant was entitled to make a statement of any defects he believed he had, and was required to sign the form. Subsequently, the registrant appeared before the local board physician and the local board dentist, if a dentist had been so designated. They examined the registrant in accordance with Selective Service regulations and recorded their findings on page 2. If a case presented unusual diagnostic difficulty such as suspected mental disease, the local board physician could request that the registrant be referred for examination by a specialist on the Medical Advisory Board. The specialist's findings were recorded on page 3 of the form, which was similar to page 2. (A fourth page carried instructions for the use of the form.) After physical examination, the local board physician entered near the foot of page 2 his recommendation concerning availability for military service.

The local board considered the recommendation of the local board physician in classifying the registrant and usually concurred in it. The local board classification, as shown in the certification section on page 1 of Form 200, has been used in preparing tables 4 and 6.

Completeness of defect data. Examining physicians were instructed to record minor as well as major defects observed in the course of the physical examination. 2/ For purposes of statistical analysis this is fortunate because it led to more complete enumeration of many kinds of defects not specifically listed in the Physical Standards.

Only a small proportion of the Forms 200 show any indication that the physical examination ended when a disqualifying defect was found. The overwhelming majority of the forms were completely filled out, including all tests and measurements for which space was provided.

Naturally there were great differences in the detail in which defects were described. Typically, terse diagnostic terms were recorded when a defect was noted and "normal" or "none" when no defect was noted. Many physicians, however, made a record of the principal findings on which their diagnosis was based, stated the cause of the condition, or made a notation to show to what extent the registrant was handicapped by the defect under discussion. Frequently statements from hospitals or sanitoria where the registrant had been under treatment were stapled to the form.

SAMPLING PROCEDURE

Local boards reported 3/ that more than 2,800,000 physical examinations had been made through September 30, 1941 and, in addition, 186,000 registrants had been deferred because of obvious defect and 143,000 for educational deficiency. On the basis of this report, a total of approximately 3,129,000 Reports of Physical Examination, Form 200, were potentially available for statistical analysis. With existing facilities it was impossible to code and tabulate each of these schedules, and so it became necessary to estimate the largest number of schedules which could be coded and tabulated and to apportion this number in such a way that each state, county, and local board would be equitably represented.

It was considered feasible to undertake analysis of approximately 300,000 schedules, which represented a ten-percent sample of all Forms 200 dated September 30, 1941 or earlier.

Reports of Physical Examination, Form 200, were arranged in National Headquarters' files by state, county, and local board. Within each local board, Forms 200 were filed by the order numbers of the registrants. A count was made of the number of Forms 200 transmitted to National Headquarters by each state, and sampling was not attempted until sufficient schedules were on file to represent 85 percent of the reported number of physical

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1/ Even though a registrant were disqualified by the local board prior to physical examination for obvious defect or for educational deficiency, page 1 of Form 200 was filled out, and such forms are represented in this study.

2/ Selective Service Regulations, Volume 6, Physical Standards: paragraphs 3 and 5 of Standards of Physical Examination during Mobilization, MR 1-8, August 31, 1940.

3/ Accumulative Progress Report of Classification and Induction through September 30, 1941.

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examinations made through September 30, 1941. When this degree of completeness of the files had been attained, work sheets were made up which showed for each county:

(1) The number of physical examinations made and the number of registrants deferred for obvious defect or educational deficiency.
(2) The number of Forms 200 received at National Headquarters.

It was desired to draw one-tenth the number of forms shown in item (1) from the number of forms shown in item (2) in such a way that every Form 200 received from the county would have an equal chance of being drawn. The procedure may be illustrated by a hypothetical case.

Suppose, on the basis of reports made by local boards, that 600 Forms 200 could be expected from the local boards in a county. In the sample, that county would be represented by one-tenth of the number, or by 60 Forms 200. Suppose further, that local boards in that county had transmitted only 540 Forms 200 to National Headquarters by the time sampling began. The 60 schedules desired represent one-ninth of the number on file. Every ninth schedule was drawn for coding and tabulation. This procedure resulted in drawing Forms 200 from every local board in the county and since order numbers were assigned to registrants in an unbiased and systematic manner 1/ it also gave each examined registrant whose schedule was on file an equal chance of being drawn. In the example shown, the desired number of Forms 200 could be obtained at the first trial. Usually, of course, the number of schedules on file was not a simple multiple of the number of schedules desired for the sample. Sample ratios were so calculated that the first drawing would yield slightly less than the number of schedules that were wanted. The deficit was noted, and a second sampling ratio was calculated so that the requisite number could be drawn from the schedules remaining in the files. If a deficit still remained, a third sampling ratio was calculated and the process repeated.

Selection of the 21 states included in this study. After the sampling operations described in the preceding paragraphs had been completed, the pressure of other statistical work on Selective Service reports made it necessary to curtail the original plans for tabulation of Forms 200. Accordingly, a selection was made of states in which the total number of schedules could be coded and tabulated with available personnel and tabulating facilities. It was desirable that these states should be representative of the Nation with respect to:

(1) Geographical distribution
(2) Proportion of whites and Negroes
(3) Proportion of urban and rural residents

The states selected were:

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Florida
Georgia
Indiana
Iowa
Kansas
Kentucky
Maine
Maryland
Minnesota
Montana
Oklahoma
Oregon
Pennsylvania
Utah
Wisconsin

1/ The process by which order numbers were assigned to registrants has been clearly and briefly described in Chapter VIII of Selective Service in Peacetime, pages 84-99. Details may be found in Volume Three of Selective Service Regulations.

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Local Board No. 1	01
Thornton County	001
SEPTEMBER 5, 1941	001
County Court House	
Thornton, Maryland	
(STAMP OF LOCAL BOARD)	

REPORT OF PHYSICAL EXAMINATION

Doe (Last name) John (First name) Thomas (Middle name) 158 (Order No.) Race White

Occupation Public school janitor

Permanent address Thornton (Town) Thornton (County) Maryland (State) [Urban ☒ Rural ☐] English (Mother tongue)

Birthplace Platteville (City, town, or county) Maryland (State or country) Birth date October (Month) 10 (Day) 1914 (Year)

†Place "X" in box opposite urban community of 2,500 population or greater; otherwise place "X" in box opposite rural.

STATEMENT OF PERSON EXAMINED

Do you consider that you are now sound and well? No If not give details Heart trouble, bad eyesight

What illnesses, diseases, or accidents have you had since childhood? Heart trouble following rheumatic fever at age 5

Have you ever had any of the following? If so, give dates: Spells of unconsciousness, convulsions, or fits No

Gonorrhea No Sore on penis No

Are you addicted to the use of habit-forming drugs or narcotics? No

Have you ever since childhood wet the bed while asleep? No

Have you ever raised or spat up blood? No If so, when?

When were you last treated by a physician, and for what ailment? 1919 - rheumatic fever

Have you ever been under treatment at a hospital or asylum? No If so, when, and for what ailment?

I CERTIFY that the foregoing questions and my answers thereto have been read over to me; that I fully understand the questions, and that my answers thereto are correctly recorded and true in all respects.

I FURTHER CERTIFY that I have been fully informed and know that making or being a party to making any false statement as to my fitness for military service renders me liable to punishment by fine and imprisonment.

Place Thornton, Maryland

John Thomas Doe
(Signature of person examined)

Date September 5, 1941

This local board finds that the person named above is:

~~Qualified for general military service.~~

~~Qualified for limited military service.~~

Disqualified for military service because of Enlarged heart and poor vision

Date September 10, 1941

W. W. Wollingrath
(Member of Local Board)

Application is hereby made to have the registrant sent to a Medical Advisory Board for further physical examination because of

Date

(Signature and title)

This Local Board respectfully refers the registrant named on first page hereof to Medical Advisory Board No. for further examination in

Date

Member of Local Board.

D. S. S. Form 200 Report of Physical Examination.

Page 1

Figure 6.

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PHYSICAL EXAMINATION BY PHYSICIAN FOR LOCAL BOARD

1. Eye abnormalities: Convergent squint, with amblyopia
2. Ear, nose, throat abnormalities: None
3. Mouth and gum abnormalities: None
4. Teeth (Examinee's) — Right: X 7 6 5 4 3 2 1 / 16 15 14 13 12 11 10 9 — Left: 1 2 3 4 5 6 7 8 / 9 10 11 12 13 14 15 X (Strike out those that are missing; circle those that may be restored)
5. Skin: Clear
6. Varicose veins: None
7. Hernia: None
8. Hemorrhoids: None
9. Genitalia: Normal
10. Feet: Pes planus, first degree. Bunions, both great toes.
11. Musculo-skeletal defects: Considerable stiffness of knees
12. Abdominal viscera: Normal
13. Cardiovascular system: Enlarged heart. Loud mitral murmur
14. Lungs, including X-ray, if made: Normal
15. Nervous system: Reflexes, pupillary: Normal patellar: Normal
16. Endocrine disturbances: None
17. Results of laboratory examinations, when made: Kahn negative
18. Remarks on defects not sufficiently described above: Rheumatic heart disease. History of rheumatic fever in childhood. At present has loud systolic murmur over mitral area, transmitted to the axilla. Dyspnea on exertion.
19. Summary of defects in order of importance, impression of physical fitness:
    Rheumatic heart disease
    Amblyopia
    Stiffness in knee joints

Vision: with glasses
- Right eye 20/ 30 20/20
- Left eye 20/ 200 20/200

Hearing:
- Right ear 20/20
- Left ear 20/20

Height: 65½ in
Weight: 127 lb
Girth (at nipples):
- Inspiration 32½ in
- Expiration 30 in

Girth (at umbilicus): 29 in
Posture: Stooped
Frame: Slight
Color of hair: Brown
Color of eyes: Brown
Complexion: Dark
Pulse: ‡
- Sitting 80
- After exercise 104
- 2 min. after exercise 86

Blood pressure: ‡
- Systolic 130
- Diastolic 82

Urinalysis:
- Sp. gr. 1.024
- Albumin Neg.
- Sugar Neg.
- Microscopic‡
- Other data‡

‡ When required.

I CERTIFY that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is:

~~Qualified for general military service~~
~~Qualified for limited military service~~

Disqualified for military service by reason of: Rheumatic heart disease; defective vision.

Place: Thornton, Maryland
Date: September 5, 1941

Jerome A. Johns, M. D.
Examining Physician.

I hereby appeal from the finding of the above Local Board to the Board of Appeal because of .....

Date .....

(Signature of registrant)

Figure 7.

CODING

Discussion of the coding of data entered on page 1 of Form 200 falls outside the province of this bulletin.

With certain exceptions, such as those mentioned under "Priority Chart," every defect described in words on page 2 was included in tables which show the incidence of all recorded defects.

Physicians were free to describe defects in any language they chose. Usually, precise terminology was used but frequently idiomatic expressions and lay language were employed. Coding manuals were made up by copying and classifying all of the entries found on approximately 30,000 Forms 200, describing physical or mental defects. After coding and classifying these entries two manuals were set up. One, used by coders, listed key words and permissible modifiers in alphabetic order, together with the code number to be assigned. An example follows:

802 Bow legs (due to) rickets (childhood, during childhood, old, possibly, probably)
251 Bradycardia, sinus
662 Brain abscess
648 Brain, concussion (of) [May include one or more of the following]

convulsive disease	personality changes
fracture of skull	post-traumatic
marked	recent
mild	severe
moderate	symptoms

648 Brain injury, sequelae (of) (old, severe)
652 Brain stem disorder, encephalitis
639 Breakdown, nervous
777 Breastbone deformity

Each of these three-digit codes, 802,251,662, etc., designates one of the 515 titles listed in Table 7. If a coder could match, word for word, entries on Form 200 with terms listed in the manual, the indicated code number could be assigned. Terms listed within parentheses might or might not be present and would not affect choice of code number. Instructions to coders were placed within brackets [ ]. Except for a few types of defects such as tuberculosis and flat feet, no attempt was made to code the stage or degree of the defect. This greatly simplified the problem of coding. If a coder were unable to match a physician's entry with terms listed in the coding manual it was brought to the attention of the section supervisor. Difficult cases were referred to the Medical Division and when the situation warranted, the advice of leading specialists was obtained.

When every named defect recorded on a particular Form 200 had been coded in this way the form passed to a verifier, who looked up each code number in a manual which listed all the terms to which that code number could be applied. If the physician's entry could be found in the verifier's manual by looking up the assigned code number, the coding was considered to be correct. If the entry could not be matched up with terms in the verifier's manual, the supervisor of the verifying section was notified and the correct code was obtained, as noted above.

PRIORITY CHART

Frequently information entered in one part of the physical examination form was duplicated by information entered elsewhere on the form in different words and it became necessary to set up safeguards against counting the same condition two or more times for a single man. Figure 7 provides an example. Rheumatic heart disease is reported in the physician's summary in item 19, and in item 18 the examining physician has listed the evidence on which he based his diagnosis. Since the existence of these signs and symptoms is implied by the diagnosis they should not be tabulated in addition to rheumatic heart disease.

A procedure which was set up to minimize duplication of this kind involved (a) assigning a code number to every defect recorded in words on the physical examination form and (b) checking the code numbers against a "priority chart" to ascertain which would best describe the registrant's condition.

Thus, in the example shown in Figure 7, code numbers would be assigned to the entries: "enlarged heart," "loud mitral murmur," "At present has loud systolic murmur over mitral area, transmitted to the axilla," and "Dyspnea on exertion," as well as to "Rheumatic heart disease." After verification the coded form would pass to a clerk who would review each coded form in terms of the priority chart which listed, in terms of code number, 28 major subdivisions of the defect code, corresponding to organic systems of the body, e.g., eyes, ears, teeth, etc., or to diseases, e.g., tuberculosis, syphilis, etc. Within each of these 28 major subdivisions of the code, defects were arranged in order of the preference to be given when a choice had to be made between two or more named defects. Diagnoses, which imply the existence of certain signs and symptoms, were at the top of the list and signs and symptoms (often reported by themselves) were at the foot of the list. Thus, only the term which was most descriptive of the registrant's condition was finally transferred

to a punch card.

Terms that describe the end result of a pathological condition have, in general, been given preference over terms that describe the cause. Thus in the entry "Convergent squint with amblyopia," the end result amblyopia was selected as the term describing the registrant's eyes instead of convergent squint, the probable cause.

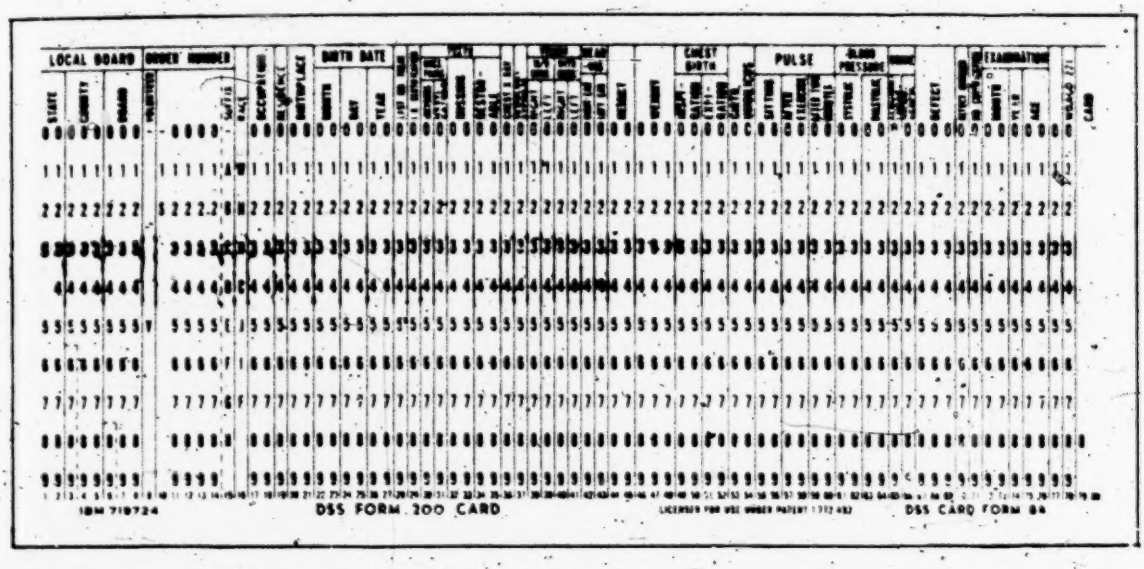


Figure 8. Punch card to which coded data were transferred from Form 200, Report of Physical Examination.

PUNCH CARD

A specimen of the punch card to which coded data were transferred is shown in Figure 8. The column headings printed on the card indicate the items of information that are available for tabulation. Subsequent bulletins will deal with other aspects of the data. A separate card was punched for each defect described for each man. The defect listed first in item 19, "Summary of defects in order of importance" was identified by an X-punch in Col. 70 so that the cause of rejection could always be ascertained.

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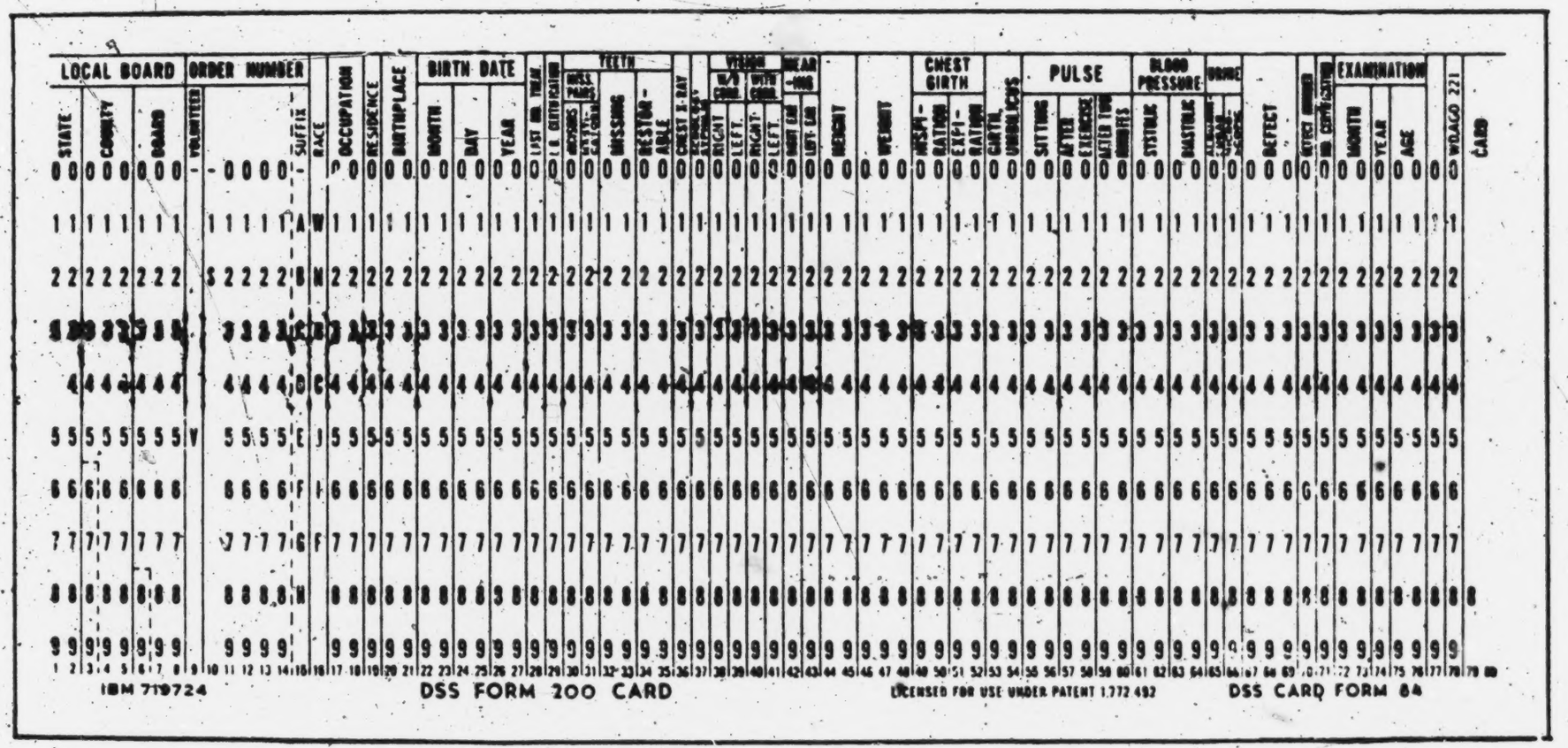


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AGE DISTRIBUTION

The data on rejection rates in relation to age presented in figures 2 and 3 and in Table 2 have been derived wholly or in part from the data of Table 6. Table 6 shows the number of men in each year of birth by race and by classification after physical examination. Several general features of these data will be discussed briefly.

Figure 9 shows, by the height of vertical bars, the percentages of white and of Negro registrants who were born in specified years. The shape of the upper boundary of these bars is influenced principally by three factors: (1) Men born after July 1, 1920 were not liable for military service until after July 1, 1941, the date of the second registration, and a large proportion of the ca shown as born in 1924, 1923, 1922, 1921, and to a certain extent, 1920, were volunteers who applied for enlistment through local boards. (2) There is a gradual decline in the heights of the bars fro 1918 on because, with advancing age, a larger proportion of men were granted deferment on grounds of dependency, essential occupation, and other reasons discussed in connection with Figure 1. (3) After July 1, 1941, men over 28 were deferred. 1/

Average age. The average age of both white and Negro registrants was 26.0 years, reckoned from year of birth as given in Table 6 to April 1, 1941, the date when half the registrants included

Table 6. Classification of registrants after local board physical examination, by year of birth and by ra November 1940 through September 1941 1/

Year of birth	White and Negro				White 2/				Negro			
	Total	I-A	I-B	IV-F	Total	I-A	I-B	IV-F	Total	I-A	I-B	IV-F
Total examined 3/	121,700	68,435	26,260	27,005	107,613	60,997	22,740	23,876	14,087	7,438	3,520	3,129
1924	11	6	3	2	5	4	1	-	6	2	2	2
1923	279	240	23	16	117	107	4	6	162	133	19	10
1922	730	645	53	32	378	336	25	17	352	309	28	15
1921	567	479	41	47	320	280	9	31	247	199	32	16
1920	5,019	3,351	885	783	4,452	2,958	792	702	567	393	93	81
1919	16,211	10,891	2,861	2,459	14,249	9,610	2,481	2,158	1,962	1,281	380	301
1918	16,482	10,570	3,177	2,735	14,841	9,580	2,791	2,470	1,641	990	386	265
1917	13,473	8,453	2,639	2,381	12,230	7,699	2,349	2,182	1,243	754	290	199
1916	11,461	6,932	2,385	2,144	10,343	6,337	2,085	1,921	1,118	595	300	223
1915	9,994	5,746	2,170	2,078	9,040	5,239	1,913	1,888	954	507	257	190
1914	8,921	4,848	2,022	2,051	7,946	4,371	1,747	1,828	975	477	275	223
1913	6,741	3,487	1,616	1,638	6,049	3,174	1,416	1,459	692	313	200	179
1912	5,329	2,597	1,257	1,475	4,698	2,319	1,089	1,290	631	278	168	185
1911	4,462	2,038	1,112	1,312	3,913	1,809	953	1,151	549	229	159	161
1910	4,299	1,832	1,129	1,338	3,670	1,607	940	1,123	629	225	189	215
1909	3,611	1,440	987	1,184	3,196	1,295	842	1,059	415	145	145	125
1908	3,478	1,343	930	1,205	3,034	1,180	796	1,058	444	163	134	147
1907	3,374	1,197	939	1,238	2,927	1,061	799	1,067	447	136	140	171
1906	3,072	976	867	1,229	2,662	849	741	1,072	410	127	126	157
1905	2,826	857	833	1,136	2,417	752	694	971	409	105	139	165
1904	602	154	169	279	526	140	144	242	76	14	25	37
1903	18	5	5	8	17	5	4	8	1	-	1	-
1902	8	1	-	7	4	1	-	3	4	-	-	4
1901	10	3	2	5	8	3	1	4	2	-	1	1
1900	9	4	1	4	7	4	-	3	2	-	1	1
Not stated	713	340	154	219	564	277	124	163	149	63	30	56

1/ In the columnar headings, I-A designates registrants available for general military service; I-B, registrants available for limited military service; and IV-F, registrants disqualified for military service.
2/ Includes all races other than Negro.
3/ Excluding 266 registrants whose classification was not shown.

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PERCENT DISTRIBUTION, BY YEAR OF BIRTH, OF WHITE AND NEGRO REGISTRANTS PHYSICALLY EXAMINED AT LOCAL BOARDS NOVEMBER 1940 THROUGH SEPTEMBER 1941

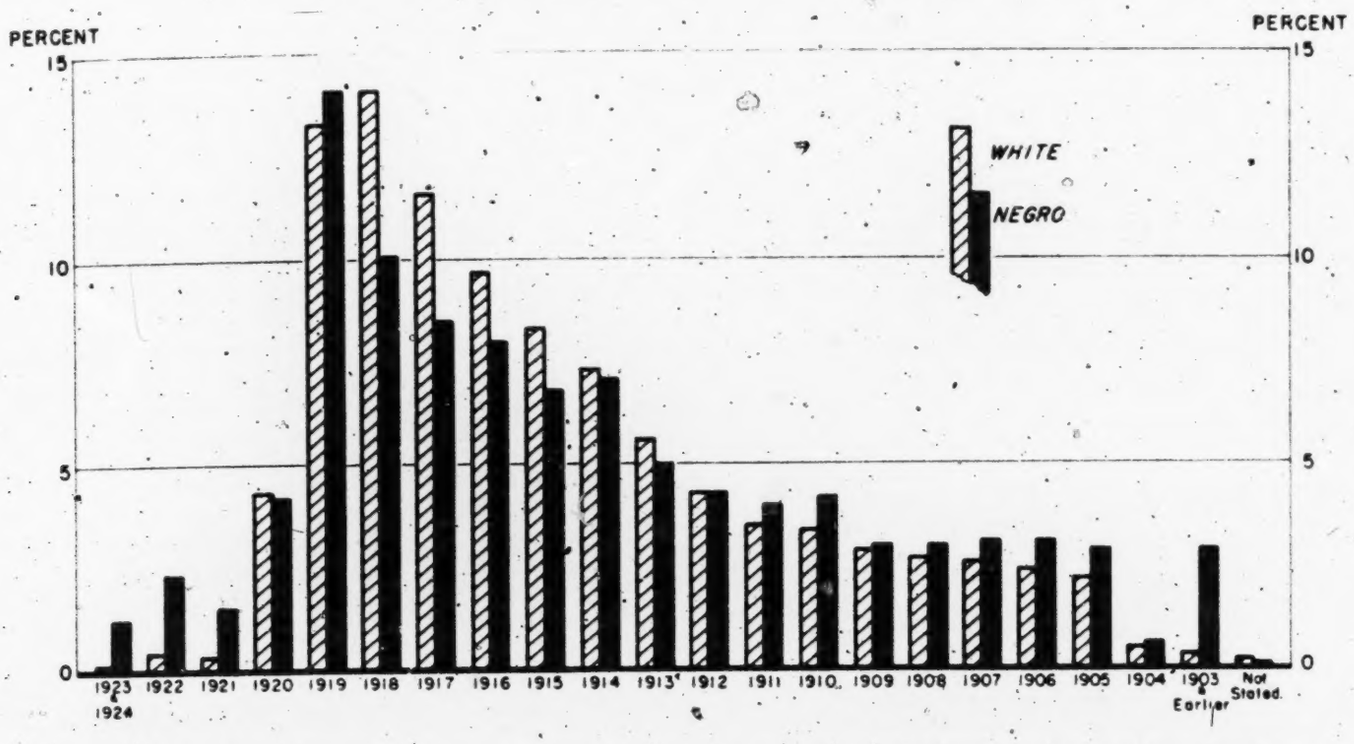


Figure 9. Bar diagram showing percentages of white and of Negro registrants who were born in specified years. Based on data in Table 6.

in this study had been examined. For the period November 1940 through May 1941 the average age of registrants called up for local board physical examination was 25.8 years.

The average age of over 3,000,000 applicants for War Risk Insurance in World War I was 24.9 years. 2/

Age scales on Figures 2 and 3. The data dealing with classification in relation to age in Table 6 and in releases of the Office of The Adjutant General were expressed in terms of year of birth rather than in terms of completed years of age at time of examination. Tables and graphs were constructed and labeled accordingly. For convenience in interpreting these graphs an age scale has been added showing the age attained by April 15, 1941, the date when half of the registrants included in this study had been examined.

1/ A table and a set of bar diagrams showing the age distribution of inducted registrants, November 1940 through November 1941, in relation to year of birth appear on page 235 of Selective Service in Peacetime. Data showing classification after local board examination in relation to age for the period November 1940 through May 31, 1941 appear on pages 104 and 211 of Selective Service in Peacetime.

2/ Similar data on the age distribution of soldiers in the Civil War and in World War I are presented on pages 64 and 65 of Army anthropology: Based on observations made on draft recruits, 1917-1918, and on veterans at demobilization, by C. B. Davenport and A. G. Love. Government Printing Office, Washington, D. C., 1921.

2064

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
Number examined				121,966	107,851	14,115
EYES	123.5	130.5	70.6	15,066	14,070	996
Blindness, bilateral	.7	.7	.5	88	81	7
Blindness, unilateral	5.8	5.8	6.3	713	624	89
Amblyopia	3.1	3.4	.8	381	370	11
Blindness, partial	1.6	1.6	1.0	190	176	14
Vision defective or insufficient	16.6	17.6	8.7	2,021	1,898	123
Astigmatism	5.8	6.4	1.1	706	691	15
Hyperopia	1.8	1.9	.5	216	209	7
Myopia	17.5	19.3	3.4	2,130	2,082	48
Errors of refraction, other, unspecified	30.8	33.9	7.6	3,762	3,654	108
Ptosis, eyelid	.9	.9	1.4	114	94	20
Ectropion or entropion	.1	.1	.1	7	6	1
Dacryocystitis	.2	.2	.2	24	21	3
Trachoma	.5	.6	.1	63	62	1
Conjunctivitis	8.9	8.1	6.1	963	877	86
Pterygium	3.0	2.8	4.0	361	305	56
Cornea, diseases of	2.9	2.7	4.4	357	295	62
Choroiditis	.3	.3	.4	35	30	5
Phthisis bulbi	.1	.1	.1	7	6	1
Iris, diseases of	.4	.5	.4	54	49	5
Synechia	.4	.4	.4	46	41	5
Night blindness	*	*	-	4	4	-
Retina detached	.2	.2	.1	26	24	2
Retinitis	.9	1.0	.6	112	103	9
Color blind	1.0	1.1	.2	120	117	3
Optic nerve, diseases of	.6	.6	.5	75	68	7
Exophthalmos	1.3	1.3	1.7	161	136	25
Glaucoma	.1	.1	.2	12	9	3
Cataract	2.1	2.1	2.8	262	222	40
Aphakia	.2	.2	.3	31	27	4
Pupillary abnormalities	2.2	2.2	2.0	271	243	28
Strabismus	7.7	8.1	5.2	943	869	74
Nystagmus	1.5	1.6	.7	178	168	10
Congenital anomalies of eyes, lids	.3	.3	.1	33	31	2
Eye, injury	2.2	2.1	2.8	268	229	39
Eyelids, injury	.1	.1	-	9	9	-
Eye, other diseases of	1.6	1.2	4.7	194	128	66
Eyelids, other defects	1.1	1.0	1.2	129	112	17
EARS	50.1	54.0	20.0	6,112	5,829	283
Deafness, bilateral	.7	.8	.3	86	82	4
Deafness, unilateral	1.8	1.9	.6	216	208	8
Hearing, defective	5.7	6.1	2.6	697	661	36
Mastoiditis	.4	.5	-	50	50	-
Mastoidectomy, result of	1.7	1.9	.2	211	208	3

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
EARS-Continued						
Otitis externa	0.3	0.3	0.1	31	30	1
Otitis media	8.3	9.2	1.6	1,016	993	23
Otitis interna	.3	.3	.1	40	38	2
Tympanic membrane, perforated	4.0	4.4	.7	481	471	10
Tympanic membrane, absence of	.2	.2	-	20	20	-
Tympanic membrane, other	6.3	7.0	1.1	771	756	15
Ear, deformity of	.6	.5	.6	69	60	9
Impacted cerumen or foreign body in ear	19.1	20.1	11.5	2,334	2,170	164
Ear, other conditions of	.7	.8	.6	90	82	8
TEETH	167.8	176.9	98.5	20,470	19,080	1,390
Teeth, none, satisfactory artificial dentures	5.7	6.4	.4	698	692	6
Teeth, none, unsatisfactory artificial dentures	*	*	-	3	3	-
Denture, full upper or lower, with partial denture opposing	.9	1.0	.1	107	105	2
Denture, full, artificial, satisfactory, upper or lower or unspecified	10.6	12.0	.5	1,296	1,289	7
Denture, full, artificial, unsatisfactory, upper or lower or unspecified	.1	.1	-	15	15	-
Denture, partial, artificial, satisfactory upper, lower or unspecified	21.2	23.2	5.5	2,582	2,505	77
Denture, partial, artificial, unsatisfactory, upper, lower or unspecified	.6	.6	.2	68	65	3
Teeth missing	60.1	64.5	26.8	7,333	6,955	378
Malocclusion	10.3	10.9	5.8	1,253	1,171	82
Dental infection	1.9	2.0	1.3	238	220	18
Caries	40.8	40.7	41.2	4,971	4,389	582
Teeth, impacted, unerupted, supernumerary	6.4	6.7	4.4	765	723	62
Teeth, loose, unspecified cause	.3	.3	.5	36	29	7
Dental conditions, other	8.9	8.5	11.8	1,085	919	166
MOUTH AND GUMS	84.2	81.3	106.3	10,265	8,764	1,501
Gingivitis	14.6	14.3	16.2	1,774	1,545	229
Pericoronitis	*	*	.1	5	4	1
Trench mouth	.9	.9	.8	106	95	11
Gums, other diseases of	10.5	10.2	13.5	1,285	1,095	190
Pyorrhea	49.5	47.3	66.3	6,033	5,097	936
Stomatitis	.2	.2	.2	25	22	3
Prognathism	.2	.2	.1	24	23	1
Lips, palate, congenital deformities	1.8	1.9	.5	216	209	7
Oral cavity and annexa (except teeth), other diseases of	6.5	6.3	8.6	797	674	123
NOSE	81.5	89.0	24.1	9,937	9,597	340
Septum deviated, complete obstruction	.9	1.0	-	105	105	-
Septum deviated, partial obstruction	43.3	48.2	6.3	5,286	5,197	89
Obstruction, cause unspecified	5.5	6.0	1.4	668	648	20
Septum, perforation of	.5	.5	.2	60	57	3
Turbinate, hypertrophy of	11.2	11.2	11.0	1,368	1,213	155

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
NOSE-Continued						
Nasal polypi	1.5	1.5	1.0	180	166	14
Vasomotor rhinitis	3.3	3.7	.5	402	395	7
Rhinitis, chronic	5.0	5.5	1.5	609	589	20
Sinusitis	5.3	5.9	1.1	650	634	16
Nose, deformity of	3.6	3.9	.8	436	425	11
Nasal fossae, other diseases of	1.4	1.6	.3	173	168	5
THROAT	81.5	81.2	84.0	9,938	8,753	1,185
Adenoids	.2	.1	.3	18	14	4
Tonsils, hypertrophy of	44.1	42.7	54.8	5,381	4,608	773
Tonsillitis	28.1	29.1	20.8	3,432	3,138	294
Nasopharyngitis and pharyngitis	7.4	7.5	6.8	899	803	96
Vincent's angina of throat	*	*	.1	5	4	1
Throat, congenital anomalies of	.6	.6	.7	70	60	10
Pharynx, other diseases of	.4	.4	.4	48	42	6
Laryngitis	.3	.3	.1	36	35	1
Larynx, other diseases of	.4	.5	-	49	49	-
LUNGS	16.2	17.1	8.6	1,971	1,849	122
Bronchitis	1.8	1.9	.7	218	208	10
Bronchiectasis	.5	.5	.1	61	60	1
Asthma	5.4	5.6	3.7	655	602	53
Pleurisy	.9	1.0	.1	106	105	1
Empyema	.2	.2	-	18	18	-
Empyema scars	1.7	1.9	.5	213	206	7
Emphysema, pulmonary	.6	.7	.1	72	71	1
Lung, abscess of	*	*	.1	3	2	1
Pneumoconiosis	.1	.1	-	11	11	-
Hydrothorax	*	*	-	1	1	-
Pneumothorax	.9	.9	.1	104	102	2
Rales, persistent	.5	.6	.4	66	61	5
Respiratory disease, acute	.4	.4	.6	54	45	9
Lungs, congenital anomalies	*	*	-	1	1	-
Pulmonary pathology, unspecified	3.0	3.1	2.2	367	335	32
Lungs, other diseases of	.2	.2	-	21	21	-
TUBERCULOSIS	9.7	10.3	5.2	1,189	1,115	74
Tuberculosis, pulmonary, active, far-advanced	.3	.4	.1	33	31	2
Tuberculosis, pulmonary, active, moderately advanced	.4	.4	.4	55	49	6
Tuberculosis, pulmonary, minimal	.8	.9	.3	103	99	4
Tuberculosis, pulmonary, arrested, quiescent	2.0	2.1	.5	239	232	7
Tuberculosis, pulmonary, unspecified	3.3	3.5	2.0	401	373	28
Tuberculosis, pulmonary, suspected	1.1	1.2	.8	140	128	12
Tuberculosis, genito-urinary system	.1	.2	-	10	10	-
Tuberculosis, bones and joints	.9	.9	.4	110	104	6
Tuberculosis, history of	.6	.5	.3	70	66	4
Tuberculosis, other	.2	.2	.4	28	23	5

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
CARDIOVASCULAR	83.1	84.6	71.8	10,140	9,126	1,014
Mitral regurgitation	5.2	5.3	4.5	634	570	64
Mitral stenosis and unspecified diseases of mitral valve	4.6	5.0	3.2	583	538	45
Aortic and mitral lesions combined	.5	.5	.7	59	48	11
Aortic regurgitation	.5	.3	1.2	56	39	17
Aortic stenosis and unspecified diseases of aortic valve	1.3	1.2	1.5	155	134	21
Pulmonic lesions	.2	.2	.3	29	25	4
Tricuspid lesions	.2	.1	.2	19	16	3
Systolic murmur, unspecified	8.2	8.1	8.8	995	869	126
Murmur, type unspecified	4.0	4.0	4.3	492	432	60
Endocarditis, bacterial, subacute	*	*	-	3	3	-
Endocarditis, unspecified	.7	.8	.5	88	81	7
Heart disease, rheumatic	3.5	3.8	1.3	433	415	18
Pericarditis	.1	.1	.1	11	10	1
Heart disease, congenital	.2	.2	.1	26	25	1
Cardiac hypertrophy	2.8	2.8	3.0	345	303	42
Vascular disease, cardiorenal	.3	.3	.4	37	32	5
Coronary disease	.1	.1	-	8	8	-
Myocardial insufficiency	2.1	2.2	1.1	255	239	16
Heart block	.1	.1	.1	11	10	1
Bradycardia	.3	.3	.4	43	38	5
Auricular fibrillation	.3	.3	.1	34	32	2
Tachycardia, persistent	1.6	1.8	.2	194	191	3
Tachycardia, functional	6.0	6.6	2.0	737	709	28
Tachycardia, unspecified	5.1	5.4	2.8	623	582	41
Arrhythmia, premature beats	1.8	1.9	1.1	217	201	16
Arrhythmia, sinus arrhythmia	1.1	1.2	.4	133	128	5
Cardiac rhythm, other disorders of	2.6	2.7	2.3	319	287	32
Murmur, functional, apex systolic	1.3	1.4	.7	161	151	10
Murmur, functional, cardiorespiratory	.3	.3	.1	33	32	1
Murmur, functional, pulmonic systolic	.4	.4	.9	55	42	13
Heart murmur, functional, others	3.0	3.1	2.6	370	332	38
Heart, other diseases of	2.8	2.8	2.6	340	304	36
Arteriosclerosis	.6	.6	1.2	74	57	17
Hypertension, arterial	16.6	16.3	19.1	2,028	1,758	270
Transient hypertension	3.3	3.4	2.5	406	371	35
Hypotension, arterial	.7	.6	1.1	84	69	15
Aortitis	.1	*	.2	8	5	3
Aorta, aneurysm of the	*	*	.1	2	1	1
Aneurysm, other than aortic	.1	.1	.1	10	9	1
Raynaud's disease	*	*	-	3	3	-
Thromboangiitis obliterans	*	.1	-	6	6	-
Circulatory system, other diseases of	.2	.2	-	21	21	-
BLOOD AND BLOOD-FORMING ORGANS	1.3	1.4	.4	161	156	5
Anemia, pernicious	*	*	-	2	2	-
Anemia, other than pernicious	.8	.8	.3	96	92	4
Hodgkin's disease	*	*	-	5	5	-

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Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
BLOOD AND BLOOD-FORMING ORGANS-Continued						
Leukemias and aleukemias	-	-	-	-	-	-
Spleen, enlargement of	.1	.2	-	18	18	-
Spleen, other diseases of	.1	.1	-	16	16	-
Hemophilia	.1	.1	-	12	12	-
Blood, blood-forming organs, other diseases of	.1	.1	.1	12	11	1
HERNIA AND RELAXED INGUINAL RING	79.7	83.0	54.5	9,724	8,954	770
Hernia, inguinal, direct	1.3	1.3	.9	154	141	13
Hernia, inguinal, indirect	5.7	5.9	4.2	699	639	60
Hernia, inguinal, unspecified	21.0	21.4	18.0	2,564	3,310	254
Hernia, femoral	.3	.3	.1	32	30	2
Hernia, umbilical	2.8	1.9	9.8	345	207	138
Hernia, ventral	2.0	2.2	.9	245	232	13
Hernia, unspecified	1.7	1.8	.6	205	196	9
Herniotomy	10.5	11.4	3.8	1,279	1,225	54
Inguinal ring, relaxed	34.4	36.8	16.2	4,201	3,974	227
KIDNEYS AND URINARY SYSTEM	9.0	9.2	7.9	1,100	989	111
Nephritis	2.6	2.6	2.5	318	284	34
Albuminuria	1.8	1.8	2.0	223	195	28
Pyelonephritis	.1	.1	-	16	16	-
Pyelitis	.2	.2	.1	23	22	1
Pyuria	.5	.4	1.2	58	41	17
Hematuria	.2	.1	.1	17	15	2
Kidney stone, (nephrolithiasis)	.5	.6	.1	63	62	1
Kidney, floating or movable	.2	.2	-	20	20	-
Kidney, absence of	.4	.5	-	50	50	-
Cystitis	.1	.1	.1	14	12	2
Glycosuria	1.1	1.2	.9	137	124	13
Kidney and urinary system, other diseases of	1.3	1.4	.9	161	148	13
ABDOMINAL VISCERA	44.5	48.3	14.7	5,421	5,213	208
Gall bladder and bile duct, diseases of	.7	.7	.4	82	77	5
Liver, diseases of	.6	.6	.6	71	62	9
Gastritis and enteritis	.5	.5	.4	59	54	5
Peptic ulcer	3.2	3.5	.6	387	378	9
Colitis, ulcerative	.3	.3	-	35	35	-
Splanchnoptosis	.9	1.1	.2	117	114	3
Chronic appendicitis	1.5	1.7	.7	185	183	2
Appendectomy with present complications, excluding hernia	1.6	1.8	.2	193	190	3
Appendectomy without present complications	25.8	28.2	6.9	3,141	3,045	96
Other gastro-intestinal operations, present complications except hernia	.3	.3	.2	40	37	3
Other gastro-intestinal operations, no present complications	2.0	2.1	1.4	244	224	20
History of peptic ulcer	.9	1.0	.2	113	110	3

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
ABDOMINAL VISCERA-Continued						
Abdominal pains and tenderness	3.1	3.3	1.3	380	361	19
Gastro-intestinal diseases, other	.8	.9	.2	95	92	3
Abdomen, other defects of	2.3	2.3	2.0	279	251	28
GENITALIA	81.3	80.0	91.5	9,918	8,627	1,291
Testicle, absence of	1.6	1.6	1.0	191	177	14
Testicle, atrophy of	6.5	6.8	4.8	794	728	66
Testicle, undescended, intra-abdominal	.9	1.0	.2	110	107	3
Testicle, undescended, inguinal canal	1.5	1.6	1.1	192	176	16
Testicle, undescended, unspecified	2.3	2.3	1.8	277	252	25
Hypospadias and epispadias	1.2	1.2	.9	142	129	13
Epididymitis, orchitis, non-venereal	1.2	.9	3.1	144	100	44
Hydrocele	3.3	3.4	2.7	405	367	38
Varicocele	40.0	42.7	18.8	4,875	4,609	266
Phimosis	6.2	5.6	9.9	747	607	140
Balanitis, balanoposthitis, non-venereal	.1	.1	.1	7	5	2
Penile sore, not defined as venereal	1.1	.5	5.3	132	57	75
Urethra, stricture of the	.5	.4	1.6	64	41	23
Urethritis, non-venereal	.1	.1	.1	10	9	1
Urethritis, unspecified	2.9	1.3	15.8	360	138	222
Fistula, urinary	.1	.1	.1	8	6	2
Prostatitis	.9	.9	1.0	112	98	14
Warts on genitalia	1.0	.9	2.2	124	93	31
Genitalia, other congenital anomalies of	2.4	2.5	1.0	288	274	14
Genitalia, other conditions of	7.6	6.1	20.0	936	654	282
SYPHILIS	30.8	11.7	176.7	3,752	1,258	2,494
Neurosyphilis, paresis	*	*	.1	3	2	1
Neurosyphilis, tabes dorsalis	.1	.1	.1	7	6	1
Neurosyphilis, taboparesis	-	-	-	-	-	-
Neurosyphilis, unspecified	.4	.4	.9	48	36	12
Syphilis, cardiovascular	.3	.1	1.7	32	8	24
Syphilis, late, other forms	2.0	.6	12.8	248	67	181
Syphilis, congenital	.4	.3	.9	49	37	12
Syphilis, early	1.1	.4	6.3	137	48	89
Serological test for syphilis positive, no other findings	14.3	4.7	87.0	1,733	503	1,230
Syphilis, suspected	2.0	1.2	7.9	245	134	111
Syphilis, unspecified form	10.2	3.9	59.0	1,250	417	833
GONORRHEA AND OTHER VENEREAL DISEASES	7.3	3.4	36.5	886	371	515
Gonococcus infection, genito-urinary system, including unspecified	6.4	3.0	32.2	780	325	455
Gonococcus infection of joint	.3	.2	.4	34	28	6
Gonococcus infection, other forms	*	*	-	2	2	-
Chancroid	.2	.1	1.2	24	7	17
Lymphopathia venereum	*	-	.1	1	-	1
Granuloma inguinale	.1	-	.8	11	-	11
Venereal disease, type not specified	.3	.1	1.8	34	9	25

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
SKIN	88.0	94.0	42.2	10,737	10,141	596
Acne	50.4	54.9	15.4	6,141	5,924	217
Furunculosis	1.6	1.8	.5	196	189	7
Cellulitis	*	*	-	3	3	-
Abscess or ulcer, except varicose	.8	.6	2.0	93	65	28
Nails, defects and diseases of	2.3	2.5	.5	278	271	7
Impetigo	.4	.4	.3	52	48	4
Scabies	.9	1.0	.6	114	106	8
Pediculosis	.2	.2	.1	21	19	2
Eczema	3.2	3.5	.9	390	377	13
Hyperhidrosis	.5	.5	.1	58	57	1
Ichthyosis	.5	.5	.4	65	59	6
Psoriasis	2.3	2.5	.6	278	270	8
Alopecia of scalp	.3	.3	.3	38	34	4
Skin condition, fungus	11.1	12.0	4.6	1,356	1,291	65
Dermatitis, other and unspecified	3.8	4.0	2.3	465	432	33
Wounds, lacerations, handicapping	.3	.3	.4	38	32	6
Scar, disfiguring face	.2	.2	.3	26	22	4
Scar, painful	.7	.8	.4	87	81	6
Skin, other diseases of	8.5	8.0	12.5	1,038	861	177
HEMORRHOIDS AND OTHER RECTAL DEFECTS	35.1	36.5	24.8	4,281	3,931	350
Hemorrhoids, external	13.9	14.5	8.6	1,686	1,565	121
Hemorrhoids, internal	4.0	4.2	2.6	489	453	36
Hemorrhoids, internal and external	1.9	2.0	1.1	228	213	15
Hemorrhoids, type unspecified	12.4	12.9	9.3	1,515	1,382	133
Fissure, anal	.5	.5	.6	67	59	8
Fistula, anus or rectum	1.1	1.0	2.0	130	102	28
Rectum, prolapse of	.1	.1	.2	15	12	3
Abscess, ischiorectal	.1	.1	.1	13	11	2
Pruritus ani	.7	.8	.1	88	87	1
Anus and rectum, other conditions of	.4	.4	.2	50	47	3
VARICOSE VEINS	32.1	33.6	20.4	3,917	3,629	288
Varicose veins of lower extremities	24.8	26.1	15.5	3,035	2,817	218
Varicose veins except lower extremities	.3	.3	.5	39	32	7
Varicose veins, site unspecified	6.1	.3	3.7	738	686	52
Varicose veins with ulcerations	.4	.4	.6	48	39	9
Phlebitis and thrombophlebitis	.4	.4	.1	45	43	2
Veins, other diseases of	.1	.1	-	12	12	-
MENTAL AND EDUCATIONAL DEFICIENCY AND MENTAL DISEASE	60.2	53.8	108.9	7,338	5,801	1,537
Group I Mental and educational deficiency	36.5	28.1	101.1	4,453	3,026	1,427
Moron	1.2	1.1	1.4	145	124	21
Imbecile, idiot	1.3	1.3	1.3	154	136	18
Dull normal	1.2	1.3	.9	152	140	12

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
MENTAL AND EDUCATIONAL DEFICIENCY AND MENTAL DISEASE-Continued						
Illiteracy, educational deficiency; mental defect not stated	21.2	12.4	89.0	2,588	1,332	1,256
Mental deficiency, history of institutionalization	.5	.5	-	58	58	-
Mental deficiency, unspecified	11.1	11.5	8.5	1,356	1,236	120
Group II Psychopathic personality	2.7	2.8	1.7	325	300	25
Psychopathic personality	.4	.4	.1	43	42	1
Homosexuality	.1	.1	-	15	15	-
Criminal record	.7	.6	.8	80	67	13
Constitutional psychopathic inferiority	.4	.5	.1	48	47	1
Group II disorders not classifiable elsewhere	1.1	1.2	.7	139	129	10
Group III Major abnormalities of mood	.6	.6	.2	70	68	2
Cyclothymic personality	.3	.4	-	41	41	-
History attempted suicide or treatment for excitement or depression	.1	.1	.1	7	6	1
Manic depressive psychosis	.2	.1	.1	19	18	1
Mood disorders, not specified	*	*	-	3	3	-
Group IV Psychoneurotic disorders	14.9	16.3	3.7	1,812	1,760	52
Hypochondriasis, anxiety attacks	.5	.6	-	62	62	-
Psychoneurosis associated with organic disease or injury	.1	.1	-	14	14	-
Hysteria	.1	.1	.1	16	15	1
Obsessive compulsion states	.1	.1	-	7	7	-
Functional gastro-intestinal syndrome	.8	.9	.1	97	96	1
Neurocirculatory asthenia	3.5	3.9	.6	427	418	9
Functional disorders of expressive movements	4.3	4.5	2.0	514	485	29
Psychoneuroses not specified by type	5.5	6.1	.9	675	663	12
Group V Grave mental or personality disorders	1.6	1.8	.5	201	194	7
Schizoid personality	.2	.3	-	25	25	-
Schizophrenia, history of institutional treatment of	.6	.7	.2	77	74	3
Schizophrenia, incipient, acute, and catatonic	.4	.5	-	53	53	-
Hebephrenic schizophrenia	*	*	.1	6	5	1
Paranoid personality	*	*	-	5	5	-
Schizophrenia, paranoid	.1	*	-	7	7	-
Group V psychoses, type not specified	.2	.2	.2	28	25	3
Group VI Chronic inebriety and drug addiction	1.5	1.6	.7	177	167	10
Alcoholism	1.1	1.2	.6	135	126	9
Drug addiction	.1	.1	.1	10	9	1

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
Group VI Chronic inebriety and drug addiction-Continued						
Advanced addiction, mental disease	.3	.3	-	32	32	-
Group VI disorder, type not specified	-	-	-	-	-	-
Mental defects and disorders not classifiable elsewhere	2.4	2.6	1.0	300	286	14
NEUROLOGICAL	22.4	23.9	11.0	2,734	2,579	155
Poliomyelitis, residuals of	6.7	7.4	2.1	814	785	29
Hemiplegia	.4	.4	.4	49	43	6
Paraplegia	.2	.2	.1	23	21	2
Monoplegia	.3	.3	.1	34	33	1
Paralysis, unspecified	1.4	1.4	.9	168	155	13
Peripheral nerves, residuals of injury or disease	.5	.5	.5	64	57	7
Cranial nerves (except optic and auditory); lesions of, Bell's palsy	.3	.3	.6	42	34	8
Deaf mutism	1.2	1.2	1.0	145	131	14
Post-traumatic cerebral syndrome, post-traumatic encephalopathy	1.2	1.3	.4	148	142	6
Jacksonian epilepsy	*	*	-	4	4	-
Spinal cord and nerves, progressive degenerative lesions of	.2	.3	-	28	28	-
Cerebral arteriosclerosis, cerebral vascular accidents and residuals	*	*	-	5	5	-
Chronic encephalitic syndrome; paralysis agitans	.6	.6	.3	72	68	4
Epilepsy	3.7	4.0	2.2	448	417	31
Attacks of fainting, unconsciousness, or convulsions, not further specified	1.0	1.1	.4	126	119	7
Narcolepsy	.1	.1	-	7	7	-
Spina bifida, meningocele	.2	.2	-	24	24	-
Neuritis, polyneuritis, or neuralgia, chronic recurring	.7	.8	.1	89	87	2
Chorea	.1	.2	.1	19	18	1
Huntington's chorea	.1	.1	.1	9	8	1
Migraine	.3	.3	-	38	38	-
Enuresis	1.1	1.1	.9	135	123	12
Brain abscess	*	*	-	1	1	-
Subdural hematoma	*	*	-	4	4	-
Meningitis, residuals of	.3	.3	.1	35	34	1
Ataxia, muscular incoordination, spasm, not elsewhere classifiable	1.0	1.0	.5	120	113	7
Neurological disease or disorder not elsewhere classifiable	.7	.7	.2	83	80	3
MUSCULO-SKELETAL	113.9	119.3	73.0	13,892	12,861	1,031
Arm, amputation of	1.0	.9	1.7	122	98	24
Hand, amputation of	.5	.6	.6	67	58	9
Fingers, amputation of	7.1	7.5	4.1	862	806	56

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
MUSCULO-SKELETAL-Continued						
Leg, amputation of	1.7	1.6	2.2	205	174	31
Foot, amputation of	.3	.2	.6	34	26	8
Toes, except great toe, amputation of	1.0	1.0	1.3	128	110	18
Upper and lower extremities, amputation of	*	-	.1	1	-	1
Great toe and others, amputation of	.2	.2	.1	23	21	2
Great toe, amputation of	.4	.3	.4	43	37	6
Spine, ankylosis of	.2	.2	.1	25	24	1
Shoulder, ankylosis of	*	.1	-	6	6	-
Elbow, ankylosis of	.8	.8	.9	98	85	13
Wrist, ankylosis of	.2	.2	.1	23	21	2
Hand or fingers, ankylosis of	.9	.9	1.4	115	95	20
Hip, ankylosis of	.2	.2	.2	24	21	3
Knee, ankylosis of	.4	.4	.4	52	46	6
Ankle, ankylosis of	.5	.5	.4	63	57	6
Toes, ankylosis of	.2	.3	-	27	27	-
Upper and lower extremities, ankylosis of	*	*	-	2	2	-
Ankylosis, other and unspecified	.1	.1	.1	7	6	1
Spine, arthritis of	.6	.6	.1	68	66	2
Shoulder, arthritis of	.1	.1	.1	10	9	1
Elbow, arthritis of	.1	.1	.1	8	7	1
Wrist, arthritis of	.1	.1	-	9	9	-
Hand or fingers, arthritis of	.1	.1	-	14	14	-
Hip, arthritis of	.2	.3	.2	30	27	3
Knee, arthritis of	.7	.6	.8	80	69	11
Ankle, arthritis of	.4	.3	.5	43	36	7
Toes, arthritis of	.1	.1	.1	8	7	1
Upper and lower extremities, arthritis of	.2	.2	-	20	20	-
Arthritis, other and unspecified	1.2	1.2	.7	142	132	10
Arm, atrophy of	.9	1.0	.3	106	102	4
Hand or fingers, atrophy of	.2	.3	.1	28	27	1
Leg, atrophy of	1.4	1.5	.9	171	159	12
Ankle, atrophy of	.1	.1	-	10	10	-
Toes, atrophy of	*	*	-	2	2	-
Upper and lower extremities, atrophy	.1	.1	.1	11	9	2
Atrophy, other and unspecified	.1	.1	.1	18	17	1
Spine injury	2.9	3.2	1.0	357	343	14
Shoulder injury	2.1	2.3	1.1	258	243	15
Arm injury	2.9	3.0	1.8	350	324	26
Elbow injury	2.7	3.0	.6	336	328	8
Wrist or hand injury	2.1	2.2	1.5	259	238	21
Finger injury	3.8	3.9	2.7	459	422	37
Chest injury	.8	.9	.3	103	99	4
Hip injury	.7	.7	.6	89	80	9
Leg injury	2.7	2.7	2.6	333	296	37
Knee injury	3.5	3.9	1.1	433	417	16
Ankle injury	2.6	2.8	1.3	323	305	18
Foot injury	2.6	2.7	1.6	314	292	22

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
MUSCULO-SKELETAL-Continued						
Toe injury	1.1	1.2	0.8	136	125	11
Upper and lower extremities, injury	.1	.1	.1	14	13	1
Semi-lunar cartilage injury	2.3	2.6	.3	282	278	4
Arm, one shorter than other, injury	.2	.2	.1	23	21	2
Leg, one shorter than other, injury	2.2	2.2	2.6	275	238	37
Other and unspecified injury	.1	.1	.1	9	8	1
Spine, other defect	1.5	1.6	.4	181	175	6
Shoulder, other defect	1.3	1.4	.6	158	150	8
Arm, other defect	.8	.8	.7	96	86	10
Elbow, other defect	.5	.5	.4	55	49	6
Wrist or hand, other defect	.7	.7	.6	87	78	9
Fingers, other defect	2.7	2.7	2.0	333	296	37
Chest, other defect	4.5	5.0	.9	549	537	12
Hip, other defect	.6	.7	.3	78	74	4
Leg, other defect	1.7	1.8	.9	203	191	12
Knee, other defect	1.4	1.5	.6	171	163	8
Ankle, other defect	1.1	1.1	.9	129	117	12
Foot, other defect	2.0	2.1	1.1	240	225	15
Toes, other defect	7.7	8.0	5.0	936	865	71
Upper and lower extremities, other defect	.1	.1	.2	18	15	3
Arm, one shorter than other, congenital or unspecified	.1	.1	-	12	12	-
Leg, one shorter than other, congenital or unspecified	1.9	1.9	1.5	229	208	21
Other and unspecified defect	.8	.8	.6	95	87	8
Skull and jaw						
Head and skull injuries, deformities	1.1	1.2	1.0	140	126	14
Defect or deformity of jaw	.8	.8	.5	96	89	7
Spine						
Scoliosis	7.6	7.9	5.0	923	853	70
Lordosis	2.3	2.3	2.8	286	247	39
Kyphosis	3.7	3.9	1.8	452	426	26
Disorders of sacro-iliac joint	1.3	1.4	.1	155	153	2
Torticollis (not spasmodic)	.1	.1	.1	17	15	2
Other						
Ganglion	.3	.4	.3	42	38	4
Recent fracture, not healed	.5	.6	.1	60	59	1
Genu varum, valgum, recurvatum	2.9	2.9	3.1	353	309	44
General						
Birth injuries and residuals of	.8	.8	.4	95	90	5
Osteomyelitis and residuals of	2.9	3.1	1.1	353	338	15
Rickets and residuals of	2.4	2.6	1.0	292	278	14

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
FEET	172.4	158.9	275.7	21,024	17,133	3,891
Callosities or corns	5.9	5.9	6.1	719	633	86
Hallux valgus or bunions	2.2	2.2	2.3	269	237	32
Pes cavus	.9	1.0	.1	108	107	1
Metatarsalgia	*	.1	-	6	6	-
Pododynia	*	*	-	2	2	-
Rigid foot	.1	.1	-	7	7	-
Club foot (talipes)	1.2	1.3	.7	150	140	10
Supernumerary toes	.1	.1	.3	11	7	4
Pes planus, first degree	57.0	56.8	58.2	6,943	6,122	821
Pes planus, second degree	40.0	37.0	63.3	4,881	3,987	894
Pes planus, third degree	22.5	21.5	29.9	2,744	2,322	422
Pes planus, unspecified degree	42.5	33.1	114.8	5,184	3,563	1,621
ENDOCRINE DISTURBANCES	19.7	21.3	7.4	2,403	2,299	104
Frohlich's syndrome	2.4	2.7	.4	297	292	5
Acromegaly and gigantism	.2	.2	.2	26	23	3
Diabetes insipidus	.1	.1	-	7	7	-
Other pituitary dyscrasias	1.9	2.1	.6	235	226	9
Hyperthyroidism	4.0	4.4	1.0	487	473	14
Hypothyroidism	1.0	1.2	.1	128	126	2
Simple goitre	4.1	4.4	1.5	499	478	21
Parathyroid disease	.1	.1	.1	8	7	1
Diabetes mellitus	2.9	3.0	1.9	349	323	26
Hypoglycemia and hyperinsulinism	*	*	-	5	5	-
Adrenal dysfunction	*	*	-	4	4	-
Hermaphroditism	*	*	-	3	3	-
History of surgical treatment for endocrine disorder	.4	.4	.1	48	46	2
Endocrine dyscrasia, not specified elsewhere	2.5	2.6	1.5	307	286	21
CANCERS, TUMORS, OTHER NEW GROWTHS, AND CYSTS	14.1	14.2	13.0	1,717	1,534	183
Malignant						
Carcinoma	.1	.1	-	10	10	-
Sarcoma	*	*	-	4	4	-
Other malignant tumors	*	*	-	5	5	-
Non-malignant localized tumors						
Epulis	*	*	-	4	4	-
Gynecomastia	.2	.2	.1	20	19	1
Pilonidal cyst or sinus	3.6	4.0	.4	439	434	5
Keloid	.9	.4	5.4	115	37	78
Keratosis	.1	.1	.1	13	12	1
Sebaceous cysts	1.7	1.8	.9	206	193	13
Cysts, except sebaceous or pilonidal	1.9	1.7	2.7	226	188	38
Lipoma	1.3	1.4	.7	161	151	10
Chondroma	*	*	-	4	4	-
Exostosis	1.6	1.8	.6	201	192	9

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
CANCERS, TUMORS, OTHER NEW GROWTHS, AND CYSTS-Continued						
Tumors not described as malignant						
Brain	.1	.1	-	10	10	-
Spinal cord	-	-	-	-	-	-
Head and face (not brain)	.5	.5	.4	61	56	5
Extremities, upper and lower (not including skin and bone growths)	.5	.5	.3	60	56	4
Intrathoracic	*	*	-	1	1	-
Intra-abdominal	.1	.1	-	7	7	-
Genitalia	.4	.4	.4	53	48	5
Other and unspecified	.9	.9	1.0	117	103	14
INFECTIOUS, PARASITIC, AND EPIDEMIC DISEASES	.6	.7	.2	74	71	3
Ankylostomiasis	.2	.3	.1	29	27	2
Helminth infections, other	*	*	-	2	2	-
Malaria	*	*	.1	4	3	1
Dysentery, all forms	*	*	-	3	3	-
Other diseases, protozoal, metazoal	*	*	-	3	3	-
Acute exanthemata	*	*	-	2	2	-
Influenza	.1	.1	-	15	15	-
Typhoid	-	-	-	-	-	-
Paratyphoid	-	-	-	-	-	-
Mumps	*	*	-	2	2	-
Whooping cough	-	-	-	-	-	-
Pneumonia	*	*	-	2	2	-
Other bacterial and virus diseases	.1	.1	-	12	12	-
OTHER DISEASES, DEFECTS, AND ANOMALIES	73.3	76.9	46.0	8,942	8,293	649
Nutritional deficiency						
Avitaminosis, not represented by clinical diagnosis	.1	.1	.1	12	11	1
Beriberi	*	*	-	1	1	-
Scurvy	*	*	.1	3	2	1
Pellagra	.1	.1	.1	8	7	1
Malnutrition	1.5	1.5	1.3	189	170	19
Clinical entities not classified elsewhere						
Lymphadenitis	2.5	1.5	10.6	310	159	151
Lumbago	.1	.1	-	15	15	-
Rheumatic fever, acute	.1	.1	-	8	8	-
Chronic poisoning	.1	.1	-	11	11	-
Lack of fitness						
Attributed to body build	2.1	2.2	1.3	254	236	18
Not attributed to body build or to posture	2.1	2.1	1.8	256	231	25
Bad posture or poor musculature	4.4	4.8	1.8	540	514	26
Backache	.8	.8	.3	95	91	4
Convalescence	.5	.5	.4	57	51	6

Table 7. Incidence of all recorded defects of registrants physically examined at local boards, by race, November 1940 through September 1941-Continued

Defect	Rate per 1000 examined			Frequency 1/		
	White and Negro	White	Negro	White and Negro	White	Negro
OTHER DISEASES, DEFECTS, AND ANOMALIES-Continued						
Lack of fitness-Continued						
Chest measurements deficient	0.9	0.8	1.6	114	91	23
Underheight	1.9	1.9	2.1	231	202	29
Underweight	29.7	32.0	12.3	3,622	3,449	173
Overheight	.2	.2	.3	30	26	4
Overweight	23.9	25.8	9.8	2,920	2,781	139
Anomalies						
Dextrocardia	.1	.1	-	8	9	-
Supernumerary fingers	.1	.1	.1	8	7	1
Albinism	*	*	-	5	5	-
Other and ill-defined diseases and defects	2.0	2.0	2.0	245	217	28
TOTAL DEFECTS	1583.3	1595.0	1493.9	193,109	172,023	21,086

1/ Numbers in these columns indicate the number of times the specified defect was recorded.
* Indicates a rate less than 0.1 per 1000 registrants examined.
\- Indicates that no cases were recorded.

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Table 8. Height in relation to weight of registrants physically examined at local boards
November 1940 through September 1941
White 1/ registrants

Height in inches	Total	Weight in pounds																	
		Under 100	100-109	110-119	120-129	130-139	140-149	150-159	160-169	170-179	180-189	190-199	200-209	210-219	220-229	230-239	240-249	250 and over	No entry
Number examined	103,889	151	848	3,482	9,593	17,074	20,217	17,560	12,729	7,745	4,358	2,478	1,354	797	474	263	174	308	4,284
56	105	11	3	2	12	14	16	20	9	2	2	3	1	-	1	-	1	2	6
57	39	4	3	6	4	4	4	7	-	-	1	-	-	-	-	-	-	2	4
58	56	3	8	4	7	4	4	9	4	2	2	-	-	-	-	-	-	-	9
59	93	8	13	10	14	9	13	5	4	-	4	1	1	-	-	1	-	1	9
60	265	13	36	43	38	33	23	35	20	10	7	4	1	-	-	1	-	-	1
61	498	21	43	110	102	90	46	32	28	16	4	1	4	-	-	-	-	-	1
62	1,125	27	113	253	299	188	131	47	25	21	5	6	4	2	-	-	-	-	4
63	2,179	20	132	364	598	486	294	118	78	44	18	8	10	4	3	-	-	-	2
64	4,069	19	121	519	975	1,051	669	346	174	88	46	27	12	4	2	2	2	4	8
65	6,814	9	131	584	1,386	1,824	1,274	763	422	199	95	55	27	12	12	1	2	7	11
66	10,248	3	95	561	1,656	2,555	2,279	1,441	792	401	176	121	55	34	21	8	8	19	23
67	13,218	3	55	485	1,647	2,935	3,222	2,178	1,279	660	321	188	77	62	37	19	10	15	25
68	14,914	2	46	300	1,287	2,939	3,562	2,832	1,800	914	528	285	164	90	56	33	13	31	32
69	14,005	3	26	132	796	2,235	3,256	2,966	2,032	1,186	623	315	182	96	56	27	21	26	27
70	11,748	-	14	67	424	1,425	2,460	2,565	2,014	1,245	687	361	196	121	47	27	33	37	25
71	8,925	-	5	27	218	703	1,598	2,014	1,687	1,139	637	363	213	112	78	43	24	44	20
72	5,828	-	1	9	76	351	826	1,212	1,258	871	517	319	161	86	57	38	22	53	11
73	2,968	-	1	2	29	141	309	579	604	504	312	183	107	69	42	36	18	21	11
74	1,501	-	-	1	12	40	131	236	287	274	193	123	69	58	30	14	7	22	4
75	627	-	-	-	4	10	43	77	118	126	94	60	35	26	14	4	6	9	1
76	281	-	-	-	-	8	15	30	50	41	52	30	23	9	8	5	3	5	2
77	89	-	-	1	1	3	2	9	11	19	13	10	5	6	4	1	1	2	1
78	54	-	-	1	1	1	2	9	6	7	9	5	4	2	-	1	2	3	1
79	27	-	-	-	-	1	4	4	4	3	1	3	-	3	1	-	-	-	3
80 and over	36	-	-	1	-	2	5	5	8	4	2	3	1	1	-	-	-	2	2
No recorded height	4,177	5	2	-	7	22	29	21	15	9	9	4	2	-	5	2	1	3	4,041

1/ Includes all races other than Negro.

Table 9. Height in relation to weight of registrants physically examined at local boards
November 1940 through September 1941
Negro registrants

Height in inches	Total	Weight in pounds																	
		Under 100	100-109	110-119	120-129	130-139	140-149	150-159	160-169	170-179	180-189	190-199	200-209	210-219	220-229	230-239	240-249	250 and over	No entry
Number examined	13,033	6	75	372	1,133	2,220	2,829	2,477	1,694	897	456	224	96	43	36	15	5	22	433
56	16	-	-	-	4	3	4	2	2	-	-	-	-	-	-	-	-	1	-
57	5	1	-	-	1	-	1	1	-	-	-	-	-	-	-	-	-	-	1
58	8	-	1	1	1	1	-	2	1	-	-	-	-	-	-	-	-	-	1
59	17	-	3	3	3	1	1	-	2	-	1	-	-	-	-	-	-	-	3
60	46	-	5	8	10	5	8	7	3	-	-	-	-	-	-	-	-	-	-
61	76	-	7	20	19	17	8	2	2	1	-	-	-	-	-	-	-	-	-
62	195	1	17	45	59	38	15	14	4	1	-	-	-	-	-	-	-	1	-
63	341	1	9	64	82	92	51	27	8	2	1	2	-	-	-	-	-	-	2
64	658	-	13	66	170	190	126	57	22	4	6	1	1	1	1	-	-	-	-
65	1,070	-	8	65	204	333	257	114	48	19	7	6	1	1	2	1	-	3	1
66	1,506	-	4	48	186	415	404	237	125	47	15	12	7	1	-	1	1	1	2
67	1,768	-	1	25	179	413	469	368	174	71	28	17	8	6	2	2	-	1	4
68	1,808	1	4	15	115	314	508	419	246	97	46	21	8	1	3	2	-	1	7
69	1,663	-	1	7	68	211	419	424	297	128	63	17	10	5	3	4	1	3	2
70	1,304	-	1	2	14	113	287	354	254	145	69	27	16	7	8	2	-	2	3
71	938	1	-	-	9	42	152	242	221	158	46	32	12	4	7	-	1	1	-
72	568	-	-	2	4	18	70	113	141	90	59	34	18	7	4	2	1	4	1
73	309	-	-	-	3	4	26	40	79	71	46	27	6	5	1	1	-	-	-
74	170	-	-	1	1	3	11	28	37	33	31	18	1	3	2	-	1	-	-
75	73	-	-	-	1	-	3	8	15	13	17	7	5	2	1	-	-	1	-
76	27	-	-	-	-	-	-	3	6	8	4	2	1	-	1	-	-	2	-
77	15	-	-	-	-	1	3	3	-	6	-	-	1	-	1	-	-	-	-
78	16	-	-	-	-	-	2	4	4	-	4	1	1	-	-	-	-	-	-
79	3	-	-	-	-	-	1	1	-	-	1	-	-	-	-	-	-	-	-
80 and over	2	-	-	-	-	1	-	1	-	-	-	-	-	-	-	-	-	-	-
No recorded height	431	1	1	-	-	5	3	6	3	3	2	-	-	-	-	-	-	1	406

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REFERENCES

There are a number of other sources of statistical information on the incidence of illness and defects in the general population with which the data of this bulletin can be compared. Comparisons are not always simple because the fact that each set of data has been obtained under different conditions affects the magnitude of the rates and even determines whether or not a particular illness or defect will be counted at all. Among differences that have to be considered in such comparisons are:

(1) Age distribution and socio-economic status of the persons under study differ from study to study.

(2) In some of the most extensive surveys the persons under study were not examined by physicians; enumerators recorded information on recent or current illness and disability.

(3) In studies in which physicians have obtained all the information tabulated there are differences in objectives, physical standards, and in the availability of X-ray equipment and other laboratory facilities, which have a bearing on the findings.

The list of references that follows includes the principal publications which present statistical summaries of the results of investigation of the general health of fairly large numbers of relatively unselected populations of adults. Many publications dealing with the incidence of specific diseases, such as tuberculosis, have not been included because they can be found easily by reference to the standard indexing and abstracting journals. In addition, a number of Directors of Student Health in large colleges and universities have prepared statistical summaries of the incidence of defects found on examination of students. These are usually in mimeographed form and presumably for limited distribution.

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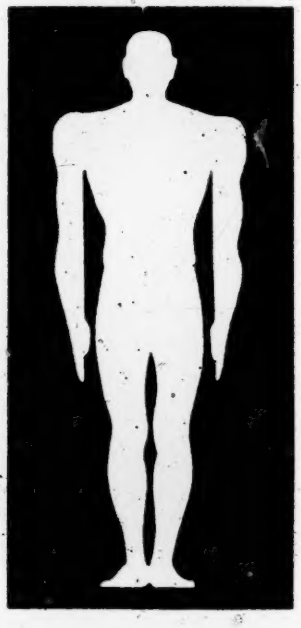
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1104

DEFENDENT'S EXHIBIT 7

How To Get Well-
And Stay Well



1105

1610 Lake St., Bakersfield, Cal.,
May 11th, 1946.

Mr. E. R. Fillion,
Nutrilite Representative,
Bakersfield.

Dear Mr. Fillion:

In answer to your inquiry as to my progress in using your product for my Arthritis, I thought you might be interested in learning something about my case.

I have had rheumatism almost all my life, beginning with rheumatic fever at age 7.

During the past 15 years I have had to use crutches constantly, and I have gone to almost every doctor in California and Oklahoma I have been told might help me with my rheumatism. Have also had many baths (mineral), as well as two operations to remove the calcium from my joints. Altogether I have spent 4 years out of the last 15 in bed. All my efforts to recover my health have seemed to be of little if any avail.

After 9 months in bed, with great pain from my swolen joints and muscles, and with a feeling that nothing could help me, when you came along 4 months ago and told me what your Nutrilites might do for me. I was willing to try anything, as a last resort, so started with you.

I did not take Nutrilites long before feeling a slight change; to-day I am a different person entirely. I have been sitting up for a month, have walked a little, unassisted, and can now get out and sit in the sunshine. I have also been able to ride in my brother's car, getting in and out of it with a little help. My joint and muscle pains have almost entirely gone.

I am now looking forward, with high hopes, to getting back to work within the next 2 or 3 months, something I haven't been able to do for years.

You tell me some people think your product costs too much. I have spent several thousands of dollars for treatments, with no benefits, so the value of Nutrilites to me can never be measured in dollars and cents. To me no price would be too high.

You may use this letter in any way you wish, if it will be the means of helping other poor sufferers.

Sincerely yours,

Ermon Jones

2196

Pomona, Calif.
April 8th, 1946

Dear Mr. Stivers:

Just a line to tell you how we have benefited by Nutrilite. My husband had colon trouble for eighteen years and it has not only helped this condition, but he had colds all Winter long, and has not had a single cold since taking this treatment.

I was troubled with gas, short breath, and could not eat much at night. Now that has all disappeared. We can't say enough for Nutrilite.

You may use this letter in telling others about your product, if you wish.

Yours truly,

Mrs Hickey Putnam
1271-E. Grand
Pomona, Calif.

325 East Sycamore Street
Anaheim, California
May 22, 1946

My dear Mr. Mytinger:

I wish to tell you and others what Nutrilite Products have done for our little girl, Carole. She is four years old and has had eczema very severly since she was seven months old. We have consulted many specialists and have tried numerous suggestions, but to no avail. Her appetite became poor, she had no pep and spent many sleepless nights. She appeared to be anaemic and frail. Then, Mr. Mytinger, you came along with your wonderful products and saved the day. Carole has been on Nutrilite for six months and she isn't the same child. Her Eczema is practically gone now, she has an enormous appetite, her color is good, she is gaining weight and above all, her energy is everlasting. She plays all day long and no longer requires an afternoon nap. She sleeps exceptionally well at night.

I'm looking forward to the day when my whole family can take Nutrilite Products.

Sincerely,

Mrs. James P. Johnson

Nutrilite Products Company have my permission to use this letter

June 9,1946
5655 Olive Ave.
Long Beach 5, Calif.

Dear Mr. Mytinger;

I have been taking Nutrilite for six months and it has done great work for me.

My stomach was in such bad condition that I dreaded to eat a meal. I had gas and sour stomach all the time, and dizziness until I could not work on a scaffold without holding on, and I would get so tired I just felt like I could not last the day out.

But after three months my ailments are gone and I can eat anything and I have no more gas or sour stomach. My stomach is in the best of condition and my dizziness is gone . I can now climb ladders all day and don't get tired, and that is more than all the Doctors have done for me.

My arms have been lame for 12 years and they are getting better now.

Yours truly,

E. R. Ackley

Painter

E.R. Ackley

you have my permission
to use this letter in any way

216 W. Cleveland Ave,
Montebello Calif
May 20, 1946

Dear Mr. Stowers —

After using Nutrilets for five months, our five year old daughter has not only built up a resistance for a tonsilectomy but her tonsils show a decided decrease in size. She has suffered a slight loss of hearing due to her diseased tonsils and an operation may still be necessary but maybe her ears will improve too. I have great faith in Nutrilets —

Very truly
Anna Lappan Litell

Permission to use letter on file.

1110

Mr. Stivers

El Monte Calif
4-23 '46

Dear Sir:

Over the previous eight months, I have been taking the "Nutrilite" course of treatments that we got from you, and have been greatly benefitted by their use, in regard to my Hay fever and also my premature meno pause. You may use this letter, if you care to do so. My husband too, has received quite gratifying results, he had been a sufferer with sciatica + until taking up the Nutrilite mode of treatment had found no relief, and now he seems to have discovered the right thing to control this trouble.

Sincerely

Edna Mateska
1261 So. Hoyt
El Monte Calif.

1111

2418-3rd Street
Santa Monica, Calif.
September 25, 1945

Mr. B. M. Meyer
Nutrilite Products
Santa Monica, Calif.

Dear Mr. Meyer,

Because your product has done so much for my children as they became teen age, I felt I should write you a little note of appreciation.

When you called on me after your lecture, I had some definite problems in my children's health to discuss, as you remember. Gordon, 12 years old, wasn't growing as he should and was so thin. He complained of nausea in the morning and wouldn't eat his breakfast. He was listless and slow to mind. Frances, who was 14, had constant colds and sore throats, and just couldn't keep up with her school mates.

I had taken both of them to a child specialist. I was told Gordon needed hydrochloric acid tablets for an allergy we couldn't discover, and Frances was getting shots. They had been under this treatment for several months, with practically no improvement, when I was introduced to Nutrilite.

I took a child's course for them, and within a few weeks we noticed a pick-up; Frances particularly felt more pep. Gradually the colds and sore throat trouble occurred less frequent, and the boy, though it took several months, began eating breakfast and filling out and growing. He is so proud of the 2-1/2 inches he has grown the last year.

I've passed them their rations daily, with a few exceptions, for over a year, and I'm glad I stuck with it because now everyone tells me how well the children look. If this letter would help another mother to appreciate and use your very fine product to build her child's health, I'd be glad for you to use it.

I guess you've got a steady customer in me because I wouldn't think of quitting when it keeps them in such good condition.

Very sincerely yours,

(Mrs) Elsie McNabb

Have no objection to your permission to use this letter as a testimonial in any way you wish.
Elsie McNabb

1112

6668 Naval Court,
Riverside, Calif.
Feb. 13, 1946

Dear Mr. Stivers:

My boy Zan has been on Nutrilite just six months now and he has only had one bad attack of Asthma in that time. Before that time he had at least two a month and I could never build him up as he had one cold after another. He was so thin and in very poor health simply because he had Asthma so much. Now he takes part in school activities and is a new boy. Before, his teacher would tell me he looked as though he were so tired she felt sorry for him, and he didn't enter into the spirit of things. Now he has gained and is filled out and is ready for anything. He is ten years old. He first had Asthma when he was six and we have tried everything, even a new shot for Asthma, but until we began Nutrilite he was the same. Now he has a good appetite and is not a Doctor's care. I know Nutrilite has worked wonders for Zan and I just wanted to thank you for telling us about this product.

Yours truly,

(Mrs.) Hyelvin Olson

You have my permission to use this letter that others might learn.

1113

Ontario, Calif.,

July 1, 1943.

Just a few lines to say how thankful I am for better health than I have had for so many years. I have tried many doctors. About two years ago they told me I could never expect to be any better -- that I should be glad to be able to move around the house a little. The doctors said I should not try to go out any more.

Soon after that I suffered a stroke that left me unable to walk without help for some time.

About 10 months ago we heard Mr. Stivers' lecture. My husband said he was sure Nutrilite would help me. I have been taking it ever since.

Now, to make a long story short, I have been walking from 8 to 16 blocks in the morning and help quilt all day and feel fine after, something I had not done for years. I thank God and Nutrilite for my better health at the age of 62 years.

Mrs E. M. Daiken

Mrs. E. M. Daiken

you may use this letter.

Here follows Pho

1114

448 Sadler Ave.,
Montebello, California.
March 15, 1946.

Dear Mr. Stivers,

I want to tell you how wonderful I feel after having been on Nutrilite, for about five months.

When you first called on me my back and neck were so stiff I could hardly move them and then only with agonizing pain. I had changed climates, gone to the best specialists and had spent many hundreds of dollars trying everything that I heard about, hoping that something would help me, but to no avail.

My husband heard about NUTRILITE from his employer who had attended one of your health lectures. When you came to see me at his request, I was skeptical and knew that nothing would help me because I had become so discouraged. However to please my husband I said that I would try it.

In three months time I had become so much better, every one who knew me were astonished and I myself could not believe I was the same person.

I have very little pain and can move my neck freely. I am not so nervous, my terrific headaches are gone and I truly feel like another person.

My husband, who was very nervous. has been on NUTRILITE as well as myself and he is much better. We have also recently put our young daughter on this wonderful product.

I can certainly heartily recommend NUTRILITE for those who are troubled with Arthritis of ~~the spine, or anything~~ else as a number of my acquaintances are on NUTRILITE for various afflictions and they are receiving so much good from it.

My husband and I have decided that we would rather "pay Nature" by giving her the building material she needs to keep us going strong than by trusting to chance.

Very gratefully yours,

Ollie Lewis

Nutrilite products have my permission to use this letter

1115

Pomona Calif.
1454 Signal Dr.
April 27, 1946.

Mrs H. H. Stewart
Nutrilite Products
880 Roswell Pomona Calif.

Dear Mrs Stewart:

Because your product has done so much to improve my health I feel I should write a note of appreciation.

When I heard of your products I had been to several doctors and none had helped to relieve my suffering which was a severe hurting in my back and down my limbs. I would have cramps and drawing in my limbs for a week at a time couldn't straighten them.

I took a course of Nutrilite Ration No 1. and within a few days I noticed the pains were leaving in my back and limbs. I could work all day without feeling tired. I am taking my second course of these products and my wife is taking it with me so you see we are convinced of its great wonders.

If you care to use this letter to show others what your product has done for me I'd be very glad.

Sincerely yours
Erwin Bunch

222 N Locust St
Inglewood, Calif
April 29, 1946

Mr B. M. Megow
2 South St
Santa Monica Calif

Dear Sir

This is to inform you of the wonderful results I obtained from the use of your product Nutrilite Capsules.

In February 1944 I became very ill with asthma, after an attack of influenza. I began taking your product and continued for six months, and was very much improved. Later my illness returned and I began taking Nutrilite capsules again in March 1945 and continued for a year. I am feeling fine now, have had no attacks in many months.

I would highly recommend this product to anyone so afflicted

Yours truly,

Mrs Oscar Hanneman

You may use as you see fit.
Mrs Oscar Hanneman

1117

Riverside, California
April 23, 1946

Mr. Davison Stivers
8361 Magnolia Avenue
Riverside, California

Dear Mr. Stivers:

As the days go by and I feel so much better, I want to take this opportunity of telling you how glad I am to have found so effective a course as the Nutrilite Products. I apparently had no serious organic trouble, yet I realized something was lacking, preventing my enjoying a fully active life. I was always so tired.

In my office work I use my eyes steadily. I was tired and run down and felt I was in need of a refraction and perhaps new lenses. I delayed doing anything about it, meantime I started taking the Nutril Products and since then I have not felt the need of new glasses. In other ways I have noted a marked improvement. I feel I really can't afford to be without your products.

Very truly yours,
Pearle M. Freeman
(Mrs. Pearle M. Freeman)

3976 4th Street
Riverside, California

(Permission to use this letter is on file.)

1118

110 S. 10th Street
Montebello, California
January 13, 1946

Mr. D. L. Stivers.

Dear Sir:

Four months ago, as you must well remember, I was a physical wreck. I was on the verge of a nervous break down, and all the ailments which I have had through the years past seemed to flare up,--namely—liver and gall bladder trouble, constipation, bleeding piles, colitis, menstrual difficulties, an ear and throat condition--for which three specialists, an M. D. , a dentist and a Chiropractor could do nothing; arthritis in knees, elbows, wrists and knuckles, eyes getting worse, touches of sinus, kidneys and bladder acting up, losing weight fast, and to say nothing of small aches and pains, and a lump that was forming on my lower jaw.

Now after taking Nutrilite over a period of four months most of these troubles have cleared up to where they are unnoticable and all others are improving fast.

In all sincerity, Nutrilite was a God send. All I hoped for was help for my nerves but miracles happened , it seems. My only regret is that I cannot tell the whole world about it.

If Ponce De Leon lived today, I could tell him where to find the Fountain of Youth—Nutrilite!

My husband has had a decided improvement in prostrate and kidney trouble. Also, our five year old boy used to get up for toilet twice a night, now rarely gets up....after only a few weeks on Nutrilite.

Very sincerely and thankfully,

Mrs. Edward F. McKernan

Mrs. Edward F. Mc Kernan

Now have my
sermon to
use this letter
so that others may
benefit from it.

2094

2095 FOREWORD

For eleven years a certain Laboratory had been preparing a food supplement. This food supplement enabled people to have a fully nourishing diet, and consequently to eliminate all kinds of deficiency diseases from Arthritis to Asthma, and from Migraine Headaches to High Blood Pressure.

In 1945 many new people came into the organization, and wished to know just what the food supplement would do. So all the representatives who had been supplying the product to people all around Los Angeles for from three to ten years, were gathered together at a luncheon meeting. The Chairman got them started talking about the results their customers had obtained, using the food supplement, and the stenotypist took it down on her machine.

The case histories in the following pages are substantially as reported at the meeting, only small changes having been made for the sake of clearness or brevity. All of these cases, told about in this book, can be investigated and substantiated, together with many more too numerous to be included.

2096 HOW TO CHEAT DEATH

The Educator looked around the luncheon table at the other members of the organization, and at the girl with her stenotype machine ready to take down all that was said.

"You want to know about cheating death?" he said. "Listen."

"One day Mrs. B. —— asked me to call on a friend of hers, a man who, she said, was just waiting to die. I said, 'I'd rather not, if you don't mind—he'll just think I'm trying to sell him something.' 'No,' she replied, 'It's all right. I've told him all about your product, and he wants to see you.'

"When I called, he was lying on the davenport—a sick, underweight, emaciated old man. He told me about all the money he had spent for X-ray pictures and doctors and sanitariums. He said that five specialists had just thrown up their hands and had said, 'We don't know what is wrong with you, but the best thing you can do is go home and take it easy. You have about two weeks or a month to live.'

"I said, 'Mr. J. ——, it isn't right to make such a prediction about a person. Nobody in the world can tell what Nature can accomplish. If you give her a whole set of tools to pick any and everything she needs to work with, she will take care of you.

"What will happen in your case? Nobody knows. And how fast she will work we don't know, but we know she will do all she can, when given the right materials to work with. So I won't make any

predictions. We can't be sure our product will relieve all
2097 your ailments. That is Nature's problem. But we can give her all she needs, and then let her do the rest.

"Anyway, he started using our product, and I dropped back about six weeks later, and he told me he had gained seven pounds.

"I didn't see him again for six months, and when I called that time he was up to his normal weight and had just finished working five days and most of five nights. As you may imagine, he was a very happy man.

"But, as I say in my lectures, you don't have to die, or to be near death, to suffer," continued the Educator. "Take migraine for instance. The worst case of migraine I ever encountered was a young girl. She had had these headaches for a long time—from birth, I guess.

"When her headaches would come on she was given sleeping powders, and for two or three days she would just try to sleep it off. At the end of that time there were heavy black patches under her eyes, and you could see just by looking at her, how she had suffered.

"When the doctor who had administered the sleeping powders died, the girl came to me and said, 'What shall I do? I can't stand the pain!'

"I said, 'Why not give Nature the tools and let her go to work?' I gave her a capsule then and there, and told her also that I didn't know whether it would take 24 hours or 24 weeks, but that if she would give Nature what she needs, Nature would do the rest.

"So the girl began using our product (#15). Two years later she told me that in that time she had had two slight headaches—but no more migraine headaches."

2098 "Your mentioning the sleeping powders," said one of the representatives, "reminds me of Mrs. F.——. Here was one of those cases where the person is ill, but with no particular symptoms that make it easy to diagnose. A general degeneration of the whole system best describes it.

"A friend of hers had been using our product, and told her about it, so she sent for me. When I first saw her she was weak and ill, lying on the couch in the living room. She was able to take only a few steps around the house, and was almost living on sedatives. She hoped to live only a few months at the most.

"She was a teacher, and intelligent. The reasonableness of our method of providing Nature with the right materials appealed to her. So she started with our product at once.

"One week later she called me on the phone, saying she was feeling better. Within five weeks she took a walk of two blocks. Not long ago I took her down town in my car, and she is well on her way to complete recovery. And she is one of my best boosters for our product."

"There was a lady in Long Beach," said Mr. Rehnborg, "who had almost the same experience. She also didn't have any specific ailment, except possibly Anemia. The doctors couldn't put their finger on anything in particular, but they said she wasn't going to live more than a few months.

"Her husband would carry her out to the garden swing in the morning, and bring her back into the house at night, and she just waited to die. A friend told her about our product, she sent for one of our representatives, and he went to see her.

2099 "She was so eager for help she would hardly listen to our explanation of the way Nature works. She started on the course. In about six weeks she was up and about and so enthusiastic about our product she just had to tell everyone. She continued to gain steadily, and for the past eight years has been one of our most enthusiastic representatives. She says she is living on borrowed time, since she was given up for dead; and now considers herself a missionary.

"Speaking of sleeping powders," said the Chairman, "did you see the article in the Readers Digest for May, 1945? The title is *Sleeping Pills Are Not Candy!* You should all read it. It tells about the harm that comes from the free use of sleeping powders that is so common now."

"This has nothing to do with sleeping powders, but it does have to do with cheating death," said another representative. "I called at a home on an errand, and chanced to meet an old man of 81. He had never been sick a day in his life, he said, until he began to get weaker and weaker, and finally was unable to do anything.

"I happened to catch him just after he came back from his doctor's office. He looked so bad, and seemed so sad, I couldn't help but talk to him. He was worried about the blood transfusion the doctor had ordered for the following day. He was sure he was going to die.

"I said, You may need a blood transfusion all right, but it seems to me that if you put good blood into your body, whatever is making your present blood bad will continue to act; and in a few days you'll be right back where you were. Why don't you do this: phone your doctor and see if the transfusion could be postponed for a couple weeks, without harm. If so, you could use our product and

2100 give Nature a chance to do her work. And you could still have the transfusion later, if you need it.

"So the transfusion was postponed for two weeks, and the old gentleman started using our product. Three days later—can you imagine that?—three days later he phoned to tell me he felt ten years younger. I said, 'You haven't any right to feel better so soon, but I'm delighted.' He continued to use our product, and one month later instead of a drooping old man, he was smiling, pleasant and peppy. His blood count was improving, and the doctor advised him to continue with our product.

"The next time I saw this man was six months later. Now remember, he was 81, and six months previous he was almost dead. When I arrived; do you know what he was doing? He was mixing concrete and putting in a driveway and a four foot wall!"

"How about constipation?" asked one of the new representatives. "Some people suffer a lot with that."

"I tell my people," replied the Educator, "and I always say in my lecture, that if they will give Nature the tools and let her work on it long enough she will correct the condition, and they will be regular. But it takes time, of course, because our product isn't medicine, and the body cells have to change. So I tell them to keep on with any laxative they are now using, but to take as little as possible. As the body rebuilds they can use less and less of the laxative, and in a few months they will not need any at all.

"I had one man who said to me once, 'You are a great big liar!'

Naturally I was surprised. He continued, 'I took your product
2101 and after the first week I have not had any constipation.'"

"Here is something most people don't know," said Mr. Rehnborg, the biochemist. "The bowels can be flushed by drinking three or four pints of a solution made as follows: to each pint of very warm water add a level teaspoon of salt, and put in lemon to taste. This is the same proportion of salt to liquid as occurs in the body, so the water goes right through and you get results in about 40 minutes. If a person has constipation, and he has to have something to help his bowels while our product is building him up, that is good to take."

"I don't want to change the subject, necessarily," said another representative, "but I happen to be most interested in 'psychological' cases. I majored in Psychology in college, you know, and I thought I would become a consultant.

"As I studied Psychology it became evident that people can have two kinds of psychological troubles. The first type is a matter of bad habits. Examples are: wrong habits of thinking, poor methods of solving problems; habits of introversion, submission, dependence and tantrums; inferiority feelings, procrastination, the habit of rush and hurry and tension, and poor social or business habits. For these the person should have training from a good consulting psychologist.

"Along with these bad habits, and aggravating the condition, are the so-called 'psychological' or 'functional' troubles. These stem from the physical condition. We all experience this when we are irritable due to hunger, fatigue or illness. In this group are mental depression, lack of ambition, difficulty in concentrating, nervousness,

worry over little inconsequential things, insomnia, hysterical
2102 tendencies, hypersensitiveness, restlessness, poor memory, chronic fatigue, feelings of apprehension and uneasiness and anxiety, and general weakness. Since these are symptoms of a deficient physical condition, they all improve or disappear entirely

when the person uses our product over a period of time. So it happens that I get the greatest satisfaction from seeing these poor people throw off these 'psychological' troubles, and become normal, happy human beings."

"There is a psychiatrist in New York, Dr. Cowles, I believe," said the Educator, "who says it is not enough to treat a person just through psychiatry—getting him to change his thinking—he says you must build up his body at the same time."

"Doctors are realizing that more and more, too," said Mr. Rehnborg. "Who was that doctor who wrote in for some of our product—from Riverside, I think?"

"That was Dr. ——."

"That's right. I wrote back and told him that since the American Medical Association did not approve of our product because it is sold direct to the consumer, he might not want it. So he came in personally and took home a course for his own use. I think he has sinus trouble.

"He is a good doctor, and I'm glad he's interested. He can do a lot of good in the world when he passes our product on to his patients."

"I had an interesting sinus case lately," said a representative. "He had sinus trouble almost all his life, and for the last twelve years he says it has been so bad he could hardly stay at his barber chair and work. He started on NUTRILITE ten weeks ago, and
2103 the other day he told me he had almost forgotten he ever had sinus trouble. He had arthritis too, and that hasn't cleared up yet, but his sinus trouble bothered him most and is all gone."

"I can tell you something about arthritis," said one of the women representatives. "This is my own case. I am 60 years old, and for several years I was unable to go up and down stairs except one step at a time, and in addition, had to pull myself up with the railing, or be helped by someone. I had aches and pains in my elbow, hand and thumb, in addition to my legs. Also, I wore strong bifocals—had for 20 years—the glasses getting stronger and stronger each year.

"I am now just finishing the first six months of my year course, and for the past six weeks I have been going up and down stairs as I did when a young woman. The aches I have had for many years in my left elbow, hand, and thumb are now almost negligible. And last week the optician changed my bifocals to a less strong lens. I don't know what it is to be tired any more, and I have such a wonderful inner feeling of well-being—it's hard to describe except that I feel 'swell'. As I run around now I'm not conscious that I have a body—it just comes along with me."

"Speaking of not being tired," said another representative. "A lady in Los Angeles is employed at Bullock's as a saleslady, and is on her feet all day. She is 50 years old, and before starting the use of our product she was tired out at the end of the day, and in addition had constant colds due to the air conditioning.

"She has now just finished her third NUTRILITE month.
2104 At the end of the day she walks with the spring in her step that she had when she went to work in the morning. She is without colds, and the neighbors in the apartment where she lives constantly remark about her improvement."

"Nobody has said anything about heart trouble yet," remarked a representative, "but here is an interesting case: Mrs. ——, who is Matron of the Eastern Star, was highly nervous and high-strung, and she had a heart condition which caused her much worry, and which interfered with her work and her lodge duties. She has just finished five months on a #15 course, and her whole condition, including the heart, has improved to such an extent that she is calling her friends on the telephone and telling them about our product."

"It is interesting to note," said the Educator, "how the people who use our product become boosters. Just the other day a stranger phoned me from a nearby town, asking me to see him. When I got there I found he was number 8 in a chain of users, one telling another until finally the word got to him. I traced it back to a lecture I gave six months ago."

"Nobody has said anything about losing weight," said a woman representative. "When I told you about my recovery from arthritis, I forgot to say that I was overweight when I started, and I lost ten pounds by the end of three months. But I haven't lost any more because I eat too much pie and cake."

"All a person who is overweight needs to do," said Mr. Rehnborg, "is use our product, and then cut down on his food intake."

"I haven't had much success getting fat people reduced," said the Educator. "They won't cut down on their rich pastries."

2105 "Speaking of eating," put in a woman representative, "my husband, for the first time in twenty-five years, is without indigestion. He is just completing his fourth month with NUTRILITE. He is just fine. He works as a conductor and eats in restaurants. He told the proprietor of the cafe where he eats, that he can now eat his stew without getting indigestion. The proprietor said, 'If you can eat this stew without indigestion, what you are taking really must be good!' Also, he has had no flu this year, and he always has had it several times, every year."

"I wonder how your asthma cases are progressing?" asked another representative. "I started a boy with a bad case of asthma on our product about a month ago, and he is doing very nicely."

"If a child has asthma, hay fever, or eczema he will respond quickly. This must be because he is growing and developing," said Mr. Rehnborg. But most adults with asthma will recover too, if they use our product long enough. Usually, however, they are impatient for quick results, and they won't stay with it long enough."

"How long does it take?" asked a new representative.

"Possibly a year—maybe two years," replied Mr. Rehnborg. "It depends partly on how long the persons has had the asthma, and upon his physical condition."

"You are right about the children," said a representative. "I started a seven year old girl on our product. She had asthma. Now, after three months' use of our product, she has no asthma.

"Eczma yields very nicely in adults, too. One man had had eczema for thirty years. He got rid of it in four months.

2106 "Do all the people who use our product have something definitely wrong with them, like these people you tell about?" asked a new representative. "I mean, do well people use our product to stay well?"

"I'm getting a larger percentage of 'well' people all the time," said the Educator.

"My experience is that all the people you meet, no matter how healthy they may seem, have some secret ailment," said one of the old timers in the organization. "Either their teeth are decaying, they have constipation, they have frequent colds, they are too fat or too thin, they have high or low blood pressure, or indigestion, nervousness, fatigue, brittle nails, aches and pains in various parts of the body, headaches, or they are growing old too fast. Usually we tend to think of these ailments as part of living, and that nothing much can be done about them. But many of these people are interested in feeling better, and in eliminating their physical troubles, and so they are interested in our product. Also, most people know their parents or grandparents died of some particular trouble like cancer, consumption, heart trouble, or apoplexy, which they rather fear, and which they would like to avoid. And they too use our product."

"That reminds me," said a new representative, "I need to know more about our product, and why and how it was developed."

"That's easy," said one of the older representatives, "let's get the Educator to give us his lecture. I understand it is very interesting, as well as instructive. How about it, Mr. Educator?"

"I don't have the lecture cards with me."

"I have a set in my car. If I get them, will you give it?"

"I will if you coax me," smiled the Educator.

* * * * *

2107 The lecture cards were brought, the Educator smiled again at his audience, and spoke as follows:

"Once a man had a little calf. It was a cute little brown calf with a white face. He took the calf out to his pasture, here in California one of those ideal pastures in a beautiful valley, so all year round the calf could find plenty of food, and water from the stream.

The man left the calf there, with some salt, and took a trip around the world. He was gone a year. When he returned to his calf he

found, as we would naturally expect, that it wasn't a calf any more at all—it was a cow. It was a great big cow, with horns and hooves and a long tail.

As the man stood there by the fence and gazed at his cow, he began to wonder where all the material came from that wasn't there when he left. What made the horns, and the hair on the tail, and the hard material of the hooves?

Obviously, it all came from the grass, since that is all the calf had to eat, with a few leaves, possibly, which it may have nibbled from a young tree.

Now, believe it or not, where the material came from, to make the cow, is important to all of us, for we too grow up in the same way. We too start as a very small animal, and we finish as adults with hair, teeth, bones, finger nails, inner organs and muscles not possessed at first. (Of course, some of us *don't* have any hair or teeth when we're grown up, but that's all part of the story too.) As we grow up the hair and teeth grow—they have to be made of something. Where does this material come from?

2108 Again you say, it's in the food we eat. It's in all the stuff we put into our bodies—in the meat, potatoes, milk, bread, candy, coffee, ice cream, pancakes and fruit, vegetables and nuts. Anyway, we hope it is.

It's much like building a house. Suppose you build a brick house, but while it is being built, the bricklayers substitute a lot of wooden boxes, made to look like bricks, for the real bricks. Obviously in an earthquake or big storm, you would lose part of your house. Or a wall might come tumbling down at most any time. So you call some more bricklayers and they put in a lot more of the imitation bricks along with the good bricks. Everything looks all right, and you think you have done a good job in taking care of your house, but actually your house is still weak, ready to fall apart, and it will stay weak until you get every imitation brick replaced with a good brick.

How many imitation bricks do you suppose you have in your body? It's pretty hard to tell, of course, but here are some facts and figures that will give us an idea of the condition of the bodies of us Americans.

Children die every year in this country from malnutrition. Notice it is not in Europe—not in Japan—not in China during a famine—but right here in the U. S. According to the Bureau of Education, 50% or more of our children in schools need medical attention of some kind. Four million of the boys drafted for army service were rejected for physical defects and inability to serve.

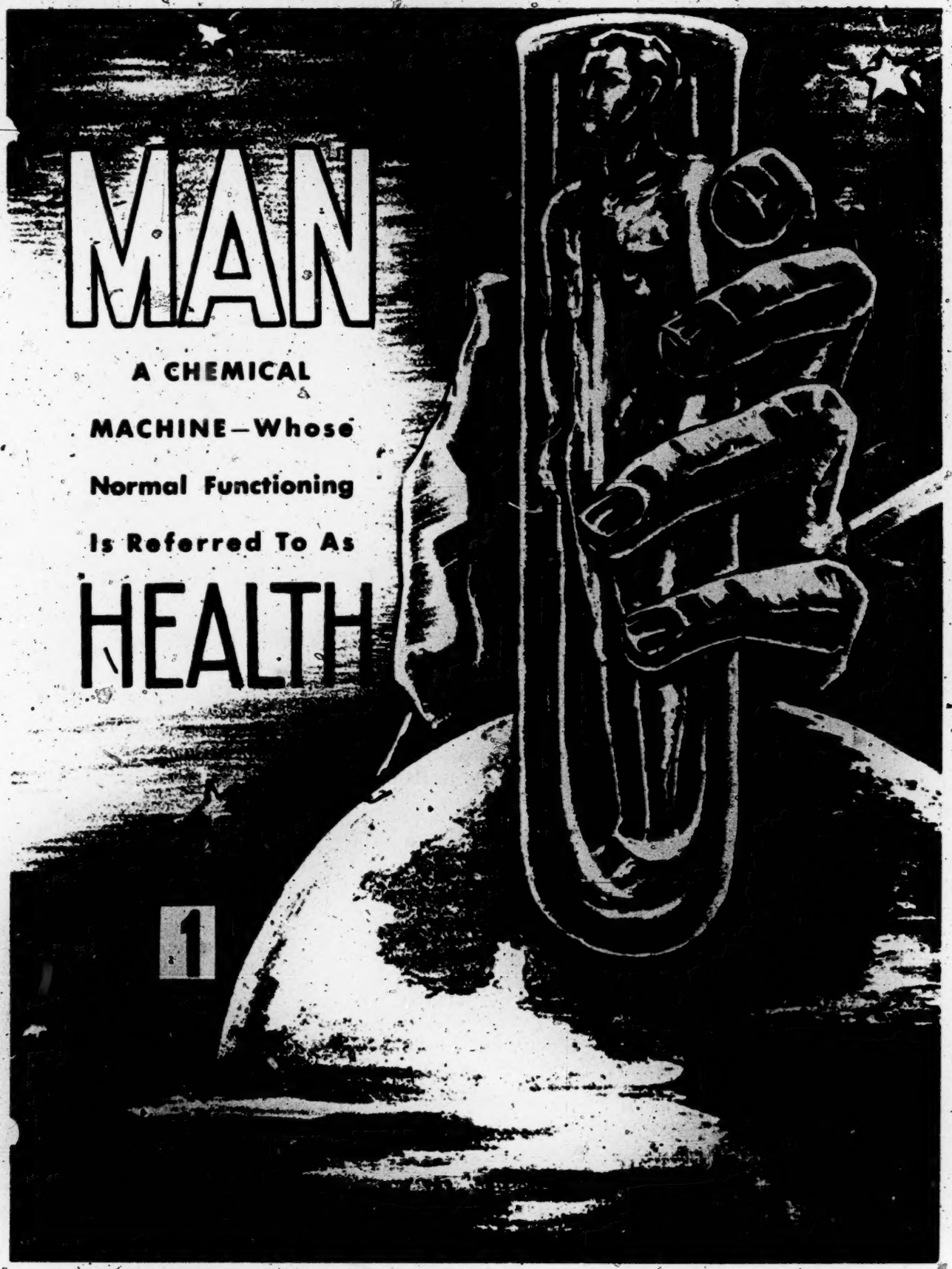
According to a recent study made by the Pennsylvania College of Philadelphia, only one in a thousand is not suffering from
2109 deficiency—from malnutrition. This means that no one can safely say: "I am perfectly healthy and my body is sound and well nourished."

Think of our population, and think of the number of cases of cancer, diabetes, heart trouble, high blood pressure, constipation, tuberculosis, arthritis, neuritis, and so on ad infinitum.

This would certainly make it look as though each of us might have a body containing many imitation bricks, so that we look reasonably well, we can get around and do our work, but either we are now experiencing some disease, or we are ready to come down with one.

Man is a chemical machine. You know you can take some cold hydrochloric acid and some cold copper, put the copper in the acid, and soon both the acid and the metal are *hot*. That is a chemical reaction. And in the same way, when you put cold food into your body, and the body converts it into heat to keep you warm—that, too, is a chemical reaction. Thousands and thousands of chemical reactions take place in your body every second of every day, and you don't know anything about what is going on.

(Here follows 1 Photolithograph, side folio 2110.)


MAN
A CHEMICAL
MACHINE—Whose
Normal Functioning
Is Referred To As
HEALTH
1

2111 In Illustration #1 we see a man in a test tube, where his chemical reactions, metabolism, allergies and general aches and pains can be studied.

I have a great respect for doctors. We couldn't get along without them. But there are two words doctors use that often confuse us. One is the word metabolism. "Your metabolism is out of balance," they say, or "Your basal metabolism is way too low." Now this word "metabolism" is awkward. What does it mean? Few people know. But the doctor doesn't use the word to confuse you. It's just his scientific way of expressing it. He refers to the *chemical changes* in living cells by which the energy is provided for the vital processes and activities, and by which new material is assimilated to repair the waste. If your basal metabolism is low, it means that this *chemical process* is not very productive of energy and new material. You can correct your metabolism by living right and *eating correctly*. Just as this metabolism is going on inside your body right now, and you don't know anything about it, so if you give your body the right material, and treat your body reasonably well in other ways, it will automatically correct any fault in the present chemical processes.

Another word the doctor uses is "allergy." He will tell you you are allergic. I heard a doctor say recently that almost everything wrong with us was due to some sort of allergy. He means the body has become so sensitive, that a certain something, otherwise harmless, will cause trouble. I know a little girl who is allergic to feathers. When feathers are near her she breaks out in a sort of rash. Some people are allergic to pollens of weeds, or flowers. Some are allergic so cats. A doctor told me recently of a man allergic to sunlight. Allergies seem so popular, it's a wonder someone
2112 doesn't say he is allergic to his wife, and claim a divorce.

Now it may be perfectly true that your body is sensitive to certain things, and that you really do have an allergy. But this is the big question—why is your body so sensitive? It isn't enough to know your allergies, and then try to avoid them. The real need is to get your body so adjusted that you won't be so sensitive—so your won't have the allergies. And here is what the doctors will be saying 25 years from now. "There is something wrong with your body chemistry if you have an allergy, and the allergy can be eliminated by your own body, automatically, if you will just give your body all the building material it needs." By this I mean, just give your body everything it needs to restore its chemical balance. Your body is a chemical machine, and always the chemical balance must be maintained. When your body gets out of chemical balance, you are ill. When you get into chemical balance and stay there, you are well. That's health in a nut shell, and that's what we find when we put man in a test tube and study him.

Now—what gets our body out of chemical balance? In other words, what makes us sick, and what gets us well? Here is the story.

(Here follows 1 Photolithograph, side folio 2113.)

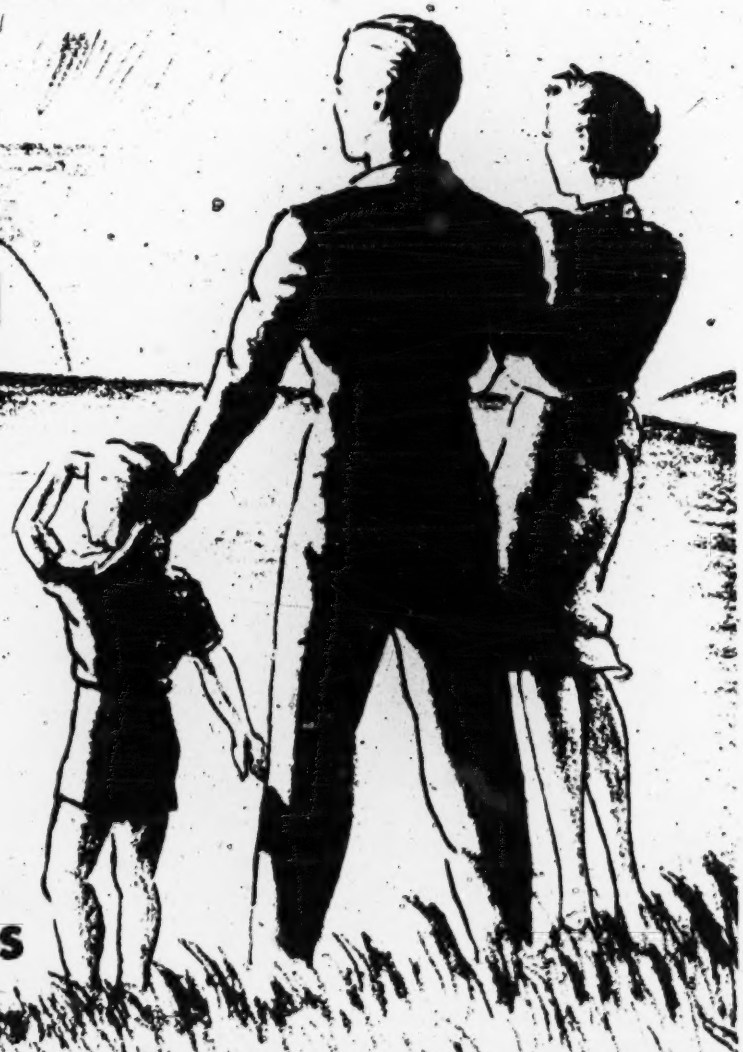
11304

THE FORMULA OF TOMORROW

— for the World of today

2

HEALTH



Includes the six
Basic fundamentals
For sound Health:

- SUNSHINE
- FRESH AIR
- PURE WATER
- PROPER EXERCISE
- SUFFICIENT SLEEP
- PROTECTIVE FOODS

Remember this... THE AMERICAN DIET IS DEFICIENT IN PROTECTIVE FOOD FACTORS

2114 In illustration #2 we find noted the six fundamentals of health (namely: sunshine, fresh air, pure water, proper exercise, sufficient sleep, and protective foods. Remember this—even our celebrated American diet is deficient in proper protective food factors. Pure water and fresh air and sunshine we don't worry about. Especially in Southern California. We have an abundance of all of them. If we lived in Calcutta, India, this water question would be something to worry about. But we take those things for granted here in Southern California. The need for proper exercise and sufficient sleep is known to every intelligent person.

Now consider the protective food factors—those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the biochemists, *nutrilites*. That's a technical word you won't find in your dictionary, but it means all the little food factors—not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

This is an interesting thing to me. We all used to think that all we had to worry about was the bulk we could see on our plates—the fats, minerals, carbohydrates, and proteins of which we are built. Now we are learning about the vitamins and other nutrilites, and the history of their discovery is interesting.

There was a Swiss biochemist, whose name was Lunin, who was intrigued by the consideration that there would come a time when the growing population of the world would be so great that the
2115 ground available for growing foods would be insufficient to support them, and he conceived the idea that it might be possible to feed human beings, as it was possible to feed animals, on substances which were not commonly recognized as a food. To determine that this was a sound theory, he fed experimental animals on synthetic diets made up of the substances that science then thought were contained in foods. These experimental animals were fed pure carbohydrates in the form of corn starch, pure refined fats, and protein secured from milk and leached with ether until nothing but protein was left. To this mixture he added all the minerals that analysis showed were in the body, and then fed this diet to animals. In theory they should have been able to maintain life, but they all very promptly died, and successive experiments of similar character all failed, *unless small quantities of natural green materials or milk were added to the diets.* Lunin concluded that there were substances not yet discovered in foods which were essential to life.

By some strange indifference that problem was not investigated further for another twenty-five or thirty years. At that time there was a Dutch physician in charge of a prison hospital in Java. The patients in his hospital were mostly suffering from an oriental dis-

ease called beriberi, which is a Malay slang word for "no can do", because the men who have it are incapacitated. They suffer much pain and finally die.

The Dutch physician, Doctor Eikjman, noticed also that the pigeons that flew around the prison yard seemed to have a similar disease. Their heads were drawn back and their wings and legs were partially paralyzed and they died. He also noticed that what they ate was chiefly the white grains of rice that fell from the chow bowls of the prisoners as they ate their meals. Because it was polished rice, as an experiment he fed the birds *unpolished*
2116 rice—and they recovered. He then fed unpolished rice to the men, and they also recovered. But, Eikjman, being a physician and dealing with a totally new effect, concluded that there was a toxic substance in the white grain of rice for which the antitoxin was in the rice hulls.

About the same time a Japanese physician was trying to stamp out the same disease in the Japanese Navy. He knew that the staple diet of the Navy men was white rice, and he concluded that the reason a diet chiefly of white rice causes beriberi was because it did not contain sufficient protein. So, picking a training ship, he arranged that the diet of the cadets on the training ship throughout the cruise should include beans, rather than rice, as a staple food. On the trip there was no beriberi whatever. He concluded that the reason for the beriberi was the lack of protein.

An American, by the name of Williams, who was then in the Philippines, following these conclusions, advanced the completely new idea that the reason for the sickness was not something the sufferer had eaten, but was because there were factors, normally present in natural foods, the lack of which caused the disease. In other words, the sickness resulted from something not eaten. All that is known of these factors, which we now call vitamins, or nutrilites, has been discovered in the past forty years.

Very early in this investigation it was discovered that one of the principles involved was contained in butter fat and dissolved in fats generally. It was called "fat soluble principle A". Another principle, the lack of which was responsible for beriberi, was found to be water soluble and was called "water soluble principle B".
2117 Sometime around 1912 a scientist named Funk believed from his investigations that he had proved that the substances in question were amines; so, he proposed the name vitamines, or *amines* vital to (vita) life—vita-amines. Later it was discovered that they were not amines and the final "e" was dropped and they were called vitamins. Fat soluble principle A became Vitamin A. Water soluble principle B became Vitamin B. Presently—about 1919—we knew of Vitamin C and Vitamin D. Then it was discovered that Vitamin B was not simple, but composed of at least two factors, and when this separation had been established, it was

discovered that the second of these factors was extremely complex. It is now known to comprise not less than fourteen distinct values, and for convenience it is called the "B-Complex."

From 1920 until 1930 the knowledge of the vitamin (or nutrilite) factors grew until there were about ten known. In the next ten years perhaps thirty more were discovered or postulated, and most of the first ten were made synthetically. Now, no one knows how many there are. There may even be twice as many as are known, or assumed to exist, but they have one character in common—they all originate in the green leaves of plants. And the nutrilites, you remember, are ALL the little vital food factors, including the familiar vitamins. So if you want to be really stylish and up-to-date, you should talk about the nutrilites, and not just the vitamins, for the nutrilites are ALL the protective food factors, including the vitamins.

Now, be sure to remember this: the American diet is deficient in these protective food factors. Why is this true? We are sick and ailing because of what we *don't* eat. Why *don't* we get all the nutrilites we need?

(Here folows 1 Photolithograph, side folio 2118.)



Enemies of HEALTH

- DEPLETED SOIL
- IMPROPER COOKING
- PROCESSING; STORAGE & SHIPPING DELAYS

Resulting in: *devitalized, demineralized and denatured foods!*

★ Henry A. Wallace says:

"50% of the people in the United States do not get enough in the way of protective foods (containing vitamins and minerals) to enable them to enjoy full vigor and health."

3

★ Lela E. Booher, Chief of Foods & Nutrition Div., U. S. Bureau of Home Economics informs us:

"The chief fault of many American diets is that they provide too little of the essential minerals and vitamins.

★ English Academy of Medicine, LANCET, states:

"99% of common illnesses are due to or are superimposed on vitamin deficiencies."

OUR ARMED FORCES KNOW • They supplement the diets of our fighting men with vitamin concentrates.

2119 In Illustration #3 we find the answer—depleted soil, improper cooking, processing, storage and shipping delays cause devitalized, demineralized and denatured food.

"Well," you say, "What's that got to do with it?" Here's the answer. Consider storage and shipping—consider an orange. An orange stored thirty days loses some of its vitamin value. Cold storage preserves food, but not one hundred percent. Therefore, your friend and my friend in Chicago or New York get oranges with a lowered value. They are figuring now that after the war we will not ship fresh fruits and vegetables in storage cars. Instead, we will put them on a plane tonight and twelve hours later they will be in Chicago.

As a matter of fact, possibly you saw that clipping in the Daily News for about the 6th of July, 1945. An American Airlines C-39 giant four-motored airfighter carried fruit and vegetables from Salinas, the "Salad Bowl", to Cleveland. The plane loaded the produce, picked early Wednesday morning, left at 9 a.m., and the fruits and vegetables were being carried home from the Cleveland markets the next morning. Think of that! Contrast that twelve hours with twelve times that and you will know what it means to have fresh fruit in Cleveland. Take your Oregon and Washington apples. We get them along in February and they are not as good as apples picked in October. We know that. Well—so much for the shipping.

Now consider the matter of processing. The beriberi which afflicts the Orientals, who eat a lot of polished rice, is the result of processing. In this country we eat polished rice, and also white flour. Do you know why they give us white flour and why it is so hard to get whole wheat flour, and good whole wheat bread? Be-

2120 cause millers discovered that white flour would store well without getting rancid, and that weevils would not get into the processed flour. Either the weevils had more sense, or they didn't find enough nourishment in the white flour. Anyway, that's the reason for white flour. And just as the weevils can't live on it, we can't either. The weevils have to supplement their white flour diet, and so do we, for it's what we *don't* eat that makes us sick.

Sugar is another item which is highly processed. The negroes of the tropics who chew the sugar cane get sugar *and* minerals *and* vitamins, but we who eat the refined sugar from the cane, do not. And further, the white sugar actually draws on the body's stores of certain nutrilites necessary for the chemical processes the sugar goes through in the body as it is used for energy, so that white sugar not only doesn't give us the nutrilites we need, but it takes from us some that we already have. A double loss.

Now let's talk about cooking for a minute. Far be it from me to tell a lady how to cook, but there are certain things that happen in cooking that make it necessary to consider it. In other words, our

food is prepared for taste and appeal, not scientifically for health. We cook so that our foods will be pleasant to eat, not because they are better for us.

Now, what's lost in cooking? Here's a fair example. Last fall when there are plenty of peaches to can, this article appeared in the local paper: "Peaches are good sources of vitamins. When canned they retain one-third of their original value." We don't worry about the half-dollar we save. It is the one we lose we worry about. I read that article this way: "Peaches are a good source of vitamins. When canned they lose approximately two-thirds of their original value." When you stop to think, we *are* losing two-thirds of the real value to us of that peach. That's something worth thinking about. That's one reason why this body of yours (and
2121 mine) doesn't feel and act as well as it should. That makes sense, doesn't it?

The same thing is true in the cooking of many of the vegetables. Unfortunately for most of you women, men like meat, potatoes and gravy. We are not good vegetable eaters. We ought to be. But even if we were, would we get the nourishment we need? In the preparation of cabbage, as an illustration, you put a nice green head of cabbage in the pot and it comes out something between tan and brown. The chlorophyll is gone as well as the vitamins and minerals which are quite soluble in the cooking water. Even if the cabbage was as good as it should be to start with, which is not always true under modern cultivation and storage transportation, it certainly is not as good as it should be when it is finally cooked and served. The drain pipe gets most of the good foods and you and I get what is left.

The greatest enemy of all is depleted soil. We have known that for a hundred years, but we have done very little about it. 'Way back in the days of Thomas Jefferson it was recognized that the soil in Virginia was being depleted, because the quality of the tobacco crop was falling off. So Thomas Jefferson bought most of the rest of the United States for some ten million dollars. He had to have more rich, fertile soil to grow good tobacco. Now, today, the government, both state and national, is selling the farmer on the idea of remineralizing the soil. For what? So the farmer can grow heavier crops, bigger hogs, finer cattle and sheep. The farmer will do it so he can make more money, not so that he can serve you better food. He does it so he can make more money out of it. As time goes on we shall see more and more remineralization of the soil, but now it is being rapidly demineralized. You have often passed
2122 some field, I'm sure, where vegetables are grown. You see them take off one crop after another, with just enough remineralization and fertilization to grow a good looking crop. The farmer doesn't care anything about the mineral content of his plants

—just their appearance and taste, for you buy according to looks and taste. So the food grown in that soil can't have as much food value as it should. It is impossible to take out, over and over, putting very little back, and have good food.

On the other hand, here is an example of what happens when the soil is properly mineralized with respect to only one of the essential elements. In Deaf Smith County, Texas, a dentist moved in to start his practice. But business was poor, and when he investigated, he found that practically nobody had any decayed teeth. The residents of Smith County didn't need a dentist because fluorine, in addition to other elements, was present in the vegetables and in the drinking water leached through that soil in quantities great enough to produce perfect teeth. So right now they are starting to import water from Smith County into other states, in ten thousand gallon lots. But, unfortunately, there isn't enough water in Smith County to go around. Although it is a fine example of the protective value of minerals, it doesn't solve our own health problems.

(Here follows 1 Photolithograph, side folio 2123.)

1138A

22 MILLION Children

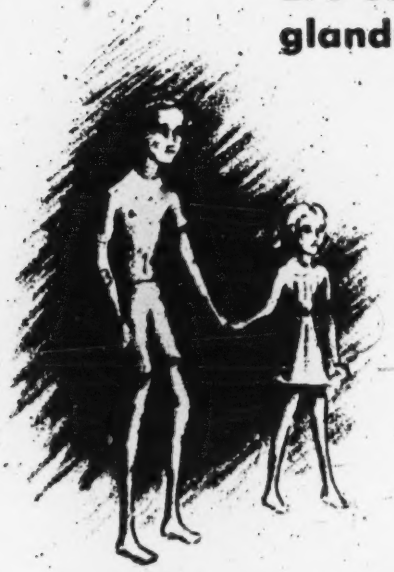
NEED CORRECTIVE TREATMENT — U.S. CHILDCLINIC

10 MILLION
have bad teeth

4

6 MILLION
are suffering from a glandular disturbance





4 MILLION
are improperly nourished in other ways

1 MILLION
have tuberculosis

1 MILLION
have spinal curvatures

90% OF THE CONDITIONS ABOVE

Originate in Deficiency of Protective Food Factors

WHAT'S WRONG?

2124 As you read in Illustration #4, twenty-two million children in the United States need corrective treatment, ten millions of them have bad teeth, six millions are suffering from glandular disturbances, four millions are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature —and even the curvatures may originate in deficiencies in protective food values—the nutrilites. And we can all see that it is the type of food we raise or buy that causes this condition.

Twenty-five years ago in the first World War, we rejected twenty to twenty-five percent of the men and women eligible for service. Today, twenty-five years later, in the second World War, we rejected forty percent, or almost twice as many. Over half of these people have deficiency ailments.

Here is an extract from a clipping in the New York Times, printed June 29, 1945. "The record of 33 per cent rejections for women (applying for admission in the WACS) indicates an even more serious health situation for women than the 40 per cent rejection rate does for men," said Dorothy La Salle, in charge of the girls. "It is to be remembered that these women were all volunteers, and at least thought of themselves as being well enough to join the W.A.C.", she said. "I am sure that if we could have a complete cross-section of the women between the ages of 20 and 50, a much higher rejection rate would be found."

That's interesting, isn't it? It means that you can think you are in good health and *still* be experiencing some 'little' health difficulty which is important, but neglected.

2124a You can think you don't need nutrilites—the protective health factors—and yet be wrong.

Coming back now to the men and women applying for admission into the Army or Navy, remember your 4-F was already 4-F when he was eight years old—not suddenly when he was eighteen or twenty-eight. It is true, whether you want to believe it or not. Of the six hundred six thousand 4-F's of California, forty per cent or more can be rehabilitated and built into real men. One of the principals of a High School here had a son. He was weak and petted and pampered. He was allergic. He looked like a healthy vigorous man, but he couldn't eat this and he couldn't eat that. Uncle Sam got him into this man's Army and started feeding him good solid food, with vitamins added. Regular habits, plenty of rest and exercise, the right food, and vitamins, and now he eats everything. He isn't allergic to anything. And they wondered what was the matter with that boy. Overindulgence. One educator said to me recently, "The American public is overfed and undernourished —more so than any other people in the world." And I think, "How can we expect to be healthy folks when our food is so poor?" You can't get prosperity out of poor food either.

(Here follows 1 Photolithograph, side folio 2125.)





ON TOP — BUT NOT ON TOP ?

Low vitality—over-fatigue—insomnia—poor appetite—gastro-intestinal distress—recurrent vague aches and pains—weak eyes—defective teeth—all of these may be caused by the lack of the "Little Things" in the diet.

5

Is there a Solution? THERE IS!

WHAT IS THE SOLUTION?

2126 You ask, "Is there some help? I don't need it for myself—I'm on top, but my neighbor, or the rest of my family—they need it." You say you are on top, but are you? Like the girls turned down by the W.A.C., you have low vitality, insomnia, recurrent aches and pains, weakness, and the prospect of operations, defective teeth and colds. All these may be caused by the lack of nutrilites—those little things not in your food—like the little man that wasn't there.

Here is a recent report on colds, for instance, dated Chicago, July 4, 1945, and printed in the L. A. Examiner. Dr. Joseph H. Kier published a report covering a two-year study. He says the common cold affects more women than men and costs $2,000,000,000 a year. Smoking apparently has little effect on colds, but posture is an important factor (I presume because poor posture cramps us and we take in less oxygen). Most colds occur in December and fewest in July (we don't need a two year study to tell us that). There are more colds per 1,000 of population in Chicago than in the East. Colds occur more in the 28-29 age group and less often above 50, but the percentage of time-losing colds increases with age. (As you grow older you can't take it.)

This articles tells us about colds, but not what we really want to know—what causes them? Do you know what causes our low vitality, insomnia, aches and pains, weakness, physical condition requiring an operation, and defective teeth, not to mention many other troubles you can think of, and which you are now very likely experiencing?

Here is something I think is interesting. There are four types of sickness or physical ills known to man: First—accidents. Second—those resulting from bacterial invasion (diphtheria, scarlet
2127 fever, smallpox, malaria, typhoid, cholera, and so on). Third—poisons. Fourth—malnutrition, or lack of proper material in the body. Imitation bricks instead of the real thing, and the diseases of malnutrition by many times outnumber the others.

So according to science, if we rule out accident, poison and bacterial invasion, *your* sickness and *my* sickness is due to malnutrition—due to what are commonly referred to as deficiencies.

In other words, if you are nervous, if you always feel tired, if you catch cold easily, if you have high blood pressure or low blood pressure, if you have rheumatism, or neuritis, or if you have indigestion, gas or constipation, you have symptoms of what science calls MALNUTRITION.

Why are we having so many of these common health problems nowadays, whereas a hundred, or two hundred years ago people didn't have them so generally?

Great-grandpa used to take the grains to the mill and bring back the *whole* flour for bread and cereals. Today the grain is shipped to

the mill where all of the bran and germ is taken from it, then a chemical is used to bleach it. Most bakers use other chemicals to make it rise when making bread and cakes. Result,—you and I do not get what our great-grandparents used to get in the old days. Is that correct?

Then remember, great-grandma's vegetables were most likely grown in virgin or at least good soil, while today much of civilization's soil has been used so often and so intensively that it has become demineralized. The effect of soil on vegetables grown from the same seed in various parts of the country is very obvious in the difference in color and flavor, as well as size and texture.

2128 What does all this mean? It means that in order to compensate for the losses caused by refining and processing, storage, canning and cooking, and also due to the lack of minerals in the soil, we have to eat two and three times as much food as would otherwise be necessary.

This results in overloading our stomachs, overworking our livers and kidneys, and eventually a break-down of one or more of these vital functioning organs.

Besides, we are spending more than we should for food, because we have to eat so much,—and even then our bodies are not properly nourished.

Is there a solution to this problem? Is there anything available that will take care of our health problems, aside from medicine and drugs?

The answer is YES. Definitely. There is actually a product in existence right now, which holds the answer to our food problem. It makes it possible to get the materials into the body that the body needs to rebuild itself, and to keep itself strong and well.

This product really solves the problem of intake and *assimilation* of sufficient quantities of vitamins, minerals and other elements needed to put, *and keep,* our bodies in *chemical balance.*

To understand something of the extensive research that went into the discovery and development of this important aid to health and happiness, it is necessary to go back some years, and mentally travel thousands of miles.

(Here follows 1 Photolithograph, side folio 2129.)

1142A

THE STORY
of the PLANT BASE in NUTRILITE

植物的生命就是人類的生命



Nearly — Thirty Years Ago, Carl Rehnborg, selling, canned milk in China, found himself blocked by ancient traditions —milk was not generally used by the Chinese even for babies. As a demonstration he began nursery feeding of the babies of the poor with his canned milk, to which was added glucose, minerals, and a formula water made of native rice and barley. Improvement was slower than hoped for, apparently something was still lacking in the babies' diet. Vitamin knowledge was then very incomplete, but through his early training in chemistry and related studies, Rehnborg had developed a theory that many, if not all, of the food factors essential to health originated in green plants. Fertilizing a plot of ground with necessary minerals, for vigorous growth, he planted it to alfalfa. As soon as the first green leaves appeared he ground them up and added the paste to the babies' formula. At once an almost miraculous change took place:

6 *not* ONE *of the babies failed to* IMPROVE!

2130 Thirty years ago, a young man by the name of Carl Rehnborg, of Swedish descent, graduated from an eastern university. He had majored in biochemistry. In time he became associated with one of the largest manufacturers of American canned milk. He was selected by this company as their representative to the country of China—to introduce this product to the mothers of Chinese babies. He soon learned that this was a very difficult assignment, about the same as trying to sell refrigerators to Eskimos.

He tried to convince these mothers that his company's famous product would make their babies fat and well, but everywhere he turned he came up against the stone wall of Chinese indifference. The Chinese had never used dairy products—babies had always been nursed.

Finally, although he was not a medical man, he decided to establish a demonstration clinic. He went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. Here desperate mothers, frantic to the point where they were willing to grasp at any promise of hope for their starving, ailing infants, willingly placed them in his care.

Mr. Rehnborg's belief in his company's product was genuine. Yet weeks of feeding one of the most highly advertised and recommended American canned milk products to these sick Chinese babies brought disappointing results. The milk was being carefuly formulated, but apparently milk was not the whole answer.

Having specialized in the chemistry of foods, and having taken a part in some of the early vitamin research experiments, he was convinced that the vitamins, the various minerals, and certain
2131 other essential diet factors, as yet unidentified, were present in many raw foods. But apparently they were absent or deficient in most cooked foods. It was not even certain that cow's milk contained the *best* concentrations of *all* of them,—at least for human infants.

He believed these essential food factors were most highly concentrated in green plants, from which the milk-givers and all other animals finally secured them. The therapeutic food value of green growing plants had been further indicated to many observers by the fact that even the meat-eaters among the animals, including man's own dogs and cats, almost invariably exhibited a tendency to eat grass as a conditioner, especially when ill.

So, with continued feeble health or early death facing his infant patients in almost any event, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants,—scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

Almost at once some of his little charges began to show improvement. Some of the babies in the clinic, by now expanded to several times its original size, began to take on weight at a more normal rate, became less listless, commenced to throw off visible symptoms of the various illnesses with which they had been afflicted.

But not all of them. Some still failed to show the hoped-for reaction.

But the man who held their future life and health in his hands was convinced that now he was on the right track. He suspected
2132 that the chemically worn-out soil of China was deficient, so that plants grown in it could not supply the consumer with all the required minerals, and probably did not even contain the normal quantities of vitamins and other essential organic substances they should produce. He subjected samples of the soil to chemical analysis. When this theory was verified by the test-tube method, he leased ground of his own, plowed the minerals, which were lacking, into the soil. Thus he grew his own green plants, containing a full complement of essential food factors as he recognized them.

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected.

The visible results from having fed these Chinese babies on a diet rich in all the vitamins and minerals then recognized as essential, (plus other food factors which he assumed were equally essential to health because they were normal components of normal plants, although their essential character was not then proved), convinced him that he had developed a practical formula for perfect chemical balance for the body, which would restore normal organic function, build resistance to infection, and strengthen the body so that it could throw off symptoms of disease and maintain complete health.

Therefore, he still further perfected this food supplement by extraction processes, discarding the non-essential cellulose and other parts of the plants, so that much value could be concentrated in small volume; and then tried the supplement formula on adults.

It is well-known that life in the Orient has always had a deteriorating effect on members of the white race. The big companies which sent men to China to represent them never kept these representatives on the job for more than about three years at a time. They were
2133 then given six months' furloughs to return to their own countries. The reason for this was that by the end of two or three years most Americans and other "foreigners" had reached a run-down condition which only a long vacation in their native climate could mend. Climate was supposed to be the essential difficulty in China. Having discovered the vitamin and mineral deficiency in Chinese-grown food, our chemist reasoned that this

deficiency, rather than climate, probably was the cause of much of the ill health among Americans in the Orient.

True enough, Americans fed on his specially prepared supplement were able to withstand the deteriorating effects of life in China. These men returned to the United States as well as when they left.

Now, then, what has this story of a diet for Chinese babies and Americans in China have to do with you? It's simple enough, for although the standard American diet is one of the best in the world and admittedly far more healthful than can be obtained in the Orient, food chemists, dietitians, and even the medical profession have long realized that our present-day processed, preserved, and cooked foods do not constitute a natural or a complete diet for the human race.

Chemical and biological science have established the fact of the chemical nature of the life process and that living things of all kinds must be in chemical balance to be normal. It is known that many of the ills and diseases of human beings are unnecessary—that they are the result of chemical starvation of our bodies for substances vitally necessary to life.

This is not a fad but the opening of a door to a new way of life and living for all mankind. It has to do with the accessory food factors so small in bulk that although they have always existed
2134 in foods they have escaped attention and were unknown until the science of chemistry and endless patient research disclosed their existence and their nature—they are Vitamins and the other Nutrilites.

Is is a fact that the body, when given the normal American diet, just runs down. Look at the people around you. Many of the children already show a marked deterioration, and you see it in almost everyone over forty.

But those men and women who ate Mr. Rehnborg's leaf concentrate didn't have to be rehabilitated.

(Here follows 1 Photolithograph, side folio 2135)

all of the factors
REQUIRED *in* HUMAN NUTRITION



come from

PLANT MATERIAL

1

therefore:

MAN

is dependent upon the

PLANT KINGDOM

for HEALTH

2136 When Mr. Rehnborg returned to the United States about 15 years ago, he started down in Balboa, California, to develop a food substance to help people—a food supplement to cause the body to live normally. Soon people started to make a track down there and finally a group of people in Long Beach found out about him and built him a laboratory and the next fact was the development of a complete food supplement to supply the elements lacking in the food we eat.

And where would you think he would get these vital additions for our diet—these nutrilities? Exactly, from plants. So his plant base, or plant concentrate, the important part of his food supplement, comes from the plants richest in nutrilites—such as parsley, water cress and alfalfa. This doesn't mean that we are going to sit down and eat a meal of raw plants, however. But you can't get away from the fact that the life of the plants makes the life of man, and that the nutrilites in our plant concentrate are what give it its magic qualities. That is why our product is called NUTRILITE.

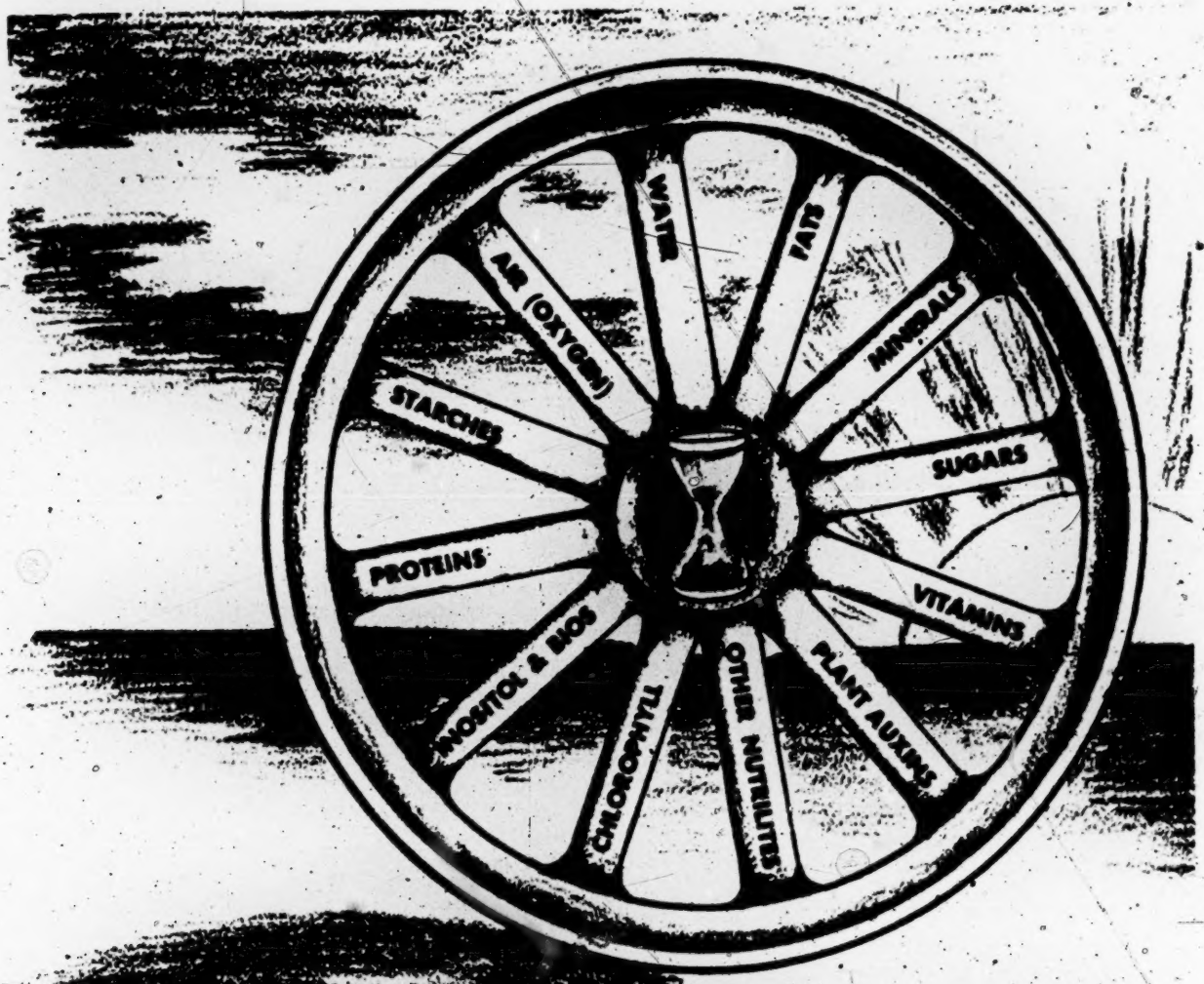
Our product enables your body to throw off disease and to remain well. The human body is composed of some eighty trillion cells, or approximately two thousand times as many cells as there are humans on the face of the earth, and everything we require as nutrition is required by each of these cells. The only way they can perform their functions adequately and completely is for them to be supplied fully with all the substances that they require for the chemical reactions that we call the life process. Under conditions of civilization many of these factors are simply not in the food we can buy. The result is that, without a food supplement to make up the deficiencies, the delicately balanced machinery of the human body does not perform normally and this lack of normal performance we call 'ill health' or 'sickness'."

2137 There is a record all through history of such ill health among humans. We know that ill health can result from accident or from invasion by bacteria, but we also know that there are a great number of illnesses which do not have any apparent cause outside of the body. These illnesses, which comprise by far the greater part of all those from which human beings suffer, are now considered to be deficiency diseases. That is, they are not entities in themselves; they are merely the evidence of the lack of supply, which is the cause of failure of perfect function. The fact is, then, that human beings under conditions of civilization suffer because of deficiencies in their diet.

This being true, there are just two ways to meet the problem. One is to induce whole populations to change their diets in such a manner that what is eaten will supply all the factors required. This is practically impossible, because people hate to change their food habits. The other way is to use supplements to our usual diet. This is both feasible and practical.

(Here follows 1 Photolithograph, side folio 2138.)

1148A



WHEEL OF LIFE

8

Like any wheel designed to bear a burden, is only as strong as the spokes of which it is formed. Should any of its supporting substances be missing or fail, the wheel is weakened and, as time goes on, it may break down unless these vital elements are restored.

2139 The wheel of life is only as strong as the weakest spoke of which it is composed. Therefore, it must have all the proteins, sugars and starches, nutrilites, and minerals which make the spokes strong. Just deny the body any of them and what happens? You've got a flat wheel, haven't you? Deny yourself air and water and you know what will happen. The body can go for three minutes without air and ten days without water. The body will do its best to live on any food you give it. This has been demonstrated by the people in the concentration camps. They lived on potato peelings and polished rice. They didn't live well, they lost weight, they lost their teeth, and many of them lost their minds, and a lot of them have flat wheels they can never overcome. Your body, too, develops a flat wheel when your diet does not contain the elements needed. What food does for us is shown here:

THE HUMAN BODY *adjusts itself* *to its* FOOD SUPPLY



9

COMPARE the Sikh—huge, powerful fighting man—and the Madrasi—weak, puny, ailing. Blood brothers of the same ancient race, *nutrition* has made them what they are in the 20th Century. Living cramped in areas where the soil has been devitalized through centuries of cultivation, the Madrasi weighs under 100 pounds and his statistical (average) life span is less than 20 years. But the Sikh, living in the hills, cultivating only virgin soil, grows well over six feet and is proud of his 250 pounds of bone and brawn.

2141 Here are two fellows who are blood brothers. The comparison is self-explanatory. And right here at home we find that the Japanese raised in the United States are seven per cent larger, in general, than Japanese raised in Japan.

The best illustration I know in plant life in this section is your hydrangea. Normally a hydrangea has an orchid-pink bloom. Here you will see one an orchid-pink and another a pale blue. Why? All in diet. There are some blue herons in Florida. The herons in the zoo in New York are white. For a long time they thought there was a lot of difference, until they captured some of the Florida herons and took them to New York to the zoo. In a year's time there was no difference—just another white heron. They ate something in Florida that they didn't get in New York and we don't know what it was.

In raising silver foxes in this country you don't have to have cold weather; we know how to regulate the amount of white hair. If you are buying a silver fox and see white hairs standing up by themselves, lay it aside. In real silver fox, the white is in the middle of the hair, but the ends are black. Take them up and blow on the fur and you will see it. Now that white was developed by the diet of that fox. The amount of vitamins or minerals makes the difference. I can give you another illustration of what diet does. Diet brings on old age, various and sundry aches and pains. Diet brings about arthritis and low blood pressure, malnutrition, eczema—all those things are caused by malnutrition, by the foods you eat that do not have the food values you need. Any food supplement that's right, from which you are going to get help, must contain not only all the nutrilites, including the vitamins, but it must also contain minerals often lacking in our diet—copper, phosphorus, cal-
2142 cium, manganese, iodine, sulphur, and so on. You must have these coming in every day in small quantities. Take iodine, for instance. All you have in your body would only make a pile about the size of a grain of wheat, but if you don't have enough, you have a goiter and a lot of other bad things.

The vitamins, too, have a very definite purpose in the body chemistry. Vitamin D, for example, makes it possible for the body to assimilate calcium and other minerals. Having the calcium in your body isn't enough. The vitamin D must be there to enable the body to use it.

They think there are about three specifics in this vitamin therapy, but they are not specific like quinine for malaria. They say there is Vitamin B for beriberi. Yes, but not alone. There is Vitamin C for scurvy. Yes, but not alone. There is Vitamin D for rickets. Yes, but not alone. Quite often you find somebody taking Vitamin D in fifty thousand units dosage. The body won't absorb that much, so far as we know. The only sure way to results in taking vitamins

is to have all of them, and then take something more than enough and let the body decide how much we want.

We know the finger nails are made up of silicon and phosphorus and calciuin. We can analyze a finger nail and tell you what is in it, but do you know anybody who can make one? No. In about three months you would get a new one. Where does it come from? You don't need to feed a finger nail. It comes from the foods we eat.

And so it is in many other parts of your body. As I said in the beginning, we can analyze a plot of ground and tell you what the deficiency is, but nobody is smart enough to analyze your body. We just haven't arrived at that point. We do know that certain aches and pains assert themselves and they are signals for us to do something about it. If we don't do it, they get worse. That's
2143 sure.

Now we come to our most important message. It is important to you if you are ill, of course. But just as important is our message to you if you consider yourself well—and if you want to stay well. Since our product enables you to *get* well by supplying your body with what it needs for health and proper development, it will obviously enable you to *stay* well. You don't have to be sick to need the proper diet supplement. You need it to stay well—and to have more pep and energy, to think more clearly, to enjoy your work, to feel better, to look better, to stay young and vigorous, to get rid of the various "slight" illnesses you have, to avoid other "minor" illnesses and all the serious troubles, and to add extra years to your life.

By this time you are likely wondering how much all this extra health and pep and youthful vigor is going to cost. You know, it's a funny thing, but we Americans tend to translate everything into terms of money. And I guess it's all right, too. Money is important. But what is money compared with health? I think almost anyone would rather be poor but always well and healthy and feeling good, instead of rich and racked with pain.

What is money compared with length of life? Wilkie was a fine man, and although possibly not rich, he was well off, and he might eventually have been President. Instead, he died long before he should have died—at the early age of 52. I wonder what Wilkie would have paid to add 20 years to his life?

What is money compared with youth and beauty? Faust sold his *soul* for youth, in the immortal opera. I wonder what Faust would have paid in money, for youthful pep and energy and a more youthful appearance?

2144 I heard of a lady the other day who had had an operation every year or so for five years. I wonder if she would have preferred to pay a small amount to *avoid* the operations?

There is no question but that money is important, and we need to use it wisely. But there is no sense in keeping a little money in

your pocket and then spending a lot of money on doctor bills. Sometimes it pays to *spend* money in order to make money, and you make money when you give your body the materials it needs to keep you strong and well, full of vim and vitality, long lived, with a youthful appearance and free from aches and pains.

* * * * *

While his audience applauded, the Educator sat down, and then one of the older representatives said, "You give a good lecture, Mr. Educator. I think I cover the same ground in my lecture, only I like to quote more from the article ARE WE STARVING TO DEATH in the *Saturday Evening Post* of Sept. 1st, 1945.",

"That is an article every man, woman and child in the world should read," said Mr. Rehnborg. "I suppose that is why the Post printed it. The article shows that we actually are starving, even with full stomachs, and it makes it clear why everyone needs such a product as ours, to supplement his present diet, and no matter how good he thinks that diet is."

"I always like to emphasize the fact," said another representative, that money spent for our product is part of the food budget, and everyone should allow enough money for food to mainfain his body adequately, and to keep his family strong and well, even if he has to skimp in other ways."

"A person might just as well do that," said another representative, "because if he doesn't he'll pay in other ways. And not just money, either. In the course of my work, and all in the same
2145 week, I found three boys, four and five years old, who would not quit wetting the bed. They just would not, no matter what their parents did. They tried starving them, and no water after 4 o'clock, and they tried punishment and bribes and shame, but nothing worked. I started each boy on NUTRILITE, and inside of 60 days all three have quit wetting the bed. One of the fathers said it was worth almost anything to have his boy rid of the enuresis.'

"I have a woman who is holding her blood pressure to normal on our #10. She says it's the best investment she ever made."

"I have seen only one case of high blood pressure that would not respond to the use of our product," said Mr. Rehnborg, "and that was a case of essential hypertension."

"A doctor tells me that if a patient with neuralgia is given injections of vitamin B in high potency, it will stop right now."

"They tried that at Cal Tech," said the Biochemist, "and they found it took from one to six months. A better way is to give larger doses of all the vitamins."

"I have a lady with neuralgia, using our product, and she hasn't been helped yet."

"I tell people that there is no incurable ailment," interjected a representative, "but occasionally we find an incurable patient."

"The surprising thing," said Mr. Rehnborg, "is not that there is a case now and then that our product doesn't seem to help. That is to be expected. The remarkable thing is that so many people, with such serious conditions, *are* helped. As a matter of fact, nine out of ten people with neuralgia get rid of
2146 it entirely by the use of our product."

"I know you people get many unsolicited testimonials," said a new representative, "I received one in the mail the other day. This lady had been out of the state for three years, and she had forgotten the name of our product. She explained that she took a course just before she left the state, and had had marvelous results. She said it did wonders for her. She was overweight and lost 15 pounds, her energy was increased, and she actually enjoyed her work. Now she has slid back, and is very anxious to get started again. She is delighted with our new plan of the year course at a reduced price."

"Here is a case for the records," said a representative not yet heard from. "Someone speaking of eczema a while ago made me think of it. Our old dog had a fungus infection of the skin, and a tumor. I gave him our product for two weeks, and now you should see him. Skin all clear, and the tumor much smaller."

"It works on cats, too," said the Chairman. "We have a beautiful Siamese cat, with four cute little kittens. The mother cat suddenly became ill, could hardly get up, limped badly when she walked, and most of the time just lay and looked at us with big imploring eyes. I gave her half a capsule of #10 night and morning, mixed with her food. That was four days ago, and already she walks around with almost no limp; and is definitely better. Now I give her half a #10 capsule each morning."

"Speaking of the dog's tumor reminds me of a very serious case," said the Educator. "This lady was almost 70 years old with heart trouble and a tumor. She couldn't get her hands up to comb her hair and was taking digitalis and stimulants all the time.
2147 She sat listlessly among her medicine bottles, and said, 'Well, I've tried everything else, I don't see why I shouldn't try your product. So she started on NUTRILITE. Four months later, when I called, there were no more medicine bottles. Instead —and remember she was almost 70 and four months before she couldn't get her hands up to comb her hair—she showed me the kitchen and bath room she had redecorated herself, and said she was going to learn to drive a car!"

"Do people with arthritis need calcium?"

"Yes," said Mr. Rehnborg, "they must have calcium. Many medical men say now that although they used to think it was due

to too much calcium, now they think arthritis is due to a calcium deficiency, or a wrong distribution of calcium."

"My worst case was a woman in Ontario," said the Educator. "Her hands were swollen and they said that if anything would help her, it would have to be a miracle. The second month she used our product, she ran up to me and said, 'Look! Look at my hands! (They were almost normal in size.) And look at the big wash I did this morning!"

"How important is calcium to the average person?"

"About 85 percent of all Americans are deficient in calcium. That goes for children, too," replied Mr. Rehnborg.

"I suppose children don't need as much of our product as adults."

"No," replied the Biochemist, "the requirement is a factor of weight."

"I talked with the mother of a boy of eleven, who was 2148 being given dilute hydrochloric acid for his digestion. He wouldn't eat and was never hungry. I wish I had taken his weight when he started using our product a year ago. Anyway, he is healthy and robust, with a good normal appetite.

"As a sort of summary of what we have heard this noon," said a new representative, "I wonder if Mr. Rehnborg would give us a list of the common ailments which have been cured or greatly helped by the use of our product?"

"I'll be glad to," said Mr. Rehnborg. "I have kept a list of the troubles in which our product has been most effective, and although it helps in almost every case, these are the cases where we can be most sure that the user will get results:

Low blood pressure	Lack of ambition
Ulcers	Certain bone conditions
Mental depression	Nervousness
Pyorrhea	Nosebleed
Muscular twitching	Insomnia (sleeplessness)
Rickets	Allergies
Worry over small things	Asthma
Tonsilitis	Restlessness
Hay Fever	Bad skin color
Sensitiveness to noise	Poor appetite
Underweight	Biliousness
Easily tired	Neuritis
Gas in stomach	Night blindness
Cuts heal slowly	Migraine
Faulty vision	High blood pressure
Headache	Sinus trouble
Constipation	Lack of concentration
Anemia	Dental caries
Boils	Irregular heartbeat

Flabby tissues	Colitis
Hysterical tendency	Craving for sour foods
Eczema	Arthritis (rheumatism)
Overweight	Neuralgia
Faulty memory	Deafness
	Subject to colds

"But we must remember," continued Mr. Rehnborg, "in any particular case nobody can tell beforehand what results will be secured. All we can do is give the body the materials it needs to work with, and then wait and see what happens."

"That is certainly an important list, anyway," said the new representative. "And what interests me is that since this product helps with all those troubles, since it is not a medicine, since
2149 it helps you even if you don't think you need it, and since it cannot possibly do anyone any harm, I, for one, shall use it all the rest of my life to eliminate the minor troubles I have, and to avoid the more serious diseases you mention. And as for those people who are now ill, I should think we would only have to tell these people about NUTRILITE, and they would take our product away from us."

"As a matter of fact, that is just what often happens," said one of the older representatives. "One man took the sample bottle I was showing him, opened it, and swallowed one of the capsules. I said, 'Don't you think you should know how much it costs before you start your course?' He said, 'I don't care what it costs—I want to get well!'"

"I can believe that," said another representative, "especially when there is so much being written just now, emphasizing the importance of an adequate diet. There is a good article called FACTS ABOUT HEALTH, in "Everybody's Digest" for August, 1945. I happen to have it here, and I'd like to read part of it. It says:

"There are those of us who are unaware of any dietary lack, who 'judge the state of their nutrition by the fullness of their stomachs,' as Dr. Sebrell of the National Nutrition Program puts it, 'and by the amount of fat they have stored away, instead of by health and physical fitness.'

"Malnutrition is like an iceberg; the greatest part of it is not visible. Only when it reaches advanced stages and we see war pictures of starving children do we realize what an acute lack of necessary food elements may do.

"All that medical science has learned is unavailing if the individual does not take advantage of it. Doctors agree that each individual should begin his own personal health and physical fitness campaign. . . . 'Chronic diseases start insidiously in apparent health, Medical Journal reports testify. Through . . .

nutritional science we can eliminate the half-health, half-strength, half-happiness which is the result of a diet not quite good enough."

* * * * * *

This seemed to be a good note on which to close, and the meeting was adjourned.

2150 SOME IMPORTANT CONCLUSIONS

It is noteworthy that the babies in China did not improve as they should until the plant extract or concentrate, developed by Mr. Rehnborg, was added to their diet.

This same plant concentrate, when added to the diet of the adult Europeans in the Orient, gave them good health and enabled them to withstand the deteriorating effects of living in China.

In 1933, when NUTRILITE was first sold in the United States, it consisted entirely of the plant concentrate. In preparing this concentrate plants known to contain the highest percentage of all the various food factors required by all animal life, are grown in especially prepared soil. The leaves are harvested and dehydrated, yielding 300 pounds of dried leaf to each ton of fresh plants. These dried leaves are then subjected to a variety of solvents which extract from them the nutrilites, leaving behind a residue of cellulose which has no food value. Less than six pounds of this concentrate of nutrilites are secured from each ton of fresh plants, and it is this concentrate which contains, as far as science can determine, all the vitamins known and unknown, discovered and undiscovered, together with all the important food factors such as bios, inositol, plant auxins, chlorophyll, and many other nutrilites which cannot be purchased in the drug store.

This concentrate was added to the diets of people in California, where the product was first introduced into the United States, and their deficiency diseases were eliminated in case after case.

2151 It was Mr. Rehnborg's plan to continue to produce just this concentrate which had amply demonstrated its ability to correct the body chemistry and to enable a person's body to throw off the deficiencies. But at this time the synthetic vitamins were being developed and used with beneficial results, so it was argued that the NUTRILITE concentrate, good as it was, would be even better if it had added to it the drug store vitamins in high potency and in proper proportions. The drug store vitamins were then added, and it was found that the product was improved. The advantage of the natural concentrate is that it contains the various vitamin complexes, *all factors* of which may be required to bring about health and strength in a particular individual, whereas a synthetic vitamin (the kind you buy in the drug store) is always *one single factor* of the complex.

Dr. Quigley, famous Omaha dietitian, in his book THE NATIONAL MALNUTRITION, says:

"In the selection of a concentrate, it is important to remember, first, that the original deficiency is invariably multiple in origin. The diet has usually been deficient in not one or two, but in many or all of the vitamins. This is being further established every day, in both the research laboratory and in clinical practice.

"It is essential that the concentrate contain all of the vitamins, both known and unknown. Undoubtedly many of the vitamins essential in human nutrition have not as yet been identified
2152 or synthetically reproduced. For this reason no synthetic preparation * can completely replace the vitamins in which the average persons may be deficient."

It is consequently the *plant concentrate* in NUTRILITE which sets it apart from all other diet supplements and which is the component which is difficult and expensive to make. All the benefits people derive from the drug store vitamins in NUTRILITE can be secured also from the same vitamins in the same potency purchased in any corner drug store. But in no drug store in the world can a person buy all the nutrilites contained in the plant concentrate of NUTRILITE.

The sufferer of dietary deficiencies and deficiency diseases has the problem of getting into his body all the basic food factors which either were never in his food to start with or which have been partially removed in some way. These basic food factors must be in his food in order that he may be well and strong.

NUTRILITE PRODUCTS containing all of the known vitamins, minerals, bios, inositol, plant auxins, chlorophyll and other nutrilites, is the answer to this problem.

2153

Arlington, Calif.
Nov. 6, 1945.

To Whom It May Concern:

I am the mother of 10 year old Joyce Larlene Grimes, who, since birth, has been a very thin, nervous and delicate child. Her appetite has been poor. We have had her under doctors' care and on some tonic or vitamin preparation at all times.

On April 21st of this year, Joyce met with a very serious accident. She was struck on the left side of the head by a 700 lb. bar, fracturing her skull. She also received a double fracture of the right foot and a broken collar bone.

She was in a very serious condition for some time. She was operated on for the skull fracture and remained in the hospital a month.

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* Most drug store vitamins are synthetic.

We had brought her home just a few days before we met Mr. Stivers. He told us of Nutrilite, and its possibilities. We took a years order and started Joyce on them right away.

She is in her fifth month now on the Nutrilite course. She has a wonderful appetite. She is no longer the extremely nervous child she was. Her skin is no longer dry and rough. The doctors say she has made a remarkable recovery from her accident. We feel Nutrilite deserves much credit for this. And we are very anxious to see the result after she has taken the year course.

Sincerely,

MRS. J. A. GRIMES.

I give you my Permission to use this letter.

2154 Sept. 29, '45.

I want to tell some one how much the Nutrilite has helped me. I have taken Number 10 about five wks. and am very much surpr-sed to see how well I am. I am 76 years old & have just come back from a trip through Oregan. was gone 2 wks. & had the care of an old lady 89 years old. My rest & sleep was broken & on my return home rode all nite & the next nite did not get to bed until 10:30. Wake up next morning feeling fine. I have not felt so well in many years. I could not of taken this trip if I had not had some help & I recommend this to any one as I feel sure it will help. I give Nutrilite the credit, pain gone & lots energy to carry on.

CARRIE R. SAMPSON,
5862½ Kansas Ave.

I hereby give Nutrilite Products permission to use this letter.

CARRIE R. SAMPSON,
5862½ Kansas Ave.,
Los Angeles 44, Cal.

2155 105½ N. Spruce Street,
Montebello, California.

Dear Mr. Stivers:

Nutrilite has been a lifesaver to me. I am in my 6th month of pregnancy and during the first three and a half months was bedridden. I was unable to eat at all and consequently became very weak and run down. The Doctors were unable to help me and it was feared I would't be able to carry a baby at all. I had been the same way thru the whole nine month period with my first baby so naturally I began to think it was going to be the same again. But, a friend came to my rescue when she told me about Nutrilite. Miraculously enough, my recovery began immediately and in two weeks' time I was up most of the day and gaining weight and

strength. Of course, I still have days when I am far from myself, but I shudder to think of where I'd be if it weren't for my discovery of Nutrilite.

If this letter can be used to help anyone else you have my permission to use it.

Sincerely,

WINIFRED MCPHERSON.

2156

6166 Strickland Ave.,
Los Angeles, Cal.
April 17, 194 .

Dear Mr. Compton:

I am glad to report that Barbara is now working. You were correct in urging us to use the highest potency Nutrilite when she was compelled to quit school on account of tuberculosis.

Barbara stands her work well and her weight is about normal for her age. Along with prayer I give Nutrilite the credit for her recovery. She now takes only the lower potentcy vitamins and minerals with calcium.

You have my permission to use this letter as you wish.

Yours sincerely,

M. A. COMBS.

2157

Chatsworth, Illinois, June 20, 1946.

Mr. Frank J. Compton,
1815 Winona Avenue,
Los Angeles 27, California.

Dear Mr. Compton:

For a number of years I was crippled with arthritis and neuritis. My knees were so stiff I could not go up or down stairs. My hands were also effected so that I could not lift anything. I would get so bad that they had to take me to a Health Resort for baths and treatment. This would ease my condition temporarily but it would only last a short time.

About five years ago upon your suggestion and recommendation I began taking your Nutrilite Products. I decided that I would give it a fair trial. In about five or six months I could see that I was making considerable improvement and it was not long until the stiffness and lameness in my knees left me. My hands also improved greatly, and I have not been to the Health Resort since I started taking your product.

No one knows, except a person afflicted with arthritis, what intense suffering one has to endure. I still use Nutrilite and gladly recom-

mend it to anyone suffering from arthritis or any other form of rheumatism.

You have a steady customer because I know it has kept me going and relieved me of my suffering.

Yours very truly,

MRS. FRANK H. HERR.

Mr. Compton:

You have my permission to use this letter in any way you wish as a testimonial regarding the use of Nutrilite Products.

MRS. FRANK H. HERR.

2158

Bakersfield, Calif.,
Sept. 9th, 1946.

Dear Mr. Fillion:

Replying to your inquiry as to how I have benefitted by using your Nutrilite Supplement I would say that after taking it for seven months I feel like a different person entirely.

I was badly troubled with Constipation when I started, and had to take purgatives most of the time. Now I am as regular as clockwork. If your Nutrilite had done nothing more than this for me I consider it was worth the cost of it.

In addition I suffered severely with nervous indigestion. My stomach just wouldn't digest my food properly, and it pained me greatly a good part of the time. I suffered from gas also. Now I enjoy my meals, with no worry about after-effects. My nerves are so much better too and I sleep fine.

I am so much better that I am going to continue to take Nutrilite for the balance of my year, so as to be sure I will completely eradicate the trouble from my system.

You may use this letter, if you wish, to let other sufferers know how good Nutrilite is.

Very truly yours,

CHAS. GIBSON.

(Here follow 4 Photolithographs, side folios 2159, 2159a, 2159b, 2159c.)

Are We Starving to Death?

By NEIL M. CLARK



Are We Starving to Death?

By NEIL M. CLARK

An eminent soil doctor warns that, unless we attack the problem of mineral-depleted land on a national scale, we face slow extinction from "hidden hunger."

WHEN Jim was driving me to the station, he abandoned the old-college-days kidding attitude that he had maintained at dinner before his wife and daughter, and spoke seriously of his personal tragedy. He mentioned his father, who had lived to be eighty-six and was strong and active almost to the last. "My aunts and uncles, too," he said—"none of them died under seventy-five. And look at me," bitterly. "Just look at me!" I had already looked and been shocked. "It's my heart, the doctor says. Why should I have a bad heart? I've always taken care of myself. But here I am, a little past fifty, and I know as well as anybody that I might pop off at any time. Neil, can you tell me—can anybody tell me why I'm not so good a man as my dad was—why I'll never live as long as he did?"

I couldn't, and didn't try. It occurred to me, too, that I couldn't explain why Jim's wife has been anemic as long as I have known her, nor why their daughter, as a child, gave signs of rickets.

Two things in the next few weeks reminded me of Jim's desperate questions. While I was having an inlay replaced, my dentist took occasion to say that his own teeth weren't so good as his Texas father's, and that few of his patients had teeth as good as their parents'. I wondered if that might not have some bearing on Jim's questions. Still later I was sitting in Dr. Wm. A. Albrecht's office at the University of Missouri, in Columbia, listening to an absorbing and almost unbelievable story about health in America and the particular chapter in that story which he has helped to write, and I interrupted to mention Jim. "Could it be," I asked him, "that he is simply hungry?"

"It could be," Doctor Albrecht answered.

I had come to ask Albrecht if America could expect to keep on eating well. "America," he said grimly



Dr. Wm. A. Albrecht *(right)* and Dr. H. S. Wittwer checking results of some soil tests on spinach.

stand that more diseases than they ever suspected could be traced to dietary deficiencies, and that many sick people were hungry people. They called it 'hidden

numbers many physiologists, physicians, surgeons and dentists among his close friends. He is a doctor of soil, a student and teacher of soil chemistry, head of the Department of Soils at the University of Missouri. However, he has never believed in hard-and-fast boundaries between sciences, and when it became clear there must be a tie-up between human health and the soil, he made that the major goal of his research. How, he asked himself, do soil and plants work together? Strangely, though agriculture is mankind's oldest industry, nobody knew; not as scientists insist on knowing. What, Albrecht asked himself, is plant health, and how does it depend on soil health, and what does it mean for those of us who can't explain or doctor our chills and fevers away?

Two things that Albrecht did have helped to revolutionize scientific thought and practice in this whole field. First, he developed a complete hypothesis as to why some soils in constant agricultural use become sick and others stay well; some of the soils of China have been in yearly use for forty centuries and are still healthy. Next, he developed a fully controlled technique for testing treatments designed to produce healthy soils and healthy plants. These two steps are somewhat comparable to the development in medicine of the germ hypothesis, plus a laboratory technique for finding out how germs act. To describe Albrecht's hypothesis and technique in detail would take more space than can be allowed in this article. But enough must be told for the reader to understand in a general way what happens. Perhaps the easiest approach is through Hans Jenny and his experiment that failed.

Jenny, fresh over from Zurich, was one of Albrecht's research assistants from 1927 to 1936; now he is asso-

He had the imagination to use the new technique to good purpose. In later experiments and through long hours of reflection about results, he developed his complete hypothesis as to what goes on in soils, how plants and soils work together, and how soils become sick and make plants, and then men and women, sick. A plant, he points out, obtains only a small part of its total growth from soil materials; the rest comes from air, water and sunshine. He likes to tell his students about the classic experiment of the seventeenth-century chemist, Van Helmont, who planted a five-pound willow in 200 pounds of earth, never added anything but water, and after five years found that the willow weighed 169 pounds and the earth still weighed 200 pounds, less about two ounces.

"What the soil contributes to growing plants," Albrecht says, "is very little in amount, compared with what air, water and sunshine provide; on the average, it amounts to about five parts in one hundred. But that little is absolutely essential to plant and human health. For soil materials are 'grow' foods—the minerals that make bones and teeth in animals, and keep us provided with a strong structure, without which we're like an automobile built of soft tin. Air, water and sunshine, on the other hand, make the 'go' foods—fuel and energy to keep the machine running. There's no indication we'll ever run short of the airborne elements in our foods. But right now we're running short of soil-borne elements. And that's our trouble. When we're short of minerals, we're short of basic health. Short of vitamins, too, for there's some unknown connection between minerals and vitamins. We know when minerals in a soil are abundant, vitamins usually are abundant in the plants that grow there."

The next fact to remember, Albrecht says, is that plants will make a lot of growth, just as you and I will, even when certain wanted minerals are missing. But the plants themselves will be different. Thus, cabbage is one thing if grown on one kind of soil, another if grown on another kind of soil. There are more minerals in it, or less, depending on the minerals in the soil, and apparently more or less proteins and vitamins in it. The same is true of carrots, beets, peas, oranges, apples, potatoes, sweet corn or any other plant product we use as food. The calcium concentration of a lettuce leaf can be varied twofold and spinach threefold, according to the calcium in the soil. Popeye would never jitterbug to the Coast on spinach grown in mineral-poor soil. Albrecht has played with many vegetables in research, varying mineral content up or down by varying soil nutrients.

The same mineral variations occur in grasses and other plants eaten by domestic animals, and what they



MISSOURI AGR. EXP. STATION PHOTOS

These soybeans, exposed to the same fungi, behaved as four people might during an epidemic: One got very sick, the next less so, the third had a mild attack, and the fourth proved immune.

eat, in turn, affects their products which we eat. Our beefsteaks, pork chops, lamb roasts and omelets can be mineral-shy, if the cows, hogs, lambs and chickens were shortchanged on their minerals.

"Nations or individuals," Albrecht says, "men or animals, we are what we eat. Breeders raise big tough mules in Missouri because of lime-rich soils that make tough bones and bodies. Farmers use a lot of those mules down South in the cotton fields, but they don't raise them there. Kentucky raises far better race horses than Florida, though some of the country's finest race tracks are in Florida. It's a matter of soil. The Japanese have a very high illness and death rate; colds are almost universal at certain seasons. The soils of Japan in large part are mineral-poor. That's the main reason why the Japs are such fish eaters; they have to eat fish to get needed minerals and vitamins. We tried a starvation experiment with male rabbits, which are naturally great breeders. When we fed certain pens of rabbits a mineral-deficient hay in their diet, we reduced the males in a few weeks to the point where they wouldn't look at a woman rabbit. Other rabbits, kept on a similar but mineral-rich diet with hay from treated soil, were regular wolves. By reversing the diets, the wolves became woman-shy, and the tame cats became wolves. Lambs fed mineral-rich hay from treated soil made nearly three times as much gain in weight in a given time as other lambs from the same flock fed the same amount of hay from mineral-poor soil. Elephants in Burma and Ceylon, when fed on sugar cane, a mineral-poor diet, quickly become unable to do the heavy timber moving required of them. A properly mineral-rich diet predisposes a man to health and normal functioning: And the healthier we are, the better we resist diseases that ought to lay us low."

To demonstrate this in plants, Albrecht took me to a greenhouse to look at an experiment. Several varieties of spinach were being fed by the colloidal-clay technique, on different diets, ranging from mineral-rich to mineral-poor. A little bug, the thrips, had somehow found his way into the greenhouse, and rows of the poorly fed spinach plants were suffering from his attacks, but not even one of the richly fed plants showed a sign of attack. They had something that enabled them to resist. It's the same, Albrecht said, when John and Jane ride on the subway and half the passengers have colds. By evening, John is coming down with a cold too. Jane stays well. The same bugs buzzed her. But somehow she had more resistance. "We are what we eat."

Another fact to remember, Albrecht said, is that soils under certain conditions easily lose a large part of their minerals. The loss

may occur in several ways. Under heavy rainfall, minerals tend to leach out and disappear in the ground water. Under heavy cropping, too, large quantities of minerals can be taken away when the crops are removed. Albrecht once calculated that a 200-acre farm producing so many bushels of oats, corn and wheat, and so much alfalfa and grass, gave up minerals which, if bought at current prices, would have cost $1630 for just one year. At that rate, if nothing else happened in the soil, two or three crops could exhaust a farm.

Luckily, two things do happen. First, farmers put back minerals in the form of natural manures and fertilizers or by plowing under green crops and crop residues. Second, the soil itself possesses a mechanism for releasing minerals naturally found in most soils, and making them available to plants. Just how this is done is part of Albrecht's revolutionary soil hypothesis. But this is what's important for us—a farmer can mine his soil by overcropping it faster than it can renew itself.

There's an interesting plot in Sanborn Field, in Columbia, which Albrecht took me to see. It's called Plot 9. Since 1886, when Sanborn Field was set aside for crop studies, Plot 9 has been planted to wheat every year. The grain and straw are always removed. Nothing is ever put back—no fertilizer, no manures, no minerals. At first, Plot 9 yielded handsomely, but as the years passed, the yearly crop got smaller and smaller, poorer and poorer. Now the soil is so sick that it can't recover enough mineral strength between crop seasons to make wheat annually, and yields only every other year.

These are Albrecht's basic facts. Much has been left out, but I have said enough, I think, to show the nature of the invisible enemy that is attacking our soils, our plants, our domestic animals, you and me. We have drawn on the mineral bank more than we have paid in, and bankruptcy is coming fast. Diseases are beginning to multiply. Heart ailments that can be traced to diet are going up alarmingly. Diabetes, arthritis, cancer, anemia, dental caries and many of the more obscure ailments have struck with increasing severity. Millions of us try to supply what we vaguely feel is wanting, by buying pills at the drugstore. Even if we aren't sick enough to see a doctor we may be only half-well. A study in a California aircraft plant showed a correlation between fatigue, work spoilage, reduced output and absenteeism, and shortages of vitamins A and C in workers' diets. Medical progress has been wonderful, but one of the more significant medical discoveries is the fact that almost any disease can be produced experimentally by faulty food. Today, doctors in increasing numbers are the ones who are saying that the tide is getting too strong for cure alone. There must be prevention. And prevention starts in the soil.

The process of decay has gone faster and further in some parts of the country than others. Albrecht cites the fact that the South has a heavy rainfall and a lot of leaching and cropping to reduce soil minerals rapidly. The South, consequently, is the part of the country where farmers use the most fertilizer; they have to. But even so, input in most places has fallen behind outgo, and Albrecht says it's a direct result of that that makes so serious the Rountree report that in one Southern state no less than 70 of 100 potential inductees for military service in this war were rejected on physical grounds whereas in Colorado, where mineral depletion has been less, 70 out of 100 were accepted. Those Southerners simply were not eating well enough.

The problem, Albrecht says, is rapidly reaching the size of a catastrophe, and if carried much further, could mean national suicide. Some future Gibbon, he says, might sit down to write The Decline and Fall of the American Republic. Soil health is that important. It could happen here.

Can the tragedy be prevented? If so, how? Not all the steps are known yet, Albrecht says, but the direction we must travel is absolutely clear. We must restore our soil bank account. Our soils, like ourselves, must be fed back to health. That's a tremendous subject. No two soils have exactly the same history, topography and climate, and soil-mineral differences may occur within the same fence lines. Albrecht visited a famous Hereford farm in Missouri and found an entire beef herd seriously afflicted with diseases that doctoring seemed unable to cure. On another farm near by he found a similar herd in practically perfect health. Oddly, the herd on the second farm was started by animals born and brought up on the first farm. The health difference was a soil difference. The first man had been operating for fifty years on the same farm and had not maintained soil minerals. The second man, a newcomer, had taken sound advice and built up his soils. The proper feeding of soils, Albrecht points out, is complicated by the fact that a greater variety of minerals is needed by soils than we used to think. At least fourteen elements are needed for plant construction and sixteen for animal body building. Most of these are needed in only tiny amounts, and are called "trace elements"; but though little is needed, if that little is missing, the soil, plants and creatures feeding on the plants may be noticeably sick.

Remarkable work has already been done in treating sick soils. After adding a pinch of manganese in certain fields, a food processor harvested tomatoes with triple the vitamin C content. A little boron around apple trees in the Northwest apparently has doubled the vitamin A content of the fruit. A retiring genius named Albert Carter Savage has been experimenting for years in Kentucky with mineralized vegetables, and a number of sick people fed at his farm have achieved near-miraculous cures. Citrus groves in Florida are planted on sand under fifty annual inches of rain, and to furnish the trees the copper and zinc they can't find in the soil, they are spoon-fed—the minerals are sprayed on and the trees take them in through their leaves. The iron content of milk has been increased from twenty-one to fifty-five parts per million by proper feeding of soils grazed by the cows. But Albrecht warns that there are no soil cure-alls. "The soil factory," he points out, "runs by processes more subtle than anything in a man-built factory. Much remains to be known. Lime is generally good on soils, but it's possible to lime too much. Boron helps to make oranges, but an overdose can make them sick." All these things are to be explored. But Dr. Jonathan Forman, editor of the Ohio State Medical Journal and a serious student of soils and nutrition, says confidently that there is no reason why the average man, if "well-bred and well-fed," should not live to be a hundred and enjoy good health.

The city man is perhaps more deeply concerned in all this than the country man, for he is not a producer of his own food and must depend absolutely on others for the mineral richness of what he eats. So the city must learn to be tolerant of new steps that farmers must take, and of the possible consequences of those steps to the city man's pocketbook. Hitherto, Albrecht says, the farmer, thanks to the system of food distribution, has often been forced to mine his soil. "Hardly any farmer," he says, "willfully destroys soil fertility. But he has been forced. The grocer says, 'I can pay only so much.' He passes that buck to the wholesaler, the wholesaler passes it to the commission man, the commission man passes it to the farmer, and the farmer passes it to the land. There's no other place. He proceeds to use his soil like a private gold mine, not as a property affected with an enduring public interest. We must enable farmers to keep on using their soil to produce food, and at the same time maintain mineral-rich fertility."

Our war-expanded chemical industry, Albrecht thinks, will find its greatest peacetime opportunity in making soil-restoring products that will help to restore our national health. The greatest challenge of all, he says, is to research.

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2160 DEFENDANT'S EXHIBIT 8

Charles S. Rhyne
Attorney at Law
730 Jackson Place, N. W.
Washington 6, D. C.

Telephone
District 1381

Eugene J. Bradley

January 28, 1949.

The Honorable Oscar R. Ewing
Administrator
Federal Security Agency
Washington, D. C.

My dear Mr. Ewing:

I believe that the Food and Drug Administration may request you to make a decision of probable cause which can be used as a condition precedent to multiple seizures under the Food, Drug and Cosmetic Act of 1938 against Nutrilite Food Supplement, a product for which my client, Mytinger and Casselberry, Inc., of Long Beach, California, is the exclusive distributor.

I believe that the basis of the request by the Food and Drug Administration will be that certain labelling or advertising used by my client are misleading. We are certain that the Food and Drug Administration is incorrect in its claim that my client's advertising and labelling are misleading, and we therefore request that you give Mytinger and Casselberry, Inc., a hearing at which they may present their side of this dispute before you make any decision of probable cause in this case.

Very respectfully yours,

CHARLES S. RHYNE.

CSR/db
cc: Vincent A. Kleinfeld
Department of Justice

2161 DEFENDANT'S EXHIBIT 9

Mytinger & Casselberry, Inc.
Long Beach, Cal (AF 28-002)

Nutrilite Prods, Inc.
Los Angeles, Cal (AF 22-872)
Zone 25

Feb. 11, 1949.

Dear Mr. Rhyne:

Your letter of January 28, 1949, addressed to Administrator Ewing requests that there be no finding of fact or probable cause to the effect that Nutrilite is misbranded until a hearing has been accorded to Mytinger and Casselberry, Inc., of Long Beach, California.

I presume that you refer to a finding of fact under the Federal Food, Drug, and Cosmetic Act for which provision is made in section 304(a)(2) of that Act. This section provides for a finding that the labeling of a misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer when the Administrator has probable cause to believe such from facts found, without hearing.

In the absence of Administrator Ewing, because of illness, I on January 28, 1949, made such finding of fact with respect to the misbranding occurring in the labeling of the drug, Nutrilite, or Nutrilite Food Supplement as distributed by the firm of Mytinger and Casselberry, Inc., and their representatives. The labeling involved is the booklet "How to Get Well and Stay Well". The partnership Mytinger and Casselberry as well as William S. Casselberry, Lee S. Mytinger, and Carl F. Rehnborg, as individuals, were accorded hearings on July 15, 1947 and on September 16, 1947, at which time they were attended by counsel Lee J. Myers in their appearances before the Chief of our Los Angeles District.

In addition to personal appearances, written responses were filed by Attorney Myers on behalf of Lee S. Mytinger and William S. Casselberry, in which it was set forth that Nutrilite products are foods for use as a supplement to the regular diet, that they do not cure and are not offered for cure for anything. Mr. Mytinger stated that he would personally revise all of the labeling so as to bring such printing into harmony with the Food, Drug, and Cosmetic Act.

Subsequently on November 3, 1947, Mr. Myers, by letter, represented to the Food and Drug Administration that the various pamphlets heretofore distributed by the firm had been destroyed and discontinued and that the booklet, "How to Get Well and Stay

Well" has been entirely revised and the old copy destroyed.
2162 Actually the current edition of "How to Get Well and Stay Well" is replete with numerous representations which classify the Nutrilite products as drugs for the treatment of serious disease. The first 36 pages of "How to Get Well and Stay Well" contain essentially the same phraseology as is involved in the earlier editions of the booklet. The recent addition to the booklet of several pages substituted for original pages from 37 to 54 do not mitigate the unjustifiable impressions established by the first 36 pages.

Sincerely yours,

J. DONALD KINGSLEY,
Acting Administrator.

Enclosure
cc this ltr

Mr. Charles S. Rhyne
Attorney at Law
730 Jackson Place, NW
Washington 6, D. C.

cc LA
cc GC
cc Div Lit
JLH:mem 2-4-49
vqm

Approved PBD

2163 DEFENDANT'S EXHIBIT 10

Charles S. Rhyne
Attorney at Law
730 Jackson Place, N. W.
Washington 6, D. C.

Telephone
District 1381

Eugene J. Bradley

February 18, 1949.

Mr. J. Donald Kingsley
Acting Administrator
Federal Security Agency
Washington 25, D. C.

Dear Mr. Kingsley:

I have your letter of February 11, 1949, in which you reply, as Acting Administrator of the Federal Security Agency, to my letter of January 28, 1949 addressed to The Honorable Oscar R. Ewing, Administrator of the Federal Security Agency.

I respectfully again call your attention to my letter of January 28 and ask that you note that no reference is made therein to "find-

ings of fact" under Section 304 (a) (2) of the Food, Drug and Cosmetic Act of 1938. My letter had reference only and exclusively to the decision of "probable cause" which must be made by the Administrator as a condition precedent to multiple seizures under Section 304 of that Act. Only the Administrator can make such a decision, of "probable cause", although "findings of fact" may be made by minor employees; and my request was that my clients Mytinger and Casselberry be granted a hearing *by the Administrator himself* before he made such a decision as to the character of the labelling used by my clients.

Your attention is specifically called to the fact that under Section 304 (a) (2), facts may be found "without hearing" but the words "without hearing" do not apply to the Administrator's "probable cause" decision. I am certain that if you will but read the language, this interpretation will be found to be the correct one.

It is shocking that you now claim that the hearing on July 15, 1947, which was held before one of your chemists in Los Angeles under Section 305 of the Act and for an entirely different purpose, could possibly be a hearing *by the Administrator* before a decision of probable cause in the instant case. The hearing on July 15, 1947, was chiefly concerned with an alleged deficiency of vitamin B_1 in one of my client's products, and only slightly with my client's labelling. This charge as to the Vitamin B_1 was clearly disproved by an analysis made by an independent laboratory, and nothing further whatever has been heard from it. The booklet "How to Get Well and Stay Well", in its present form, was not in existence at that time. It is quite obvious from your letter that you have confused the early edition of "How to Get Well and Stay Well" with the current edition, and it seems doubtful from the very nature of your comments that you have been presented with an analysis of either edition of the book. I also can tell you that just as the charge of a shortage of Vitamin B_1 was completely refuted as a result of the July 15, 1947, hearing, the charge now made in the decision you made herein would be completely refuted if the Administrator would but give my clients the opportunity to refute it at a public hearing.

2163-A. I am certain that your file will reveal that the hearing of September 16, 1947, was also scheduled under Section 305 of the Act and that Mr. Born of your Los Angeles office advised that a written response to the citation there issued was to be the procedure rather than a hearing, and this response was made by Lee J. Myers, attorney for my clients. No hearing was therefore held at all on September 16, 1947. A copy of the response by Mr. Myers will undoubtedly be found in your file. It is set forth in full in the affidavit of William S. Casselberry filed in the civil action now pending in the United States District Court for the District of Columbia, of which your General Counsel's office has a copy, as

we have been furnishing extra copies of our papers to the Department of Justice for that purpose.

I cannot believe that Mr. Ewing, who is known as a very able lawyer, would ever agree that the hearing under Section 305 *before one of your chemists* in Los Angeles for an entirely different purpose, could possibly be construed as a hearing under Section 304 (a) (2) *by the Administrator* on the question of probable cause here presented. I do not want to be argumentative, but are you not inconsistent when you say that no hearing is necessary yet argue that a hearing has taken place before your minor employees?

I note in your letter that you state in part: "I on January 28, 1949, made such finding of fact". The papers filed by the Department of Justice and served upon me contain three undated papers entitled "Finding of Fact" signed by Robert G. Butz, Medical Officer, Food and Drug Administration, and on a separate page of each, also undated, is a statement entitled "Conclusions" signed by J. Donald Kingsley, Acting Administrator, in which you say "I conclude on the basis of the facts reported above by Dr. Robert G. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause". There is a very serious and fundamental distinction between a decision or conclusion of "probable cause" and the "finding of fact" under Section 304 (a) (2), and it is quite evident that your attorneys agree with me in this or they would not have segregated the "finding of fact" and the "conclusion" with the "finding of fact" made by Dr. Butz and the "conclusion" by you as Acting Administrator.

Under Section 304 (a) (2), multiple seizures may be made when the misbranding has been the basis of a *prior judgment in favor of the United States* or when the Administrator has probable cause to believe from the facts found without hearing by him or any officer or employee of the Agency that the misbranded article is "*dangerous to health*" or that the labelling of the misbranded article is "*fraudulent*" or would be in a material respect "*misleading*" to the injury or damage of the purchaser or consumer. Your decision or "conclusion" of probable cause in the instant case is based upon your decision from facts allegedly found by Dr. Butz, without a hearing, that the labelling of Nutrilite is "misleading". I believe that you will agree that the claim of "misleading" is certainly a lesser charge than "fraudulent" or "dangerous to health", and that it is a charge more difficult to prove and on which there is more likely to be a difference of opinion. You therefore are taking the drastic action of multiple seizures of my client's product on the *weakest* of the four possible grounds authorized under the Act. Under these circumstances, is it not fair to give Mytinger and Casselberry an opportunity to appear before the Administrator to prove facts showing

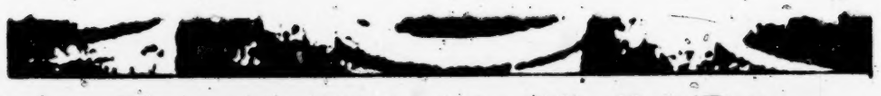
at the University of Missouri, in Columbia, listening to an absorbing and almost unbelievable story about health in America and the particular chapter in that story which he has helped to write, and I interrupted to mention Jim. "Could it be," I asked him, "that he is simply hungry?"

"It could be," Doctor Albrecht answered.

I had come to ask Albrecht if America could expect to keep on eating well. "America," he said grimly, "is not eating well now."

The story that Doctor Albrecht laid before me is what I propose to tell in this article. In my opinion, it is of the deepest possible significance to Jim and to millions more in America who—whether classified 4-F by their draft boards, or kept from work at war jobs for days at a time by colds and other "minor" complaints, or suffering from this or that occasional ache or misery that they can't explain, but that often prevents their feeling up to par—have wondered why they don't have the abundant health to go with "the abundant life" that they have heard so much easy talk about. The story isn't all about Albrecht; he is one of many looking beyond quantity into the quality of the food we eat. The Federal Government has established a focal point for such research at the Department of Agriculture's Plant, Soil and Nutrition Laboratory, organized at Ithaca, New York, five years ago. But Albrecht has played pioneer and leader, and has, perhaps, been intimately familiar with more phases of it than anybody else in the country. The substance of the story is that an enemy has come among us unawares. It stalks us invisibly, strikes silently, is almost as hard to outwit as germs were when Pasteur revolutionized medicine by revealing their role in disease. The new enemy is never dramatic. It appears as a disease of the soil directly transmissible to man, but unlike its devouring cousin, erosion, it silts up no rivers to cause billion-dollar floods, digs no gullies to swallow up farms. It works away, but leaves no clear-cut sign. Fields that always have been green may be green still. But the same life is no longer in them.

"We began getting our basic facts," Albrecht said, "about the turn of the century. Nutritional research got under way. Vitamins were discovered. People got curious about the chemical properties of food. Cookbooks recognized health as well as appetite. Doctors, through experiment and observation, began to understand that more diseases than they ever suspected could be traced to dietary deficiencies, and that many sick people were hungry people. They called it 'hidden hunger' because people who ate three squares a day, and never knew what it was to ask for food and not get it, often suffered from it. One of the hidden hungers was for calcium, a shortage of which could cause rickets. There were many others. Goiter was hooked up with a shortage of iodine; night blindness with a shortage of carotene; anemia with iron—and possibly copper—shortage; thyroid troubles with a shortage of zinc; tonsillitis with a deficiency of silver; tooth decay with shortages of calcium, phosphorus, fluorine, and so on.



Dr. Wm. A. Albrecht *(right)* and Dr. H. S. Wittwer checking results of some soil tests on spinach.

"These discoveries," Albrecht continued, "led inevitably to another. Some of us, sometime, were bound to make it, for questions and conjectures popped into any thinking man's head. What could cause hidden hunger? A train of thought suggested itself. We satisfy hunger by eating. If we eat 'enough' and still are hungry, mustn't something be lacking in the food? How does nourishment get into food? Well, it must come by way of the flesh, fish or animal products we eat, or by way of vegetables, fruits, nuts, berries. Where do these foods get it? The final answer is: By a process of manufacture, p[illegible] grow[illegible], w[illegible] beats anything Ford has dreamed up. The end product of that biggest-of-all big business is a great variety of plants; its machine tools are soil, air, sunshine and water. You and I never could make a meal of sunshine and raw minerals, but plants can and do. Then we eat them or we eat animals grown by eating them. Plants are the earth's basic food factory and nourishment warehouse, and if something is missing from our food that we need for health, it must be missing or deficient in plants. Yes, but why is it missing?"

This train of thought took the affair out of the field usually thought of as medicine, and brought Albrecht and others like him in. Like Pasteur, who advanced medicine so much, Albrecht is not a doctor of medicine, though he has always been deeply interested and hypothesis and technique in detail would take more space than can be allowed in this article. But enough must be told for the reader to understand in a general way what happens. Perhaps the easiest approach is through Hans Jenny and his experiment that failed.

Jenny, fresh over from Zurich, was one of Albrecht's research assistants from 1927 to 1936; now he is associate professor of soil chemistry at the University of California. He was experimenting with soybeans fed different diets of calcium.

Albrecht proposed the method of the experiment, suggesting use of colloidal clay. Ordinary clay is found in most soils, but colloidal clay was something new; it was ordinary clay with every shred of plant food eliminated. It was hoped it might be useful in making pottery, bricks or other articles, but Albrecht conceived a use for it in studying the feeding habits of plants. He argued that he could add any plant food he wanted to, in any quantity, observe the effect on growing plants, and have an absolute check on cause and result.

So Jenny's experiment was planned. In certain pots he put colloidal clay with only a little lime; in other pots he increased the percentage of lime, making several test mixtures. He planted his soybeans, watched them sprout, and after several days came to Albrecht with a long face.

"I'll have to start over," he said; "so many of the beans are dying."

He did start over, using the same plan. But once more he came to Albrecht with a story of dying plants; some "disease," he said, was attacking them. He was ready to try again, but this time Albrecht went to the greenhouse with him and, after a look at the plants, suggested that Jenny take his notebook and jot down some figures. Albrecht counted the number of living plants in each pot, and Jenny wrote the numbers down. When these were compared, pot by pot, with the quantities of lime used, it was seen that almost all the plants died in the pots with least lime, but a gradually increasing number lived in the pots containing more lime. As far as the original purpose of Jenny's experiment went, it was a failure. But in another sense it was brilliantly successful, for it demonstrated that the colloidal-clay technique would serve Albrecht's ends.

(11628)

according to the calcium in the soil. Popeye would never jitterbug to the Coast on spinach grown in mineral-poor soil. Albrecht has played with many vegetables in research, varying mineral content up or down by varying soil nutrients.

The same mineral variations occur in grasses and other plants eaten by domestic animals, and what they

diet, we reduced the males in a few weeks to the point where they wouldn't look at a woman rabbit. Other rabbits, kept on a similar but mineral-rich diet with hay from treated soil, were regular wolves. By reversing the diets, the wolves became woman-shy, and the tame cats became wolves. Lambs fed mineral-rich hay from treated soil made nearly three times as much gain

gers have colds. By evening, John is coming down with a cold too. Jane stays well. The same bugs buzzed her. But somehow she had more resistance. "We are what we eat."

Another fact to remember, Albrecht said, is that soils under certain conditions easily lose a large part of their minerals. The loss



CHART BY WILLIAM CAMPBELL

How to starve on three big meals a day. *Upper:* **Soil deficient in minerals produces a crop similarly lacking; the livestock raised on it, and you who eat the livestock, suffer from "hidden hunger."** *Lower:* **Mineral-rich soil means fuller growth and sturdier health for the crop, for the livestock and for you.**

(1120)

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2159c

that your decision that there is "probable cause" to believe
2164 that the labelling of Nutrilite is "misleading", is an erroneous one? That is all we ask.

That your whole case against my clients is built on a rather weak and dubious grounds is shown by the statements of your Counsel in the injunction case pending in the local District Court, for he stated your case as follows:

> "This literature accompanying the product, in our view, conveys to the ordinary person, although not perhaps to the health expert, judge or attorney, the impression, definitely, that the product, since the ordinary person suffers from vitamin deficiencies, when taken will retard and ward off all the common diseases and therefore if you have the common diseases you can get rid of them by eating this magic Nutrilite."

We dispute his contention as to the "*impression*" conveyed to ordinary persons by my client's literature. He admits all may not agree with your conclusions but labels them as experts, judges and attorneys. If given an opportunity we can show the Administrator that an ordinary person would not gain the "*impressions*" contended for and that an analysis of the literature itself disproves such impressions. A case built on impressions where admittedly there is and can be differences of opinion would seem to be one where the Administrator should want to hear both sides before taking the drastic action taken against my clients.

The so-called "finding of fact" by Dr. Butz upon which you based your conclusion or decision of "probable cause" is not a finding of fact at all but a statement that "the consensus of informed medical opinion is" that a product containing certain listed contents "would not be effective in preventing or treating most common diseases". You will search in vain in my client's booklet "How to Get Well and Stay Well" for any such claim that Nutrilite is effective in preventing or treating most common diseases. Since you merely claim that the labelling is *misleading* and Dr. Butz has not found facts directly applicable to the labelling of Nutrilite on the question of whether it is misleading, the denial to Mytinger and Casselberry of an opportunity to give you a correct statement of the facts makes your decision not only erroneous but arbitrary in the extreme. We do not know and could not guess just what Dr. Butz and your attorneys told you in the secret ex parte Conference which we presume you held before making the decision you made herein, but we respectfully say that if you had heard both sides you would not have made the decision you signed.

I would greatly appreciate your calling my letter of January 28, 1949, your response thereto dated February 11, 1949, and this letter to the attention of Mr. Ewing personally, if he has now recovered from his illness. As a lawyer he will certainly agree that a decision

condemning the labelling of Nutrilite as "misleading," when made in a "star chamber" proceedings, is repugnant to every legal principle under our Constitution. The Court of Appeals has just said in a decision cited by us in the injunction case, "He who decides anything, one party being unheard, though he should decide right, does wrong."

2165 You of course realize that the consequences of your decision of probable cause, made without a hearing, is that Mytinger and Casselberry will be put out of business completely or irreparably damaged by the multiple seizures threatened by Food and Drug officials, prior to any possible opportunity they might have to defend themselves against your erroneous claim that the labelling of Nutrilite is *misleading*.

On behalf of Mytinger and Casselberry, I again most respectfully request that the Administrator grant a hearing to Mytinger and Casselberry at which they will have an opportunity to present to him the full and true facts showing that the labelling of Nutrilite is not misleading in any respect.

Very respectfully yours,

CHARLES S. RHYNE.

CSR/db

cc: VINCENT A. KLEINFELD,
Department of Justice,
Washington, D. C.

2166 DEFENDANT'S EXHIBIT 11

Mytinger & Casselberry, Long Beach, Calif. (AF 28-002).

Nutrilite Products, Inc., Los Angeles, Calif. (AF 22-872).

March 2, 1949.

Dear Mr. Rhyne:

I have your letter of February 18, 1949, written on behalf of Mytinger & Casselberry, Inc., to renew the request that your client be granted a hearing at which it might present facts intended to show that the labeling of the product "Nutrilite" is not in any respect misleading.

This being your request, I do not see that the distinction made between "finding of fact" and "determination of probable cause" in Section 304(a)(2) of the Federal Food, Drug, and Cosmetic Act is of significance. The section is interpreted by this Agency, in accordance with its clear terms, to provide that the facts shall be found without hearing by any Agency officer or employee, and that the Administrator or one of his delegatees shall make the determination of probable cause upon the basis of the facts so found. You quite

obviously wish a hearing on the facts, regardless of your assertion that you wish to be heard on the determination of probable cause. We believe that the procedures that have been followed accord with the provisions of the law, and we find no basis for giving special treatment to your client.

My letter of February 11 was not intended to convey the thought that we considered the hearing in Los Angeles a basis for the findings of fact or the determination of probable cause. You are well aware that we believe that no hearing is contemplated prior to multiple seizures. We pointed out, however, that previously a hearing had been held which afforded Mytinger & Casselberry an opportunity to present their views in support of the truthfulness of the booklet "How to Get Well and Stay Well". The record of the hearing is before this Agency. Despite Mr. Myers' representation that the booklet would be revised to eliminate all drug claims and to offer the product as a special dietary food, the current editions of the booklet make substantially the same objectionable claims of therapeutic worth.

Dr. Dunbar's affidavit, which has been filed in the injunction case, contains a short analysis of the labeling, and I agree with his evaluation of it. I am advised that it is for the trier of the facts finally to say what representations have been made for a product and whether the representations are either false or misleading in any particular. We are content to leave it to the Court or jury that may try the cases to say whether our understanding of the labeling claims is a proper one.

2167 We see no reason to argue as to which of the several bases for multiple seizures is the weakest. Suffice it to say that Congress inserted all four conditions after considerable deliberation and study. According to our understanding, "consensus of medical opinion" is a provable fact and one of the briefs filed on my behalf in the injunction case documents that point.

The procedure which you characterize as "star chamber" is one which Congress evolved to satisfy the legitimate rights of both the consuming public and persons who deal in drugs. The statutory requirements have been followed carefully, and I am advised that they are not repugnant to the Constitution of the you quote, *WJR* v. *Federal Communications Commission*. They have discussed it in the brief referred to above.

Finally, I must disagree with your claim that the consequences of my determination of probable cause will irreparably damage your client before it has an opportunity to defend. Congress, in an effort to minimize the inconvenience to shippers in your client's position, provided a means for bringing the several actions together for trial in a single jurisdiction. You have not yet availed yourself of that right. The inconvenience of having actions pending in sev-

eral jurisdictions and the delays incident thereto are not entirely of our doing.

I do not find a basis for acceding to your request.

Sincerely yours,

(S.) J. DONALD KINGSLEY,
Acting Administrator.

Hon. Charles S. Rhyne,
730 Jackson Place, N.W.,
Washington, D. C.

2168 DEFENDANT'S EXHIBIT 12

FEDERAL SECURITY AGENCY

Office of the Administrator

Certificate

October 10, 1949.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code (55 Stat. 184), I hereby certify that the attached

Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite Food Supplement", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated December 9, 1948 and the Conclusion signed by P. B. Dunbar, Commissioner of Food and Drugs, dated December 9, 1948,

are true copies of official documents on file in the Food and Drug Administration of the Federal Security Agency and are part of the official records of said Administration and Agency.

In witness whereof, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

[SEAL] L. W. A. HENSON,
Acting Executive Assistant.

2168a FEDERAL SECURITY AGENCY

Food and Drug Administration

Washington 25, D. C.

Nutrilite Food Supplement

Finding of Fact

It is the consensus of informed medical opinion that most common diseases do not result from dietary deficiencies and that a product consisting of alfalfa, parsley, and water cress fortified with crystal-

line vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U.S.P. units.
Vitamin B_6, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams.

would not be effective in preventing or treating most common diseases.

(S.) ROBERT C. BUTZ,

Robert C. Butz, M. D., Medical Officer Food and Drug Administration.

December 9, 1948.

2169 *Conclusion*

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

(S.) P. B. DUNBAR,
Commissioner of Food and Drugs.

For the Administrator.

December 9, 1948.

2170 DEFENDANT'S EXHIBIT 13

FEDERAL SECURITY AGENCY

Office of the Administrator

Certificate

October 10, 1949.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code (55 Stat. 184), I hereby certify that the attached

> Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite Food Supplement", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated September 30, 1948 and the Conclusion signed by C. W. Crawford, Associate Commissioner of Food and Drugs, dated September 30, 1948,

are true copies of official documents on file in the Food and Drug Administration of the Federal Security Agency and are part of the official records of said Administration and Agency.

In witness whereof, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

[SEAL] L. W. A. HENSON,
Acting Executive Assistant.

2171 FEDERAL SECURITY AGENCY

FOOD AND DRUG ADMINISTRATION

Washington 25, D. C.

9-113-K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U.S.P. units.
Vitamin E, 10 milligrams.

Vitamin K, 0.4 milligram.
Vitamin B_6, 4 milligrams.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams;

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams;

would not be effective in the treatment of low vitality, over-fatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble mindedness, diabetes, hemorrhage connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, constipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases.

(S.) ROBERT C. BUTZ,
Medical Officer, Food and Drug Administration.

September 30, 1948.

2172-2174 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

(S.) C. W. CRAWFORD,
Associate Commissioner of Food and Drugs.

For the Administrator
September 30, 1948.

2174-A DEFENDANT'S EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER AND CASSELBERRY, INC., A California corporation,
Plaintiff,

v.

OSCAR R. EWING, Administrator, Federal Security Agency, et al.,
Defendants.

Washington, D. C., Monday, April 25, 1949.

Deposition of Dr. Robert C. Butz, called for examination by counsel for plaintiff, pursuant to notice, copy of which is filed in Court, and subsequent stipulation of counsel to postpone to the day and date indicated herein, in Room 3232, Federal Security Building, Washington, D. C., beginning at 2:00 p.m., before August Wolff, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

Charles S. Rhyne, Esq., for the Plaintiff.
Vincent A. Kleinfeld, Esq., and William W. Goodrich, Esq., for the defendants.

2175 PROCEEDINGS

Thereupon, DR. ROBERT C. BUTZ was called for examination by counsel for plaintiff and, having been first duly sworn by the notary, was examined and testified as follows:

Examination by counsel for plaintiff:

By Mr. Rhyne:

Q. Will you give your full name and address to the reporter?
A. Robert C. Butz, 9107 Eton, E-t-o-n Road, Silver Spring, Maryland.
Q. Doctor, how long have you been employed with the Food and Drug Administration?
A. About two and a half years.
Q. What degrees do you have, and from what schools?
A. BS from the University of Wisconsin; MD from the University of Illinois.
Q. When did you obtain your MD Degree?
A. March, '43.

Q. What did you do between 1943 and the time you came with the Food and Drug Administration?

A. I interned with the United States Marine Hospital in
2176 San Francisco, and spent three years in the Army.

Q. What type of work did you do in the Army, Doctor?

A. I was general medical officer part of the time, and I was assigned to neuropsychiatry a great deal of the time, which includes general medicine.

Q. Did you do any work that involved research in the field of nutrition before you came to the Government?

A. Yes. I was a research assistant for Dr. E. L. Sevringhaus, and Dr. E. S. Gordon, University of Wisconsin.

Q. For how long and what years?

A. I think that was '37 to '39.

Q. That was before you received your MD?

A. That is true.

Q. While you were a student at the university?

A. Yes.

Q. Have you made any special studies in nutrition since your graduation?

A. No. Other than keeping up.

Q. What type of work have you performed with the Food and Drug Administration?

A. Well, almost anything that you are called upon to do and pass medical opinion upon in the enforcement of the Food, Drug and Cosmetic Act.

2177 Q. Do you recall that you made certain findings of fact with respect to Nutrilite?

A. Well, I didn't recall it until I was notified that I was going to make a deposition. In fact, I had forgotten it. Nutrilite was just one of the numerous things that go through the office. I mean, it wasn't anything.

Q. But now that it has been called to your attention, you do recall that you made such findings?

A. I remember looking over that literature.

Q. Do you have copies of the findings of fact that you have signed?

A. Well, this (indicating) is not signed, but——

Q. That you prepared, then?

A. Yes.

Q. You did sign them, didn't you, Doctor?

A. Yes. This carbon (indicating) isn't signed; that is all. These are my findings of fact.

Q. Do you have before you the papers entitled "Finding of Fact," dated September 30, 1948?

A. No. I have December 2, 1948.

Mr. GOODRICH: Let me get these straight because these are my copies. You have all three of them here.

By Mr. Rhyne:

2178 Q. You now have before you this finding of fact dated September 30, 1948?

A. I do.

Q. What do you mean by the term "concensus of informed medical opinion"?

A. "Concensus of informed medical opinion" is that crystallized opinion that a doctor gets as a result of his training and study through his contact as he continues in his work as a physician.

Q. With particular respect to Nutrilite and the vitamins and minerals that it contains, did you form your opinion as to what the concensus of informed medical opinion is from reading the scientific literature in the field?

A. Not the scientific literature. In your contact with men, you would talk with them, go to staff conferences, and you hear what they think about the various things that are being used today, and what they feel their value is, along with reading the scientific literature. I couldn't quote you any passage and paragraph for it.

Q. Are you familiar with the scientific literature in this field?

A. Fairly well.

2179 Q. Who would you say is the outstanding M. D. in the field of nutrition?

A. Well, Dr. Thomas Spies is probably as well known as any of them. He is more publicized. Many men who are prolific writers are not always considered by someone else to be the best authorities in the field.

Q. Do you consider him to be a real authority?

A. I consider him to be a very fine physician.

Q. And well qualified to write on the subject of vitamins and minerals?

A. Yes.

Q. Would you name any other M. D. who you consider to be qualified in this field?

A. Dr. Sturgis, the University of Michigan.

Q. Do you know his first name?

A. I don't recall it right now.

Q. Do you know Dr. Russell M. Wilder?

A. I know him by name.

Q. Do you consider him to be qualified?

A. I think that he would be considered.

Q. Have you read any of the things that he has written on vitamins and minerals?

A. I probably have, but I don't recognize them as being

Dr. Wilder's particular work. I wouldn't say that I would
2180 know what he has said distinctly from anybody else.

Q. Have you read any of the writings of Dr. Spies?

A. I believe so.

Q. Have you heard of Henry Clapp Sherman?

A. Dr. Sherman is one of the early men who made determinations for standards in the vitamin field.

Q. Are you acquainted with any of his writings in this field?

A. Not distinctly, not as a separate entity I wouldn't say that I know what his standards are. You know, as distinct from somebody else's.

Q. Have you heard of Barnett Sure?

A. No, I don't know the name.

Q. How about Dr. Hugh R. Butt?

A. No relative. I don't know him.

Q. I believe he spells his name a little different than you.

A. Yes.

Q. Have you heard of Lela Booher?

A. Yes, I have heard of the name. I don't know her.

Q. Have you heard of Gilbert Dalldorf?

A. No.

Q. Have you heard of Dr. J. H. Musser?

2181 A. University of Wisconsin, I believe, originally.

Q. I have Tulane School of Medicine.

And Julia Outhouse Holmes, Massachusetts State College, have you heard of her?

A. I think she is in home economics, a nutritionist, but I don't know her personally.

Q. And Dr. Daniel T. Quigley?

A. I don't know him.

Q. In the field of diabetes, have you heard of Dr. Joseph H. Barach?

A. I know the name.

Q. And in arthritis——

A. (interposing) I believe he is a New York man.

Q. Yes.

In the field of arthritis, Dr. Theodore F. Bach?

A. No, I don't recall him.

Q. How many patients have you examined to determine whether or not they have vitamin and mineral deficiencies?

A. I suppose several thousand.

Q. Several thousand?

A. I mean, when you say "vitamin and mineral deficiencies," you examine every patient looking for any possibility of anything

that he might have. Any patient that you look at you con-
2182 sider any possibility of any type of disease he might have, so I didn't screen them purposely for the purpose of vitamin deficiencies, which is quite rare.

Q. Where did you make these several thousand examinations, Doctor?

A. The University of Illinois, during the time I was a student, Cook County Hospital, Presbyterian Hospital, research and education hospitals, internship and Army.

Q. Have you made any examinations since you completed your internship?

A. During the three years I was in the Army I probably had to do about five a day, I would say I averaged.

Q. Do you think that a physical examination of a patient will indicate with assurance to a doctor whether a deficiency disease exists?

A. If you limit it to physical, manual techniques, no, but any physical examination also includes a mental status of the individual, your evaluation of him as an individual.

Q. Is it true that the cause of a particular deficiency disease can be strictly nutritional or functional and that the symptoms may often be the same?

A. How did you put that now?

Mr. RHYNE (to the notary-reporter): Will you read him
2183 the question?

(The pending question was read by the notary-reporter.)

Mr. GOODRICH: I object to the question on the ground that it is too broad and too vague and that it is impossible to answer.

Mr. RHYNE: There is no use suggesting that it is impossible to answer.

Mr. GOODRICH (to the witness): It is too broad a question.

Mr. KLEINFELD: Go ahead and answer it, if you can.

THE WITNESS: When you put the term "functional" in there you make it anything that might have to do with the outlook of the patient, along with what he might physically be deficient in, so you couldn't say that a thing is functional due to a vitamin deficiency. You could have got a better answer if you would have limited it to vitamins.

By Mr. Rhyne:

Q. Suppose I limit it to vitamins, what answer do I get?

A. There are conditions that are due to vitamin deficiencies, but they are quite rare.

Q. Have you discussed the contents of Nutrilite with any other doctors within the Food and Drug Administration?

A. Yes.

Q. Who?

2184 A. Dr. Camel, Dr. Weinstein, Dr. Granger, Dr. Nelson.

Mr. GOODRICH: Specify which Nelson.

THE WITNESS: E. E.

I did not discuss these things with them as Nutrilite. We talked them over in terms: "What will certain vitamins do in certain conditions?" I didn't say, "Do you think Nutrilite will do this?"

By Mr. Rhyne:

Q. You just informed them of the contents of Nutrilite?

A. Not specifically labeling the exact formula, but "Would a compound having certain of these that are considered of value treat any of these conditions?"

Q. Did they all agree with you that the vitamins and minerals in Nutrilite would not help low vitality?

A. I will have to answer that this way: Low vitality is a symptom. It is the way you feel. In a recent study, that I think was done in Boston, it was found that not over one to two percent of all the people who thought they had general low vitality and over-fatigue, feeling generally lousy, you might say, who felt their conditions might be improved by vitamins—this is a study done—98 percent is probably psychic, 2 percent is probably due to real deficiencies of some type, marginal.

2185 Q. Who made the study, Doctor?

A. I can't recall that name for you. I would have given it to you.

Q. When you say "recent," what do you mean by that?

A. It is about a year and a half ago, as I remember.

Q. Do you recall when and where you saw it?

A. No. It just came up in my mind.

Q. Right now or before you made this finding?

A. When I was asked about this the other day I tried to re-find the article. I couldn't find it.

Q. Was that an article that you read before you made this finding of fact?

A. Yes.

Q. And based solely on that article, you concluded that vitamins and minerals wouldn't help a person with low vitality?

A. No, I don't think so.

Q. What did you conclude?

A. That was one of the things I read which gave a general statistical indication of about where these things lie. I offer that only as a general indication of feeling in the field about the value of vitamins in the treatment of complaints of the human race.

Q. And you concluded that this figure of 98 percent was
2186 about correct?

A. In my experience that has been correct. I have seen a good many of these people that came from Japan, during the latter part of my stay in the Army, and it so happened that a few of them were actually nutritionally deficiency. I saw that most of the ones who came into my particular section, the causes were emotional disturbances, and if we had been able to cure them with vitamins we gave them all they could stand.

Q. So you agree with the idea that vitamins would not help people suffering from low vitality in 98 percent of the cases?

A. I would say that 98 percent, approximately, of the people get no benefits other than psychic for themselves in 98 percent of the cases.

Q. Is it your conclusion, Doctor, that vitamins and minerals are, in fact, worthless?

A. No. They have an adjunct use.

Q. What do you mean by "adjunct use"?

A. If you, for instance, are a little nervous right now, and I am a little jumpy because we are working something out here, vitamins and minerals won't do a thing for us.

Q. That still doesn't tell me what you mean by "adjunct use," Doctor.

2187 A. All right. If, for instance, you were a diabetic and you had a little higher requirement for vitamins than the ordinary individual, they would be an adjunct to your specific treatment for diabetes.

Q. They would help, then, in the treatment of diabetes?

A. We would give them to be certain the individual gets a sufficient amount, and we evaluate that person as he goes along, and we watch him.

Q. Now, when you had this discussion with the other doctors inside the Food and Drug Administration, just what was the nature of the discussion? What was the occasion for it?

A. Oh, vitamins are a thing that come over the desk quite often. So you ask, "Well, have you heard of this? What do you think of that? What is the feeling? What have you learned from the people that you have come in contact with? What is the general status today of this new attitude toward some certain vitamin?"

Q. In other words, you were trying to find out what their conclusions were?

A. In view of my own experience, I would evaluate their answers.

Q. Was this a conference to discuss Nutrilite or to discuss vitamins and minerals in general?

2188 A. Vitamins and minerals in general. It wasn't a conference as such; it was merely, you go in to see a friend of yours about some problem you have.

Q. So it had not really any relation to the specific contents of Nutrilite?

A. Not to the specific and unique contents of this particular preparation.

Q. When you refer to the "unique" contents of the preparation, what do you mean, Doctor?

A. I mean there is probably no other preparation on the market that has exactly the same contents as this one does that I know of.

Q. Do you refer to the extracts from alfalfa, parsley, and watercress?

A. Not just those. Years ago I inherited about four cartons of cerophyll. Do you remember that particular vitamin preparation?

Q. No.

A. I think it was made in Iowa, or some place.

Q. Well, now, Doctor, did you discuss Nutrilite with anyone outside of the Food and Drug Administration?

A. No.

Q. How did it happen to come to your attention?

2189 A. Normal processes of things coming across the desk.

Q. Do you recall when it came to your attention?

A. No. When I was trying to think of it, I thought sometime within the last six months. When I received notice of this deposition, I tried to think of when had I done this.

Q. Now, you prepared three different findings of fact, did you not?

A. Yes.

Q. Can you tell me why you did?

A. In the process of law they require these at different times; and as a medical officer I was required to evaluate them at those different times. For what specific legal reasons they were drawn up at that time, I don't know.

Q. I am merely asking you as to factual reasons, if you know. Each one of your findings is different, is it not?

A. Well, I don't remember that it is materially different.

Q. What I am getting at, how did you go about preparing them? Say the one on September 30, 1948. And then you had the request for the one on December 2, 1948. Why is it different?

A. Probably because I didn't remember the exact wording from the time before.

2190 Q. You didn't refer back to your file?

A. I don't keep a file. I read over probably the one that I had done September 7, I looked at it, and included that in the

total file that came to me from the other division when it was referred to me. I don't have any personal file on Nutrilite, of course.

Q. Well, now, in your opinion of September 30, you list a number of ailments which you say that Nutrilite would not be effective in the treatment of. Where did you get that list?

A. I think that was probably in the Nutrilite book, as I remember.

Q. You read the Nutrilite book and gleaned these out of there?

A. I believe I read through the Nutrilite book, and I think there was also an excerpt prepared from the Nutrilite book.

Q. And you don't know whether you relied upon the excerpt or the book?

A. I would say I read the book through looking for medically significant passages in it. That is probably where I picked up these particular references to things that pertain to the field of medicine.

Q. You say probably. Could it be possible that you took
2191 these off the excerpts?

A. It could be possible.

Q. At the time you read the booklet, do you recall that you specifically found these ailments mentioned in it?

A. I think so.

Do you happen to have a book?

Q. I do have.

(The book referred to was handed to the witness.)

THE WITNESS: I think you probably would have a better marked one than I for saving time.

Mr. GOODRICH: He will have to have all three of the books.

THE WITNESS: Are all these conditions mentioned in the book?

Mr. RHYNE: We don't find that they are.

THE WITNESS: You don't find that they are?

Well, in order to save looking for each specific item in there, that is, what you want me to name—the one you have in question is this finding of fact of September 30?

Mr. RHYNE: Yes.

THE WITNESS: You would like me to find——

By Mr. Rhyne:

Q. For example, where does it say in there that Nutrilite is effective for the treatment of constipation?

2192 Mr. GOODRICH: Let's get the book. I object to that unless the 58-page book is placed before the witness.

Mr. RHYNE: Do you have the 58-page book?

Mr. GOODRICH: I don't have it up here. If you don't have it——

Mr. RHYNE: I don't have it, I am sorry.

Mr. GOODRICH: I probably could get it up here.

Mr. RHYNE: I will ask some questions about something else until we get the 58-page book.

THE WITNESS: The thing is, I am quite certain that all these statements are made in your book.

By Mr. Rhyne:

Q. You are quite certain that——

A. (interposing) I am saying this to save you time, I mean.

Q. I am not interested in saving time, Doctor. I am trying to get the true facts in this case.

A. I don't think we would go to the trouble of putting all those in unless we found them in there.

Mr. KLEINFELD: I want to object to this line of questioning on the ground that it is really irrelevant to the issue in this case. Dr. Butz has made findings of fact as to what a product bearing the
2193 ingredients contained in Nutrilite do in the treatment and cure of various diseases. What his opinion is on the labeling, or what it says, is irrelevant and not germane to the issue involved in this case.

Mr. RHYNE: He is not being asked his opinion of the labeling; he is being asked where he found specific things in the label.

I will ask different questions until the 58-page book gets here.

By Mr. Rhyne:

Q. Doctor, in arriving at this matter you refer to as "concensus of informed medical opinion," did you base that upon any specific writing other than this study you say originated in Boston which you can't identify now?

A. I made it as a result of all the reading and training I have had, not as a result of any specific one.

Q. Can you give me the name of any particular thing that you have read about vitamins or minerals upon which you relied?

A. No.

Q. Can you recall anything other than this Boston study that you have ever read on the subject of vitamins and minerals?

A. Would you like a recitation of detailed information on vitamins that I have read in general or—

2194 Q. Yes. Yes.

A. Well, for instance, the concensus of medical opinion today is that Vitamin E, which you have in here, is not considered useful in human nutrition at the present time. Vitamin B-6 isn't considered useful,——

Q. No, Doctor, you said you could name the detailed writings. That is what I asked for.

A. No, no. I thought what you wanted was something different.

Q. You cannot name anything in particular that you read?

A. Nothing specifically that I could select as being the authority upon which I would base an opinion.

Q. Are you familiar with the publication, "New and Known Official Remedies"?

A. I know of it.

Q. Is it authoritative on such things as vitamins and minerals?

A. It represents the official position.

Q. Does it represent the concensus of medical opinion?

A. At the time it was written, yes.

Q. In other words, a 1948 edition of that particular volume would give what you refer to as the "concensus of medical opinion" for that year?

2195 A. I believe that is the feeling about it.

Q. And the 1947 would give it for that year, and the 1949 would give it for this year?

A. Yes.

Q. So that if someone referred to that volume, why, they would, in fact, be reading the concensus of informed medical opinion on vitamins and minerals?

A. Up to the time it was published probably. For instance, if something had changed completely since it was published, or the general feeling among the group of men who were responsible for publishing it, if there was a change to be made, of course it would change.

Q. Doctor, do you think that nerve functions, stability, depend upon a proper proportion of vitamins and minerals in the diet of each person?

A. I think that is a pretty fair statement; yes.

Q. Do you think that physical and mental fitness depend in part on the proportion of mineral and vitamins in the diet?

A. I do.

Q. You are not a biochemist?

A. No.

Q. Or a nutritionist?

A. No.

2196 Q. Have you ever heard of the National Research Council?

A. Yes, sir.

Q. Would bulletins published by that Council be considered authoritative?

A. I think that you could consider then the concensus among the nutritionists of that time.

Q. They are a publication that you could safely rely upon, then, in the field?

A. Usually, yes.

Q. I hand you a bulletin entitled "Inadequate Diets and Nutritional Deficiencies in the United States," being a bulletin of the National Research Council, No. 109, and ask you if you have had that called to your attention?

Mr. GOODRICH: I object to his line of questioning on the ground that it is an attempt, in the examination of this witness, to place in the record hearsay statements in a publication which the witness has not stated he relied upon in forming his opinion. For that reason it is not proper examination.

Go ahead.

Mr. RHYNE: The only question I am asking him so far is if he ever saw it or heard of it.

Mr. GOODRICH: I object to any examination on the booklet as an attempt to place in the record hearsay statements on
2197 which this witness has not relied.

By Mr. Rhyne:

Q. Doctor, would you place more or less reliance upon the publication of the National Research Council than this publication that you rely so greatly on that came out of Boston?

A. I think you are deliberately attempting to mislead me in your statement there.

I would say that the National Research Council finding is, in general, considered the concensus of opinion.

Q. What about this Boston statement?

A. I think that represents a general attitude by a particular group of people.

Q. Who were the group?

A. As I say, I don't remember that particular thing. I would like to furnish it to you so you could question me on it. That is what you would like?

Q. I would be very happy to have you furnish it to me.

A. Unfortunately, I can't find it.

Q. You say you have never seen this (indicating)?

A. I won't say I have never seen it. I don't remember what is in it. I won't say that it wasn't up to the minute at that time; probably it was quite good at that time.

Q. You recognize that there is such a thing as deficiency
2198 diseases, Doctor?

A. Yes.

Q. Do you recognize that these diseases come from a nutritional deficiency?

A. Yes.

Q. If I were to tell you that this 1943 bulletin comes to the general conclusion that nutritional deficiencies exist on a wide-

spread scale in the United States, would you consider that conclusion authoritative as of that time?

A. I think that is a matter of degree at that time.

Q. For example, it says here: "All the data from numerous surveys with new methods among persons of all ages in many regions are entirely in accord in showing that deficiency states are rife throughout the nation."

Mr. GOODRICH: I object on the ground that it is an attempt to put in a hearsay statement from a publication over which this witness has not relied. I object for the further reason that if examination is to be conducted on this booklet, the witness should be permitted to examine the entire booklet rather than be asked questions at random selected by counsel.

Mr. RHYNE: Are you finished?

Mr. GOODRICH: Yes.

2199 Mr. RHYNE (reading): "Relatively few are the traditional severe, acute types. Most are milder in intensity and gradual in their course. Predominantly they are subacute or chronic states: Some marked, but very many mild or moderate."

THE WITNESS: You want me to agree with that?

Mr. RHYNE: Yes, if you will.

THE WITNESS: I will agree with that.

Mr. GOODRICH: Same objection to that.

By Mr. Rhyne:

Q. Doctor, do you believe that foods should be evaluated on the basis of what they contain rather than what they look like?

A. I think so.

Q. Do you know that deficiencies are caused in part by eating foods deficient in vitamins and minerals?

A. I think that is true.

Q. Is it possible that the diet of many people contains an inadequate supply of vitamins and minerals because they do not eat the right food, rather than because they do not eat enough food?

Mr. KLEINFELD: I object on the ground that the Doctor has not qualified as a nutritional expert.

2200 Mr. RHYNE: Read him the question (to the notary-reporter).

(The pending question was read by the notary-reporter.)

THE WITNESS: For those people who are nutritionally deficient, yes.

By Mr. Rhyne:

Q. Doctor, is it true that many people do not develop acute symptoms of disease but nevertheless fail to secure the full amount of vitamins and minerals consistent with ideal physical well-being?

A. I think it is true that the standards which have been set up as being ideal are not met by a certain proportion of the population. I couldn't state what proportion that is.

Q. This is what they call a subacute or mild deficiency state, is it, in the literature?

A. If there is detectable at all and isn't sufficient to hospitalize them, they call it mild, I would say. That would be general.

Q. What is your understanding of the word "chronic", Doctor?

A. "Chronic" is a condition that exists for a period of time in contrast with acute. You could have a chronic condition which would flare up and be acute. But "chronic" usually implies that it
2201 exists over a longer period of time than is ordinarily found in diseases. For instance, if you have a cold that lasts a week, that is acute. If it lasts a period of months it would be chronic.

Q. Doctor, is it true that mineral and vitamin deficiency conditions can be effectively corrected by administration of various vitamin and minerals in concentrated forms—for example, taking Nutrilite?

A. If Nutrilite contained the specific vitamins in the concentration which you wanted for the individual at that time.

Q. Do you think that self-medication is wrong?

A. No.

Q. Do you think that every person should attempt to secure an adequate supply of vitamins and minerals in his daily diet?

A. I do.

Q. Can he do this without consulting an M. D.?

A. Sure.

Q. Can he do this by taking vitamins and minerals in concentrated form, as by taking Nutrilite?

A. His ordinary diet should contain all the vitamins and minerals he needs.

Q. But if he has a deficiency condition——

2202 A. Then he should—he would first have to know that he had deficiency condition. In order to know it, he would have to be conversant with the clinical symptoms or the chemical study showing that he was deficient in that particular thing.

Q. Well, now, Doctor, can you tell me—you speak of clinical symptoms—can you tell me how you would go about testing a particular person to determine whether or not he had a deficiency of Vitamin A?

A. Well, the one that we use in most hospitals, there is a biophotometric method. It is dependent upon the greater regeneration of visual purple. Light bleaches it.

You don't want a long-winded talk on this?

Q. I want you to give any explanation that you want to give, Doctor.

A. Visual purple is a protein complex that contains Vitamin A as part of it. If this is bleached by light and does not regenerate rapidly enough because of a deficiency of Vitamin A, the individual is considered to have a condition called night blindness, or Nyctalopia.

Q. How many doctors have the necessary equipment to give such a test?

A. Not very many.

2203 Q. That is an unusual test, is it not?

A. No. I mean, I had it run on me when I was in school.

Q. I mean, it is not the kind of a test an ordinary M. D. can give you because he doesn't have the equipment, isn't that true?

A. You go by clinical symptoms ordinarily, appearance.

Q. Even with this equipment, can you examine a patient in a subacute stage and be sure of your diagnosis?

A. Usually there is a progressive change with the degree of Vitamin A deficiency.

Q. That is a rather expensive test, is it not?

A. No.

For instance, there are time standards on those that give you a general indication. You don't have to run a long series of studies on any one particular individual. There are limits beyond which the greater regeneration is such where you would say that the person is marginally deficient and the amount of deficiency is more or less proportional.

Q. How would you go about testing a patient——

A. (interposing) You can also do a blood determination of Vitamin A. It isn't ordinarily done. It is in research. It isn't done clinically, I mean, on the ordinary individual, except in the

2204 hospitals where they want specific blood studies done.

Q. From what you have said, Doctor, isn't it true in order to make the test; the way you have described it, you would of necessity have to go to a hospital or clinic to have it made rather than an ordinary M. D.'s office?

A. Yes, that is true.

Q. How would you test a patient for a deficiency of Vitamin B-2?

A. B-2, riboflavin. People show such symptoms as perleche, glossitis, vascularization of the cornea.

Q. Doctor, the symptoms you are mentioning are acute rather than subacute symptoms, are they not?

A. Yes. With a slit lamp microscope, for instance, on the eye, you can determine early vascularization because there is corneal opacities.

Q. Do you have anything else to say on how you would test a patient for deficiency of Vitamin B-2?

A. No.

Q. How about niacin?

A. Niacin is in its acute condition—niacin deficiency is known as pellagra.

Q. Is known as what?

A. Pellagra.

2205 Q. Well, in the subacute stage, how would you go about testing to determine whether a person had a niacin deficiency?

A. You notice the skin changes. They have a change in pigmentation.

Q. In other words, you would do it visually?

A. Usually. That is usually the best way, the easiest way.

Q. Doctor, do most M. D.'s have this particular kind of lamp that you referred to in discussing Vitamin B-2?

A. You mean a slit lamp microscope?

Q. Yes.

A. Just ophthalmologists usually.

Q. So if you went to an ordinary M. D., you couldn't have that kind of a test made?

A. Not that kind of a test.

Q. How would an ordinary M. D. test for deficiency of B-2?

A. By appearance.

Q. Is that an accurate test?

A. Along with the history and physical, it is.

I think I should qualify any of these statements that I made, that an examination of a patient you want to know all about his

2206 history, all the things about him, not just what he complains of. You want the complete history of the individual's life because you get a great many leads there, plus your special laboratory findings.

Q. How would you test for a deficiency of Vitamin D, Doctor?

A. Vitamin D is a deficiency that I don't think I have ever seen —very rarely in this country—except in children or certain conditions in which the individual has some difficulty with absorption of Vitamin D. Since Vitamin D is a fat soluble vitamin, you usually store it over a long period of time. The amount of time that it would take a Vitamin D deficiency, should the other symptoms which had brought on the deficiency because of defective absorption or neutralization, would give him time to get to a physician to determine what the cause of getting deficient would be.

Q. But still my question is, how would you test?

A. You can take X-rays. X-rays would show decalcification of the epiphysis.

Q. Is that an accurate test?

A. To a radiologist who can read them accurately it is accurate. To the person who would take an X-ray, who would ordinarily be able to read it. There are other conditions, of course, that
2207 give similar appearances on X-ray to the type of X-ray finding you have.

Q. That is not a test an ordinary M. D. can make?

A. The ordinary M. D. wouldn't ordinarily have to take it. Rickets, I think, isn't ordinarily considered today in anything except children. I don't believe that Nutrilite is directed at children Is it? Infants?

Q. Did you find anything in the——

A. (interposing) To say it wasn't? No.

Q. How about pantothenic acid?

A. Pantothenic acid isn't considered to have any human use in nutrition at the present time.

Q. When we started out here we were talking about tests. Do you know of any tests whereby a person can be tested for pantothenic acid?

A. I don't know any.

Q. How about calcium?

A. Calcium? Take blood calcium determination; they usually run about 9 to 11 milligrams percent.

Q. Isn't it true that the blood levels of calcium may remain practically normal even in pronounced cases of rickets?

A. We are presupposing that we know that it is rickets due to D deficiency. Is that what you are getting at?

Q. Yes.

2208 A. When a person shows those symptoms, you don't always know it is the D deficiency. He might have a parathyroid condition.

Q. Do you think this blood level is an accurate test, then?

A. It is an accurate test for calcium.

Q. How about a deficiency in iron?

A. The ordinary individual in his diet gets sufficient iron. What do you want out of that?

Q. Just tell me how you would test a person for a deficiency in iron.

A. I would take the hemoglobin.

Q. How about iodine?

A. There is a blood test for iodine. I think you use a colorimeter for it, in fact. It is a color test.

Q. And you think that is an accurate test, do you?

A. Oh, yes. It is accurate within limits of the test. I mean, it is as accurate as we have.

Q. How about Vitamin B-1, how would you test for deficiencies in Vitamin B-1?

A. Vitamin B-1 deficiency is a clinical evaluation as characterized by the symptoms of beri-beri.

Q. How would you determine deficiency in B-1?

2209 A. You mean what are the symptoms?

Q. Yes.

A. B-1 deficiency?

Well, in the subclinical area, which I try to avoid, sometimes in those people who are actually B-1 deficient they do have low vitality, over-fatigue, gastro-intestinal upsets, in the more severe conditions, inactivity, their estrogens giving symptoms of dismenorrhea.

Q. Could you tell us what that is in layman's language?

A. Trouble with your menstrual periods. That will do.

Q. Now, you have switched on me from tests to determine deficiencies to symptoms, Doctor.

A. There is a clinical test for thiamin—that is, a chemical test that can be done on the blood. It isn't ordinarily used except in research centers.

Q. Isn't it true that all of the tests that you have been telling us about here are tests that are ordinarily made in what we would say are research centers, clinics, or hospitals, rather than M. D.'s offices?

A. The ordinary M. D. goes by the clinical symptoms.

Q. I am asking you about the different kinds of tests that you have been talking about. There are tests that are made by ordinary M. D.'s.

2210 A. No, the ordinary M. D. doesn't do B complex determination, nor a determination in his office, that is true.

Q. Since you referred to Vitamin B-1 deficiency symptoms, wouldn't you also have a loss of appetite if you had it in a subacute stage?

A. That is usually one of the concurrent complaints.

Q. I believe you did refer to loss of strength and energy or low vitality.

A. Yes.

Q. Couldn't there also be a swelling of the lower extremities?

A. That is, usually. That edema is usually late.

Q. Doesn't the heart become enlarged in some instances?

A. In severe cases.

Q. How about breakdown of the nerve fibres?

A. Usually the function of nerve is dependent upon having adequate amounts.

Q. And you refer to stomach and intestinal upsets——
A. Yes.
Q. I suppose with all of that would come general irritability?
A. Yes. If we can assume those are only due to B-1.
Q. Yes. I mean those are some of the symptoms?
2211 A. Yes.
Q. While we are talking about symptoms, Doctor, what are some of the symptoms of an iodine deficiency?
A. Goitre.
Q. Isn't it also true that you have a dulling of the mental faculties? I take it you have had some experience in that field.
A. I have had very few cretins. People who are hypothyroid, in the rare cases where the hypothyroidism is just due to the iodine deficiency, do have some slowing up of their process of cerebration.
Q. And there is also a slowing up of the processes of growth, is there not?
A. Yes.
Q. By that I mean both physical and mental growth.
A. Yes.
Q. On Vitamin E deficiency, what are some of the symptoms?
A. Vitamin E isn't recognized to be a deficiency disease which humans have.
Q. Well, I noticed in the papers two or three days ago a report something like the one that you talked about up at Boston, which was just published in New York. That referred to Vitamin
2212 E in diabetes. It was a report by a man named Vogesang, a Canadian,——

Mr. KLEINFELD: Have you asked a question, Mr. Rhyne?
Mr. RHYNE: Yes.
Mr. KLEINFELD: Please read the question (to the notary-reporter).

(The pending question was read by the notary-reporter.)

By Mr. Rhyne:

Q. Have you heard of that report?
A. I think if you read further it said they had quite an argument about that, too, and it wasn't agreed to by everybody present, and that they tended to discredit his work.
The general feeling was of that meeting that Vitamin E has no present proved use. We have no deficiencies of E that are proven.
This particular man is a research man, I believe, and I think he offered to treat any number of people with Vitamin E. I don't think he just mentioned this for diabetes, but also heart condition, and so forth.
Q. I think he mentioned habitual abortion.
A. That is in rats. That is not in human vitamin E.

Q. Isn't it true that the Canadians have reported rather extensively with Vitamin E in humans on habitual abortion?

A. That is true. But it isn't agreed that Vitamin E is
2213 the cause. That particular man is sold on it; he is convinced of the value of it.

Q. Hasn't Vitamin E also been referred to in connection with certain types of heart conditions?

A. Yes. But as I say, Vitamin E is one of the things that humans have to a large extent in their tissues and which is essential for muscle function. But it isn't recognized that we have Vitamin E deficiency.

Q. Doctor, what about a calcium deficiency? What are some of the symptoms?

A. Well, one of the symptoms would be a tetany. Calcium deficiency would be tetany, muscle spasm.

Q. Would you also have bone deformities of various kinds?

A. That was the X-ray findings I referred to before. Both structural deformities of the bone and also shaped deformities of the bone. These are particularly noticeable at the epiphysis.

Q. Doesn't a calcium deficiency also show up in tooth decay?

A. After a tooth is formed I don't believe that Vitamin D—calcium, I don't believe has any effect on teeth. There is nothing shown.

Q. How about nervousness?

2214 A. Only in case that you had a calcium deficiency, which is rather rare as far as the diet is concerned.

Q. Neurotic pains, for example?

A. No. In neurotic pains, 90 percent of them are due to the psychic structure of the individual.

Q. Now, what are some of the symptoms of an iron deficiency?

A. Hypochromic anemia.

Q. Anemia?

A. Hypochromic anemia.

Q. What does the first word mean?

A. Low color.

Q. Paleness?

A. Paleness of the red cells.

Q. Would you also have lack of energy or listlessness with an iron deficiency?

A. If you weren't getting sufficient oxygen to your tissues because of the fact that you weren't getting enough oxygen carried by your blood because of the deficient formation of hemoglobin, which requires iron as a part of the porphyrin ring structure—you don't want this, do you?

Q. Sure I do. I sure do. It is very important. Don't you
2215 also have a numbness in your hands and feet when you have a deficiency of iron?

A. That sensation is due to the oxygen deficiency which is a secondary result of the iron deficiency.

Q. You would have restlessness, would you not?

A. As a psychic symptom.

Q. Again, a lack of energy?

A. If it is due to an iron deficiency, these symptoms——

Q. It could come from it?

A. It is possible; yes.

Q. What about the heart; would you sometimes have palpitation of the heart with an iron deficiency?

A. Again, you would have the palpitation secondarily due to the same physiology as before mentioned.

Q. How about sore tongue in mouth, does that ever come from iron deficiency?

A. The type of microcytic anemias are ordinarily not ducytic to the iron deficiency.

Q. In other words, you say that you don't have a sore tongue in the mouth from iron deficiency?

A. Ordinarily not.

Q. But you could have it?

A. Could have it.

Q. Now, how about niacin deficiency, what are some of
2216 the symptoms?

A. Niacin deficiency, it is again characterized by a sore tongue, smoothness, skin changes.

Q. Do you have also a depressive feeling or mental dullness?

A. It is believed that some of the early symptoms—the thing you are apparently trying to work out, and I can save you time——

Q. Yes:

A. Some of the early symptoms of niacin deficiencies are characterized by a dullness, almost the whole gamut of psychic symptomatology.

Q. And you referred to skin changes, did you not?

A. Yes.

Q. That can come from niacin deficiency?

A. It can.

Q. Now, take Vitamin D deficiency symptoms, what are they?

A. In the child you come to tetanies, poor bone development, and structural development of the bone, defective shape of bones.

Q. That is like enlargements of the wrists and ankles and bones?

2217 A. Parietal bosses.

Q. What do you mean by that?

A. Knobbing on the head. They get square heads.

Q. That comes from Vitamin D deficiency?

A. It is possible. They are rare and unusual. You hear them only in text book anomalies.

Q. Does it have an effect on teeth?

A. The development of the teeth—a good development of the teeth is dependent upon an adequate supply of Vitamin D.

Q. How about muscle soreness or numbness?

A. That is one of the symptoms.

Q. How about the nerves, does it have some effect on those?

A. Usually any deficiency in the cell structure of the particular system involved causes some impairment in its function.

Q. What about a Vitamin K deficiency, Doctor, what are some of the symptoms of Vitamin K deficiency?

A. Vitamin K deficiency is characterized by bleeding. However, we form Vitamin K in the intestines, so ordinarily need no Vitamin K as such as a supplement.

Q. Isn't it true that in some cases Vitamin K has proved very effective where persons have a tendency to bleed?

A. Yes, it has proved in those cases in which there is
2218 some other secondary disease.

Q. That prevents a formation of Vitamin K?

A. That prevents a formation of Vitamin K.

Q. What are some of the symptoms of Vitamin B-2 deficiencies?

A. Riboflavin deficiency is characterized by—again, this is vascularization of the cornea and sclera.

Q. Can you tell us what that is in layman's language?

A. The sclera is the white part and the cornea is the clear part of the eye.

Q. You mean sores?

A. They may go on to ulceration, but not necessarily. But the earliest symptom that you note is an increased number of capillary loops that will grow out over the sclera and the cornea.

Q. Don't you have scales or greasy accumulation on all parts of the body? Isn't that one of the——

A. These scaly and greasy accumulations you frequently see in such places as around the nose, around the mouth, behind the ears, in all flexible areas usually.

Q. Don't you have a reddening and scaliness of the lips, for example?

2219 A. That is a condition that comes as a result of the defect in the cellular function of epitheleal structures

Q. But you do have it from a Vitamin B deficiency, that is one of the symptoms?

A. Yes.

Q. Isn't one of the symptoms sores in the angles of the mouth?

A. Yes. That is called perleche.

Q. Now, Doctor, on symptoms for Vitamin C deficiency, what are some of the symptoms?

A. Usually characterized by soreness and bleeding of the gums, sponginess of the gums, X-ray changes on bone, ecchymosis of the skin due to capillary permeability.

Q. Could you explain the first word?

A. Which one?

Q. I can't pronounce it. The first word you used.

A. Ecchymosis. Ecchymosis is a small hemorrhage—are small hemorrhages.

Q. Do you also have a symptom on the Vit-man C deficiency of greater susceptibility to infection?

A. That is thought to be one of the functions that Vitamin C has, to act as a part of the structure for the gama-globulins, from which antibodies are formed. Vitamin C functions as a part
2220 of the structure in the intercellular substance.

Q. The real answer to my question is yes?

A. Yes.

Q. Doctor, do you also have the paleness that you referred to in connection with—I guess it was Vitamin A, iron deficiency?

A. Yes.

Q. And you also have a weakness of breathlessness that goes with the Vitamin C deficiency?

A. Not necessarily. Sometimes it is thought by the people who have deficient hemoglobin, the rate of formation of hemoglobin is sometimes speeded up if they have all the other necessary factors.

Q. How about rheumatic pains, is that a symptom of Vitamin C deficiency?

A. You have pains that resemble rheumatic pains that may be due to Vitamin C deficiency. Ordinarily this is only in severe cases in which you have internal joint hemorrhage.

Q. In connection with this gum condition you referred to, isn't it true that the teeth sometimes become loose?

A. Yes. You may even lose them, but that is rather severe.

Q. Do you sometimes have tensions in the bones causing swelling to elbow and ankle and other parts of the body?

2221 A. Yes.

Q. And I believe you have already referred to hemorrhages from blood vessels breaking?

A. Yes.

Q. Now, on Vitamin A deficiency symptoms, can you give me the symptoms that come from a deficiency of Vitamin A?

A. Vitamin A deficiency symptoms may be dermatitis.

Q. Is that scaliness of the skin?

A. Dermatitis refers to any skin condition, any appearance. Do you want to specify——

Q. Yes, I would like to have the specific symptoms of Vitamin A deficiency.

A. An inflammation of the skin, ulcerations of the cornea, gastro-intestinal disturbances; these are only in severe Vitamin A deficiency.

Q. Don't you have the condition known as night blindness?

A. That is nyctalopia. That is what I described earlier, where you have a defect in visual purple formation.

Mr. GOODRICH: I would like to object to this line of interrogation on the ground that it is irrelevant to the case before the court and is an effort to interrogate an employed expert by the Govern-
2222 ment on general medicine. For that reason the interrogation is improper. Under Lewis v. United Air Line Transport Corporation, 32 Federal Supplement, page 21; Boynton v. R. J. Reynolds, 36 Federal Supplement, page 593; Midland Steel Products Company v. Clark Equipment Company, 9 Federal Rules Service, 34.411, all of which hold that the opinions of hired experts are without the scope of interrogation under the oral deposition section. It has nothing to do with the findings of fact that have been made.

Mr. RHYNE: It is not necessary for me to reply to you at this time, but I will when the time comes.

By Mr. Rhyne:

Q. Now, Doctor, would you go ahead on this Vitaman A deficiency symptoms? For example, don't you have also this retardation of growth?

A. Why don't you read them off and I will say yes or no?

Q. Retardation of growth of the central nervous system when deficiency occurs in an early age.

A. That particular work was done on chickens showing the central nervous system deficiency. It has never been shown on any human beings. It is very rare that the neural findings are in Vitamin A deficiency, that it isn't a proven entity.

Q. Doctor, isn't it true that one of the symptoms of a Vitamin A deficiency is a greater susceptibility to infection?

2223 A. Vitamin A is considered to be an effective part of it.

Q. The answer to my question would be yes?

A. Yes.

Q. Now, on a Vitamin B-1 deficiency, can you tell me some of the symptoms of a Vitamin B-1 deficiency?

A. I think we have got that one. Do you want to put them in again?

Q. I believe we did cover that. Yes. You are correct.

A. I just want to save time.

Q. Now, Dr. Butz, have there ever been any controlled experiments by you or any other person, to your knowledge, with Nutrilite by the Food and Drug Administration?

A. None that I know of. However, I don't know what the vitamin division has done.

Q. If such controlled experiments had been carried out, don't you think they would be called to your attention at the time you made this finding of fact?

A. I don't believe that any experiments were done—I think they probably would have.

Q. Had you ever heard of Nutrilite before you made this finding of fact?

A. I don't believe so.

Q. Isn't it true, Doctor, that you do not know exactly
2224 what is contained in the base of Nutrilite—that is, the specific things that are named there? You do know this base of alfalfa, parsley, and watercress has never been analyzed by you or anyone else, to your knowledge, in the Food and Drug Administration, has it?

A. It hasn't been analyzed by me, and I wouldn't say that it had not been analyzed by the Vitamin Division or some other division, by a laboratory division.

Q. Well, do you know whether or not anyone has made a government assay of the contents of Nutrilite?

A. I don't know.

Q. No such assay was ever called to your attention?

A. None has been called to my attention that I can remember.

Q. Do you know that there are new vitamins being discovered all the time and that some of those could be contained in the base without your knowing it or my knowing it?

A. That is true. That part of it is true.

Q. Do you think that reports by users of Nutrilite of beneficial results are an accurate way of determining the value of Nutrilite?

A. No, I don't for this reason: Patients that are given
2225 placebos by doctors will frequently get better, and are certain that they get the best things that they possibly can get and feel greatly improved.

Q. Would you tell me what that word means?

A. A "placebo" is a sugar pill, or any other non——

Q. (interposing) In other words, it is something that the doctor gives them which the doctor knows is worthless?

A. Has no real value.

Q. But they do report benefits?

A. But they find results.

Q. Doctor, from your reading of the scientific literature in this field, isn't it true that a lot of the research people think that there are probably thousands of vitamins that haven't been defined as yet?

A. No. I think the general feeling is, the latest feeling is there may be some whose exact functions haven't been completely worked out yet, but the present-day feeling is that there is nothing which we don't have some indication of as at least a substance. For instance, up until recently, at which time B-12 was discovered, they had an anti-pernicious anemia substance, and they did not know what it was as an entity. However, there is no unknown substances which we are looking for to define as chemical entities at the present time.

2226 Q. But, the Food and Drug Administration, to your knowledge, has not made any analysis of this base of Nutrilite to determine just what it is?

A. To my knowledge, no.

Q. I believe you said, Doctor, you don't question the fact that deficiency diseases exist?

A. That is true.

Q. If it was a deficiency disease which one of the vitamins or minerals contained in Nutrilite is good for it, that Nutrilite would aid in curing or preventing it——

A. If given in sufficient quantities to cure that particular disease. I do not feel it would be the therapeutic product of choice, however.

Q. What do you mean by that statement?

A. Take an individual who had particularly, say, a B-1 deficiency. I might give him the complete B complex. However, I wouldn't want to give him this whole slug. I would give him probably, well, a cheaper form that did not contain all these other things; although they cost money to put up, they are not essential ingredients of the disease we are trying to treat. These are what we call shotgun type of things, more or less.

Q. I take it that you are opposed to shotgun medicine?

2227 A. Generally we should know exactly what we are treating before we attempt to treat it. Sometimes we do use them in the medicine.

Q. Isn't it true that especially in these so-called subacute deficiencies—I believe which you say you want to stay away from—that a doctor cannot with accuracy determine what is wrong with the patient, so that the so-called shotgun type of medicine would be the best type?

A. It is indicated in case the condition which you are treating is really a vitamin deficiency. However, most of the conditions which are subacute and are characterized mainly by symptoms of not feeling well in general are usually psychic.

Q. Doctor, how could you know that most of these conditions are psychic when you haven't examined a lot of patients for a deficiency disease in subacute cases?

A. Because a great many patients have been treated by doctors with vitamins without any relief of their prevailing symptoms and will improve on psycho-therapy.

Q. You mean you are basing this statement on reports to you by other doctors?

A. Yes. Not only that I have had a great many patients that I have dosed very heavily on vitamins when I was in the Army,
2228 for instance—we made it to rule out any possibility that there might be any deficiency from conditions under which they had lived; we gave them far beyond the required and advised minimum daily dose of vitamins, and they showed no improvement on this vitamin supplement alone.

I think probably our mental hospitals would be relieved of all problems if vitamins would take care of the emotionally unstable.

Q. Didn't I understand you to say earlier, Doctor, that vitamins in some instances at least could help the emotionally unstable?

A. Oh, yes, if the condition is due to a vitamin deficiency, that is true.

Q. What do you mean by the term "common diseases" in one of your opinions here, findings of fact? I believe it is the one dated December 9th, Doctor. Do you have it in front of you, Doctor?

A. Yes, I do. Here.

If you would refer to common diseases, you would refer to such things as you have in your family every day; such as—not every day—but cold, virus infections, bacterial infections, common childhood diseases. You would include such things as measles, scarlet fever, diphtheria.

Q. Is that the type of thing you had reference to?
2229 A. Yes.

Q. When you referred to those, then you don't find, do you, in Nutrilite's labeling any statement to the effect that Nutrilite would be useful for that type of common disease, do you?

Mr. KLEINFELD: I object to that question. It is irrelevant.

By Mr. Rhyne:

Q. You don't find that this refers to measles or any of those?

A. It refers usually to vague symptoms that may be the symptoms of a whole variety of diseases, prodromal symptoms of many diseases.

Q. But it does not refer to measles but these common diseases you were talking about.

Mr. KLEINFELD: I object to that. The witness has not professed to be an expert on labeling. He is testifying what a product of this type would do therapeutically. He is not testifying what labeling means or does not mean.

Go ahead.

THE WITNESS: You want me to answer the question?

Mr. RHYNE: Yes.

(The pending question was read by the notary-reporter.)

2230 THE WITNESS: Well, most common diseases that I would refer to would be common diseases that are characterized by these symptoms as mentioned in the finding of fact of September 30th. They would be such common diseases as diabetes, heart trouble——

By Mr. Rhyne:

Q. I was just wondering where you got the term and how you defined it since you used it there, Doctor.

A. Well, I think I got it from the general context of the book as the reference that Nutrilite would cure or mitigate any of the symptoms of the ordinary diseases to which the human race is heir.

Q. In other words, that was an over-all conclusion?

A. An over-all conclusion. Specifically, I wouldn't refer to any particular disease. I don't remember what exact pages I picked that from. I haven't any memory of that.

Q. Doctor, coming back again to your finding of fact of September 30, 1948.

A. Yes.

Q. You say it is the concensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and so forth, and you name all the contents of Nutrilite with the exception of

2231 the alfalfa, parsley, and watercress base, would not be effective in the treatment of low vitality.

Now, since it does contain some of the vitamins to which we have referred to in discussing symptoms, don't you think that it could be effective in the treatment of low vitality?

A. It could be effective in the treatment of those symptoms which were proven to be due to a vitamin deficiency.

Q. Yes. Well, for example, if a patient did have low vitality and he was given vitamins, one of the vitamins, which one specially——

A. (interposing) For instance, if you had a feeling of low vitality due to B-1 deficiency and you gave B-1, it might improve that. If it was specifically due to B-1. However, my general position in this is this, that the Nutrilite purports to treat a general subjective feeling of a large majority of the people that they have from time to time, and suggests to them if they take Nutrilite they will be better, which is not true.

Q. Well, I want to be sure I understand you. You admit that Vitamin B-1 is just for low vitality and Nutrilite contains Vitamin B-1.

A. Nutrilite would be good for low vitality in cases where
2232 the feeling of low vitality was due specifically to a B-1 deficiency, which includes only a small segment of the population.

Q. Well, now, poor appetite, for example, I believe you have testified that that is one of the symptoms.

A. I will.

Q. Of which vitamin deficiency?

A. B-1 deficiency.

Q. Now, Nutrilite contains that?

A. Yes.

Q. So that it would be effective in the treatment?

A. It would be effective in the treatment if the poor appetite was the result of B-1 deficiency but not in the host of other diseases which are often characterized by poor appetite.

Q. I take it then, Doctor, your position is, if you have one of these named deficiency diseases and Nutrilite, or any other vitamin for that matter contains the specific vitamin that will help that deficiency——

A. In sufficient amounts.

Q. Enough in sufficient amounts, it is not your position that Nutrilite couldn't aid as well as any other vitamin?

A. That is true.

Q. For example, on heart disease, I have been told,
2233 I think, that Vitamin B-1 is of aid in the treatment of heart disease; is that true?

A. Where they have a beri-beri heart, or they have a heart that is not functioning properly due to a deficiency of B-1, B-1 will cause almost one of the dramatic returns of good function by the administration of B-1.

Q. And the administration of B-1 as contained in Nutrilite could do that as well as B-1 contained in any other factor?

A. Not necessarily. You have to qualify that. Certain people, for instance, can't take it orally. You would inject it into them. You would get a little more absorption. For instance, the liver has to be functioning in order to utilize B-1 effectively.

Q. Doctor, I take it that you don't recall just which edition of this booklet you read as you made each decision?

A. No.

Q. And your statement about common diseases is a conclusion you drew from the entire pamphlet?

A. From the entire pamphlet.

Q. Rather than any specific statement?

A. That is true.

2234 Q. You recognize that it does not contain any such specific statement?

A. I don't remember it as such. You would know that better than I.

Q. These laboratory tests that we were talking about when you were discussing how you would examine patients for vitamin deficiency of various kinds, when taken as a whole are pretty expensive, are they not?

A. That is true.

Q. Isn't it also true that in diagnosis of patients' conditions from physical laboratory results, the doctor cannot always be sure of the results?

A. Most of the chemical determinations for the vitamins with the exception of D are pretty accurate. D is a bio-assay that is done on animals.

Q. But, Doctor, since the tests that we have been talking about are not generally used by M.D.'s—I believe you agree to that?

A. They are not used by the ordinary, general practitioner.

Q. Isn't it true that the tests that are used by the ordinary, general practitioner are not too accurate on testing for vitamin deficiencies?

2235 A. The testing that they do represents a composite of their opinion. What it comes down to is a validity of diagnosis. I think that in hospitals the diagnoses are found to be pathologically accurate in about 66 percent of the cases.

Q. What I had in mind was, Doctor, that I believe it is a generally recognized fact that an ordinary M. D. often differs with another M. D. on diagnosis of a deficiency disease.

A. Well, I have never heard much discussion of that particular thing. When a deficiency disease is sufficiently apparent, it is the signs and symptoms which are pretty clear-cut.

Q. But when it is in a subacute stage——

A. When there are feelings of malaise, low vitality, insomnia and poor appetite, you are not positive in that case, it is true.

Q. That is where most of the difference of opinion exists?

A. Where there is no clear-cut entity, then there is a possibility of difference of opinion.

Q. Isn't it true that doctors often use trial and error methods in getting the patient's reaction as they go along with each trial?

A. They sometimes do.

Q. So that the reaction of a user to a particular product
2236 or patient to a particular product is important then?

A. The reaction of the particular patient is important.

Q. Doctor, is it true that certain physical conditions such as fevers and infectious diseases require larger amounts of vitamins and minerals to sustain a patient?

A. That is true.

Q. I was going to say, than in a normal condition.

A. That is true.

Q. Doctor, you haven't seen any facts indicating that Nutrilite is actually, or its labeling has actually harmed anyone, have you?

A. I have never seen where Nutrilite has ever harmed anybody. I would assume a certain number of people would be misled by it, into taking it when they had other conditions which might be serious.

Q. But you know of no such instances?

A. I know of no such instance.

Q. Doctor, in the treatment of chronic diseases, is it true that a doctor can always diagnose accurately the time when such a disease begins?

A. No, you can't always tell when a disease begins. For instance,
tuberculosis, you might have that for a long time, quite a
2237 while, before you knew it. In fact, one of the early things
that you might have would be a feeling of low vitality and early fatigue, insomnia—in fact, inability to sleep is one of the early signs of a toxic product of tuberculosis.

Q. You mentioned tuberculosis. Isn't it true, Doctor, that vitamins and minerals would help build up resistance to tuberculosis?

A. A person has to have an adequate diet in order to maintain their resistance if in case they have tuberculosis. One of the things you have in a hospital is a high protein, high vitamin diet. You don't always supplement them with anything, but you give them a high protein, high vitamin diet. Plenty of rest.

Q. Doctor, do most doctors bring about an immediate improvement with patients with chronic ailments?

A. No, unfortunately.

Q. I believe you said earlier when you referred to chronic ailments you include things other than, say, the incurables like cancer——

A. I include everything in chronic diseases.

Q. It is a broad term?

A. Chronic diseases refers to those diseases which you have over
a prolonged period of time.

2238 Q. Well, if somebody uses the word "chronic," you don't
understand by that, that they are referring to cancer, is what I mean?

A. Not necessarily, no.

Q. Do you think it is impossible for a layman to recognize the symptoms of a deficiency disease?

A. No, provided the layman has had some special training of some kind so he has had an opportunity before to have observed it.

Q. Or to read about it or experience it?

A. If he is experienced and it has been diagnosed for him, then he has a better chance than somebody else. However, in that regard I might say that many doctors who have seen a disease many times, if they have it themselves, will frequently miss it because they are unwilling to accept the fact that they have it or they don't want to concede that they do have it themselves. You know, they say that a doctor who is his own physician has a fool for a patient and has a fool for a doctor.

Q. Doctor, you say you gave vitamins in the Army to rule out vitamin deficiencies?

A. Yes.

Q. Why can't an ordinary user or mother do the same with her family?

2239 Mr. KLEINFELD: I object to that question, the entire line of questioning, because the issues in this case are not the efficacy or lack of efficacy of vitamins, but as to whether the labeling of this product Nutrilite is misleading in a material respect.

THE WITNESS: A mother could treat her infant if she knew that the thing that the child was complaining of was a vitamin deficiency.

However, the probabilities of her being right are a little less than somebody better trained. That is all.

By Mr. Rhyne:

Q. It certainly wouldn't hurt the child?

A. Most vitamins are not considered to be injurious per se.

Q. Doctor, isn't there quite a wide difference of medical opinion with respect to the value of vitamin E in the human diet?

A. There is a small group who believe that Vitamin E has some value. However, the great majority of physicians who are nutritionists do not feel that the use of Vitamin E is sufficiently substantiated at the present time to indicate its use. I refer to such things for which claims are made that you mentioned, heart
2240 disease, certain types of heart disease and diabetes. This work has not been substantiated sufficiently to make the present-day feeling that it is effective in human diseases.

Q. Doctor, if the reaction of the patient is important, and I believe you so testified, wouldn't the results which users of Nutrilite have experienced be also important?

A. They would be important if they were qualified to evaluate the feelings that they got.

Q. When you speak of feelings, don't you think they know more about that than they can tell anybody else?

A. They know how it feels but they don't know that the feeling came from Nutrilite. The improvement is not necessarily from Nutrilite. The feeling is that they just felt better.

Q. Isn't it true that these deficiency diseases sometimes occur as complexities rather than single entities?

A. Usually that is true.

Q. So that use of multiple vitamins would be indicated in such instances?

A. Ordinarily, when they have one deficiency you usually give the other ones of the same group.

Q. Do you think that many general practitioners make errors in diagnosis of deficiency diseases?

2241 A. I think it is possible that some are made.

Q. Don't you think that they make many errors because they don't have this equipment to which you refer?

A. No. I think that any disease which is sufficiently clear-cut will not be missed by the practitioner. However, I think the group that you are referring to is what they call a sub-clinical group, which is no proven disease anyway. They feel that is what the condition is due to and they hang their handle on it.

Q. Doctor, are there not many types of vitamin deficiencies which are characterized by loss of appetite, say, insomnia, irritability, fatigue, and so forth?

A. There are vitamin deficiencies that are characterized by those symptoms and also other diseases characterized by the same symptoms, to which vitamins would be valueless.

Q. But the vitamins would also be of value if it came from a vitamin deficiency?

A. The vitamins would be valuable if it came from a vitamin deficiency.

Mr. Rhyne: That is all.

Examination by Counsel for Defendants.

By Mr. Kleinfeld:

Q. Dr. Butz, you signed a finding of fact on December 9,
2242 1948, that it was the concensus of informed medical opinion that most common diseases do not result from dietary deficiencies and that a product consisting of the elements contained in Nutrilite would not be effective in preventing or treating most common diseases; is that correct?

A. That is true.

Q. Is it your present view that that is the concensus of informed medical opinion?

A. It is.

Q. Is it your opinion?

A. It is my opinion and the opinion of other men.

Q. Is it a fact, Dr. Butz, that on December 30, 1948, you signed a finding of fact which state that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of gastro-intestinal distress?

A. That is true.

Q. Is that your present opinion?

A. It is still my opinion.

Q. Is it a fact that on September 30, 1948, in that same finding of fact you stated that it is the concensus of informed medical opinion that a product consisting of the elements and substances con-

2243 tained in Nutrilite would not be effective in the treatment of nervousness?

A. That is true.

Q. Is that still your opinion?

A. It is still my opinion.

Q. Do you still believe that is the concensus of medical opinion?

A. I still believe that.

Q. Is it a fact that on December 30, 1948, you signed the finding of fact to the effect that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of heart disease? Is that a fact?

A. That is true.

Q. Is that still your opinion?

A. It is my opinion that it might be effective in that particular form of heart disease which is due to a vitamin deficiency. However, a great majority of conditions that are covered by the term "heart disease" would not be benefited.

Q. How about angina pectoris?

A. Would not be benefited.

Q. How about arteriosclerosis?

Would not be benefited.

2244 Q. Is it a fact that on September 30, 1948, you signed a finding of fact that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of disease conditions requiring surgery?

A. It would not be effective in a diseased condition requiring surgery.

Q. Is it your view that that is your concensus of informed medical opinion?

A. It is.

Q. Is it a fact on September 30, 1948, you signed a finding of fact that it is a concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of feebleminded-ness?

A. It would not be effective in the treatment of feebleminded-ness.

Q. You said that was the concensus of informed medical opinion at that time?

A. Yes.

Q. Do you still believe it is the concensus of informed medical opinion?

A. I believe it is. Because the feebleminded people
2245 are congenitally mentally incompetent.

Q. Is it a fact on September 30, 1948, you signed a finding of fact to the effect that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of diabetes?

A. It would not be effective in the treatment of diabetes.

Q. It was your view on September 30, 1948, that it was the concensus of informed medical opinion that it was not effective?

A. It would not be effective in the treatment of diabetes.

Q. I want to give you the same question with respect to hemorrhage connected with the menopause.

A. Hemorrhage connected with the menopause is a symptom which at that age might suggest cancer. If the person was in the menopausal age and had bleeding, I would suspect cancer rather than a vitamin deficiency.

Q. So your answer is——

A. (interposing) The indications are that she might have not only cancer but she might have what we call myomas, muscle
2246 tumors of the uterus which frequently cause bleeding. She might have the early forms of hormonal imbalance, which might cause bleeding. Either hyper or hypothyroidism will cause excessive bleeding. All these conditions would not be benefited in any way by vitamin therapy.

Q. Is it a fact that on September 30, 1948, you signed a finding of fact which stated that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of l-ukemia?

A. The l-ukemias are a group of blood dyscrásis which could not be benefited by vitamins. In fact, l-ukemias are considered to be a form of blood cancer for which X-ray, nitrogen mustards and radioactive phosphorus have been tried and are found to be the most useful in that treatment—in the treatment of these conditions.

Q. Then, as I understand your answer, is it that a product containing the substances that Nutrilite contains would not be effective in the treatment of l-ukemia by the concensus of informed medical opinion?

A. It would not be effective for the treatment of l-ukemia.

Q. On September 30, 1948, did you sign a finding of fact
2247 to the effect that it is the concensus of informed medical opinion that a product containing the substances and elements that Nutrilite contains would not be effective in the treatment of tuberculosis?

A. Would not be effective in the treatment of tuberculosis. The Nutrilite could only be considered as an adjunct therapy in the treatment of tuberculosis. Tuberculosis requires many times surgical treatment, you have to cut the adhesions so the lung collapses and has a sufficient blood supply so as to effectively ward off and kill the area which has tuberculosis bacill*a* in it.

Q. In your opinion, Doctor, would a product containing the ingredients and substances which Nutrilite contains, as set forth in the label of Nutrilite, which I show you—would such a product be effective in the treatment of cancer?

A. It would not.

Q. What is the concensus of informed medical opinion as to whether a product such a Nutrilite containing the ingredients and substances set forth on the label of Nutrilite—what is the concensus of informed medical opinion as to whether such a substance would be effective in the treatment of cancer?

A. Nutrilite could not possibly be effective in the treatment of cancer because cancer is a condition in which you have aber-
2248 rant controlled growth of cells which have never been found capable of being treated by vitamins.

Mr. RHYNE: I want to object to all the questions about cancer and move to strike the answers on the ground that cancer is not mentioned in the labeling of Nutrilite and the Doctor's finding of fact doesn't refer to cancer in any place.

By Mr. Kleinfeld:

Q. Dr. Butz, if a person was suffering from a continuous hoarseness of the throat which persisted for some time, might that be due to a number of physical conditions?

A. Hoarseness of the throat——

Mr. RHYNE (interposing): I object to that on the ground that there is no mention of hoarseness of the throat in the Doctor's finding or in the labeling of Nutrilite.

THE WITNESS: Hoarseness of the throat could be due to tuberculosis, cancer, strictures, due to injuries of any kind. It could be due to a neurological involvement, brain tumor.

By Mr. Kleinfeld:

Q. If a person had hoarseness of throat, chronic hoarseness of throat due to cancer or brain tumor——

Mr. RHYNE: Same objection.

By Mr. Kleinfeld:

Q. (continuing)—and he did not seek medical advice, might real and permanent physical damage be done to the person?

2249 Mr. RHYNE: I object on the same ground, that there is no reference to either condition in any of the labeling of Nutrilite.

Mr. KLEINFELD (to the witness): Go ahead.

THE WITNESS: He could sustain permanent and probably fatal injuries resulting from postponing treatment. Especially since cancer of the throat is a thing which has to metastasize only a very short distance before it becomes inoperable.

By Mr. Kleinfeld:

Q. Doctor, supposing a person were suffering from loss of weight and persistent coughing, might those symptoms indicate that the person was suffering from tuberculosis?

Mr. RHYNE: I object on the same ground, there is no reference to that in the labeling of Nutrilite in any place or in the Doctor's finding.

Mr. KLEINFELD: The Doctor's finding mentions tuberculosis.

(To the witness): Go ahead, Doctor.

THE WITNESS: Tuberculosis is a condition which comes on very insidiously and which might be characterized by some of the symptoms mentioned in the finding of fact, such as fatigue, easy fatigue, loss of appetite, insomnia, and which would specifically be
2250 characterized by hoarseness if he had laryngeal tuberculosis. Any other place he could have general systemic conditions which would resemble many of the conditions mentioned in the finding of fact.

By Mr. Kleinfeld:

Q. What effect on such a person and on such a person's health would be the advice to remain away from a doctor for months?

Mr. RHYNE: I object on the ground that there is no such advice contained in the labeling of Nutrilite.

Mr. KLEINFELD (to the witness): Go ahead.

THE WITNESS: If a person would stay away from adequate medical care, he might recover from tuberculosis on his own, but the probabilities are very, very seriously against that, and the probabilities are that the condition would progress to the place where he would no longer be able to be reached and given medical care in such a way as to cure him of tuberculosis.

By Mr. Kleinfeld:

Q. If such a person had tuberculosis, would you say, as is stated on page 21, of this pamphlet, "How to get well and stay well," and I quote:

"First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical
2251 rebuilding through food and the Nutrilite since the ailment has likely been plaguing the person for considerable time and the sufferer is still alive, a few months devoted to rebuilding the body can hardly make things worse."

Do you believe that a few months devoted to rebuilding the body through the consumption of a product like Nutrilite and keeping away from competent medical advice would hardly make things worse?

Mr. RHYNE: I object to the question on the ground he hasn't read the entire statement, particularly the next statement which is:

"Second, if the ailment is acute, in addition to the physical rebuilding through food and Nutrilite, medical aid is solicited."

Mr. KLEINFELD (to the witness): Please answer my question.

THE WITNESS: In case that an individual would postpone treatment for tuberculosis, the probabilities are that they would get progressively worse and would probably get beyond the stage where any treatment would be of any use to them. This also applies to other things which you don't recognize at the time and which you can sustain irreparable damages, such as diabetes. I think it mentions just chronic diseases.

2252 Mr. KLEINFELD: I was asking about tuberculosis.

THE WITNESS: Tuberculosis could progress to a state where he could sustain no benefit even from medical care if it isn't taken

care of early. Those few cases which have gotten better by themselves represent a small proportion.

By Mr. Kleinfeld:

Q. If a person was suffering from diabetes and didn't know it, had the symptoms which came from diabetes, and devoted himself to the consumption of a product containing the elements in Nutrilite, devoted a few months to such consumption rather than going to a physician, would you say that would hardly make things worse?

Mr. RHYNE: I object on the ground there is no statement contained in the labeling of Nutrilite.

THE WITNESS: Diabetes is a disease in which vascular changes occur if it isn't controlled. These vascular changes can only become worse if the disease is not controlled. An attempt at substitution therapy such a Nutrilite would permit prolongation of the serious secondary effects of diabetes.

By Mr. Kleinfeld:

Q. Might such advice to a person who had diabetes result in his death?

2253 A. It might hasten his death.

Q. Doctor, on September 30, 1948, did you sign a finding of fact that it is the concensus of informed medical opinion that a product consisting of the elements and substances contained in Nutrilite would not be effective in the treatment of all deficiency diseases?

A. I did.

Q. It was your view on September 30, 1948, that it was then the concensus of informed medical opinion that such a product would not be effective in the treatment of all deficiency diseases?

A. It would not be effective in the treatment of all deficiency diseases. Deficiency diseases are protein deficiency diseases, which wouldn't have anything to do with vitamin deficiency diseases.

Further examination by counsel for plaintiff:

By Mr. Rhyne:

Q. Doctor, when you say in your opinion of December 9 that it is the concensus of informed medical opinion that most common diseases do not result from dietary deficiencies, you don't mean to imply, do you, that deficiency diseases could not come from a lack of vitamins and minerals, do you?

2254 A. Deficiency diseases that are vitamin deficiency diseases would come from a lack of vitamins.

Q. And you don't include those within the term "common diseases"?

A. I don't include those within the term "common diseases," because vitamin deficiency diseases are not common.

Q. Now, when you say that the contents of Nutrilite would not be effective in all deficiency diseases, you didn't mean to imply, did you, that it would not be effective in the treatment of some of the ones?

A. No. Nutrilite would be effective in the treatment of certain deficiency diseases if the deficiency diseases were definitely known to exist, and a sufficient dosage was given to treat the disease.

Q. When you term "all deficiency diseases," you were thinking of the broad picture rather than specifically deficiency diseases for which Nutrilite might be of aid?

A. That is true. Nutrilite may be of aid in those deficiency diseases in which it was definitely established that the vitamin for which Nutrilite, the vitamin deficiency had been given, had the vitamin in a sufficient quantity.

Q. Now, in your questions from Mr. Kleinfeld you had quite a discussion of tuberculosis. I believe in your earlier testimony
2255 you did indicate that vitamins and minerals could be of aid as an adjunct.

A. That is true.

Q. So therefore the multiple vitamin makeup of Nutrilite could be a valuable adjunct in the treatment of tuberculosis?

A. It could be.

Q. Now, when you were discussing hemorrhage connected with the menopause, your objection to the statement is that it is too broad rather than the fact that the vitamins and minerals contained in Nutrilite couldn't have been of some assistance, isn't that true?

A. The bleeding of menopause would only be due to a vitamin deficiency very, very rarely, in which probably the deficiency would probably be a vitamin C deficiency.

Q. I mean, it is possible that there are instances if there was a vitamin C deficiency and Nutrilite supplied it, it could be of assistance?

A. It could be of assistance. That possibility, as I indicated, I would consider very rare.

Q. In your statements about mental diseases, again, I take it that your finding of fact stated on the over-all picture rather than the fact that in some instances vitamins and minerals such as those contained in Nutrilite can assist people with mental disturbances—isn't that true?

2256 A. Mental disturbances are so rarely due to vitamin deficiency that except in conditions like pellagra in which you

have definite indication of vitamin deficiency, it is characterized by mental symptoms, the vitamins would be valueless.

Q. But if you did have the symptoms, of which you speak, why, vitamins such as Nutrilite could be of assistance?

A. In case your emotional instability, mental difficulty, would be due to a vitamin deficiency, then Nutrilite could be provided for that function. As I indicated before, that is very rare.

Q. Without going through each one of these conditions here, Doctor, I take it that your finding of fact is based upon the broad fact, say, all people included within the group of low vitality rather than upon the idea that specific vitamins and minerals could be of aid in curing a specific deficiency related to that—isn't that true?

A. That is true.

Mr. RHYNE: That is all.

Further examination by counsel for defendants:

By Mr. Kleinfeld:

Q. I understand, Dr. Butz, that you have said to Mr. Rhyne that if a person is suffering from a disease such as a
2257 deficiency disease caused by an insufficient intake of vitamins, then a product like Nutrilite might be of help?

A. That is true.

Q. Then if this same person is suffering from one of the diseases mentioned in your finding of fact dated September 30, 1948, such as sinus trouble, which is not caused by an insufficient intake of vitamins and minerals as contained in Nutrilite, would that person be helped by a consumption of Nutrilite?

A. He would not. Most of the sinusitis of that type are due to an anatomical configuration that don't lend themselves readily to draining.

Mr. KLEINFELD: That is all.

Mr. RHYNE: That is all.

Mr. KLEINFELD: Counsel for the defendants want to state for the record that they are offering Mr. Rhyne for his observation and information a letter dated October 16, 1948, from the American Medical Association to Dr. E. M. Nelson, Food and Drug Administration, Washington, D. C., and a copy of a reply dated November 10, 1948, from Dr. Nelson to Mr. Oliver F. Field of the American Medical Association.

2258 I have read the foregoing 84 pages, which contain a correct transcript of my answers to the questions therein recorded.

.....

CERTIFICATE OF NOTARY PUBLIC

I, August Wolff, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

.....

Notary Public in and for the
District of Columbia

My commission expires Feb. 1, 1952.

2259 DEFENDANT'S EXHIBIT 15

FEDERAL SECURITY AGENCY

OFFICE OF THE ADMINISTRATOR

CERTIFICATE

October 10, 1949

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code (55 Stat. 184), I hereby certify that the attached

Copy of Finding of Fact to support multiple seizures of the drug "Nutrilite Food Supplement", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated December 2, 1948 and the Conclusion signed by Geo. P. Larrick, Associate Commissioner of Food and Drugs, dated December 2, 1948,

are true copies of official documents on file in the Food and Drug Administration of the Federal Security Agency and are part of the official records of said Administration and Agency.

In witness whereof, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

L. T. O. A'Hearn,
Acting Executive Assistant (Seal)

2260 FEDERAL SECURITY AGENCY

FOOD AND DRUG ADMINISTRATION

Washington 25, D. C.

5-610 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U.S.P. units.
Vitamin B_6, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams.

would not be effective in the treatment of the conditions mentioned directly or by implication in the statements quoted in Exhibit "A" attached.

/s/ Robert C. Butz, M. D., Medical Officer
Food and Drug Administration

December 2, 1948

2261 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an

employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe, and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

/s/ Geo. P. Larrick
Associate Commissioner
of Food and Drugs

For the Administrator, December 2, 1948.

2262 EXHIBIT "A"

(Quoted from booklet entitled "How to Get Well and Stay Well")

How to get well and stay well.

If your health problem is the result of dietary deficiencies, and if you want to get well and stay well, be sure to read this book. Even if you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. If your health is good read this book and learn how to stay well.

Published by Mytinger & Casselberry, Inc. Wholesale Distributors Nutrilite Products * * *

* * * What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

* * *

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. * * *

Are you a victim?

Are you suffering from hidden hunger?

Are you slowly starving to death?

* * *

* * * Just look around you at the members of your family, at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are *you* enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who *should* be having physical help of some kind, but who are not receiving it. And finally think of

people you know, your age and younger, who have *died* in the last year, prematurely.

* * *

* * * The healthy individual *feels* good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry; he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

* * * The healthy person * * * is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties * * *

Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do *you?* Don't you think the facts point to the need for *something?*.

2263 What good health means to your body.

Having seen what good health means to *you*, let's see what good health means to *your body*.

All your senses—sight, taste, touch, hearing, and sense of smell operate *in* your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation, and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought process (confused thinking).

* * * When you heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

* * * when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

* * * Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown or invalidism? Any weakness or incapacity?

Nobody *wants* to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

* * *

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature—and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly; they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn with
2264 greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

* * *

* * * if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

Some obvious conclusions.

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost *everyone* is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And *it hurts!*

Obviously it is better to *keep* your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this—let us tell you a story.

* * *

Carl Rehnborg * * *

* * * went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born and opened a tiny nursery. * * *

* * *

* * * he was convinced that the vitamins, the various minerals, and certain other essential diet factors * * * were present in many raw foods. * * *

* * *

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants—scrubbed them thoroughly to rid them of all foreign matter, then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

* * *

* * * he grew his own green plants * * *

And when his plants were harvested, processed, and added to the diet of the babies in his clinic, not one failed to respond as expected!

* * * he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

* * * he still further perfected this food supplement by his own elaborate and ingenious extraction processes, discarding the non-essential cellulose and other parts of the plants, so that much value could be concentrated in small volume * * *

* * *

2265. When Mr. Rehnborn returned to the United States * * * he began a * * * period of intensive study and experimentation, to improve his food supplement. At last, * * * when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it, * * * This all led to further development and improvement and the creation of the present amazing food supplement * * *

* * *

* * * almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

* * *

So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, you must put into your body all the food factors required by it.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty.

* * *

* * * give a little thought to what you put into the bodies of your wife or husband—into the bodies of your children—into your *own* body?

And remember your reward—a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them. * * * Remember this . . . the American diet is deficient in protective food factors.

* * *

* * * the protective food factors—those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, *nutrilites*. That's a technical word you won't find in your dictionary, but it means all the little food factors—not the fats, minerals, carbohydrates, and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

* * *

* * * no one knows how many vitamins there are. * * * the nutrilites * * * are all the little vital food factors, including the familiar vitamins. * * * if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but *all the nutrilites*.

* * *

* * * Diet deficiencies bring on old age. * * *

* * * diet deficiencies bring on aches and pains. * * * Most of our common diseases, with the exception of germ diseases, but in-

cluding some of the most painful, the most common causes of death from illness * * * and many which are considered incurable, are the result of dietary deficiencies.

2266 * * * simply through changes in diet, you can * * * bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or, when the person is deficient, *feed* him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must contain all the vitamins * * * together with all the nutrilites and minerals so often lacking in our diet.

1225

DEFENDENT'S EXHIBIT 17

Georgiana Adams

THE PENNSYLVANIA STATE COLLEGE BULLETIN

Poor Copy - no better available

A Contribution to the Study of Nutritional Status in Rural and Urban Populations

JAN 1 1936
Isabel M. Bell, Clerk

Ellen H. Richards Institute
Research Series, Publication Number 2

Parts I and II, in collaboration with the Department of Health, Commonwealth of Pennsylvania

Part II, in collaboration with the Department of Pediatrics, School of Medicine, University of Pennsylvania and the Children's Hospital of Philadelphia

2267-2271

A CONTRIBUTION TO THE STUDY OF NUTRITIONAL STATUS IN RURAL AND URBAN POPULATIONS

PREFACE

The exigencies of war have imposed the necessity of conserving all national resources, human and material, for civilians as well as armed forces. This has attracted unusual attention to the nutritional state of the population as a whole, because physical stamina must be at a peak if a nation at war is to carry on the conflict and produce the materials of war with the highest efficiency, without exacting a heavy toll on the well-being of the people individually. Moreover, those not actually engaged in the conflict on the field of battle or on the production front require a state of nutritional well-being of the highest order, since the pressures of the times in terms of war and rationing are uncommonly heavy.

In war much more than in peace, an inventory of the status of nutritional welfare of a people becomes as much a matter of good judgment as a catalogue of the national resources of a material nature, or more so.

Unfortunately, a census of the nutritional state of all American people has never been compiled, chiefly because objective criteria for judging the manifold evidences of good or bad nutrition are of recent origin, as yet unstandardized in the main. Most of the surveys in the past on malnutrition—a term which means imperfect nutrition, whether it be general undernutrition or poor balance of nutrients—have been based upon diet records solely. These have had the advantages of making it possible to include large segments of the population in a single study, and of allowing the apparent extent of dietary inadequacies to be ascertained from the amounts of foods and nutrients recorded as consumed.

The food record study, however, unless accompanied by nutrition measurements of the persons themselves, does not estimate the extent of malnutrition, because such calculations to date have been based entirely or in considerable part upon the nutrient content of raw foods as obtained from tables of averages, which are higher in nutrient content in many respects than the same foods after storage, shipping, processing, or cooking. Not until now are widespread studies in progress throughout the country on the effect of such processes upon the nutritive value of many kinds of foods. Moreover, methods of analysis of foods for some of the vitamins are of recent origin and have not yet been applied to a considerable number of foods. In addition, people are not uniform in their utilization of foods, and hence food records, even if they were meticulously accurate with

respect to nutrient content, may not be in perfect accord with the nutritional state of the persons who consume the food.

Nor are records of illness the country over, or mortality statistics—sometimes cited as proof of low or high prevalence of malnutrition—usually the former—a criterion for judging the nutritional state of a people. As Jolliffe, McLester, and Sherman (6) point out, mortality rates, as published, do not furnish a reliable index of deaths from malnutrition. Moreover, the morbidity rates for malnutrition are high in proportion to mortality; and no generally accurate morbidity rates are available because medical attention is not sought in all cases of malnutrition, even of those which would be regarded as of a gross pathological type. Moreover, none but the advanced stages of malnutrition are recognizable in the visual medical examination, even if the majority of the population were examined at reasonable intervals.

In the final analysis, nutrition tests on human beings themselves offer the only direct evidence of nutritional status. Since the tools and techniques for measuring the physical state of a human being in so far as it is related to nutrition still are confined chiefly to the research laboratory, it is necessary to study carefully the findings of all studies of this type which have been made, and to await the completion of other studies of the kind, in order to estimate the extent of undernutrition of people generally. The assessment of representative samples of the population for as many clinical and sub-clinical evidences of the nutritive state as are measurable by the techniques available at the time when the study is made, and the keeping of diet records on the basis of the weight and measure of foods actually consumed, offer the best means known at present for obtaining data on the state of nutrition of representative samples of people. The persons observed in such a study must be very carefully selected so as to be typical of the larger population which they presumably represent, because the number of subjects who may be included in a study of this type obviously is smaller than that which may be covered by food surveys, or by an examination of morbidity and mortality statistics.

The type of inquiry under discussion, where nutritional state and food consumption are recorded concurrently for representative people, still is rightfully called a *mass study*. This is true even though the number of cases observed can not approach that in the survey types of investigation just discussed, because of the far greater requirements in facilities and personnel for the more intensive studies. The mass nutrition studies, on the other hand, deal with considerably larger numbers of people than do the still more intensive nutrition studies, in which a few subjects are observed for a considerable

length of time, with periodic re-examinations, and usually with some altered dietary or other regimen related to nutrition.

The so-called mass studies in human nutrition, which are of relatively recent introduction, involve a careful recording of the dietary intake of representative people in many walks of life (still calculated for nutrient content from the best tables of averages, because facilities for analyzing samples of each meal over a period of at least a week for a considerable number of people is impracticable at present), and the concurrent measurement of these same people for their responses to certain nutritional tests. The tests used as evidences of undernutrition can be classified broadly in three groups:

The first group includes tests of long standing and unquestioned value, such as the medical examination, the dental examination, body build measurements, and tests for hemoglobin, red cell count, and red cell volume.

The second group includes those tests of which reliable techniques have been developed, but of which the interpretation of the results is still controversial. To this group belong e.g. the evaluation of the level of protein, minerals and vitamins in the blood, and the measurement of the amount of minerals in bones from X-rays. This group includes also the evaluation of the concentration of certain nutrients in certain body cells, such as the measurement of the content of ascorbic acid in leucocytes (white blood cells) and platelets or the evaluation of the content of total thiamin in leucocytes and platelets. To the same group belong also the various "saturation" tests, such as the evaluation of the amount of thiamin excreted in the urine after a single dose of thiamin has been given orally or parenterally.

The third group includes those tests which appear to be associated with one or more aspects of undernutrition, but about which not only agreement in regard to the technique itself has still to be reached, but about which the definite connection with the nutritional status has yet to be established. To this group belong e.g. the comparison of skeletal X-rays with maturity standards, measurements of dark adaptation, and examination of certain tissues of the body with the biomicroscope.

In evaluating the results of a mass nutrition study, the line of division between those adjudged to be well-nourished and those regarded as malnourished is arbitrary. This line may be placed between those whose deficiencies have reached the stage where they may be detected by clinical examination, and all other people; or it may be allowed to fall between those regarded as optimum in nutritional state and other members of the population. In the Pennsylvania mass nutrition studies, the only persons accepted as being in an optimum group as regards nutritional well-being are those

whose physical state could not be improved further by improvements in nutrient intake, in so far as present knowledge of the subject is concerned.

In the Pennsylvania studies, a total of 2511 subjects was tested between 1935 and the early part of 1941, and 1362 more subjects were examined during the next few months. In addition, certain smaller groups were given special dietary tests for a period of time. This report therefore will be divided into two parts: in Part I, the findings on the first 2511 subjects will be summarized; and in Part II* those on the second group of 1362 will be presented. In the second part of the presentation the number of tests made was considerably extended.

PART I

Resumé of Pennsylvania Human Nutrition Studies from 1935 to 1941

CONTENTS

Introduction

Subjects of the Study

Methods of Evaluating Nutritional Status Employed in This Report

- **Dietary Records**
- **Tests for Nutritional Status**
  - Medical Examination
  - Dental Examination for Caries
  - Hemoglobin Analyses
  - Red Cell Counts
  - Blood Ascorbic Acid
  - Body Build Measurements
  - Skeletal Maturity
  - Skeletal Mineralization
  - Plantar Contact
  - Dark Adaptation
  - Capillary Wall Strength (in early experiments)

Findings

- **On Family Groups**
  - Economic Status
  - Comparison of Rural and Urban Families
  - Results of the Respective Tests
- **On the Child Groups**
  - Economic Status
  - Results of the Respective Tests

Summary

* With the collaboration of the Department of Pediatrics, School of Medicine University of Pennsylvania, and the Children's Hospital of Philadelphia. This part of the study was under the sponsorship of the Philadelphia Child Health Society.

Introduction

Several investigations were carried on from the early 'twenties until about 1935 involving a study of food habits and physical condition of people as shown chiefly by medical and dental examinations. Examples may be found in published works of Roberts (16) in Kentucky in 1922, of Reynolds (15) in Virginia in 1926, of Davies (4) in Massachusetts in 1928, of Ahmann and Abbott and their collaborators (1) in Florida in 1930, of Frayser and Moser (5) in South Carolina in 1930, of Morey (13) in New York in 1933, of Brown (2) in Utah in 1934, and of Clayton (3) in Maine in 1940. During this period a few somewhat more objective tests were applied to human beings in various localities. These studies were made primarily for the purpose of developing methods of supplementing the physical examination, which, without special equipment, is inclined to be subjective.

Beginning in 1935, a somewhat new approach to the problem of food consumption and consequent nutritional status was made when The Pennsylvania State College began a large-scale mass study on human beings in all socio-economic levels in many representative communities, using a considerable number of objective laboratory tests. Three other nutrition studies of the newer mass type were begun some time thereafter: (a) in New York City, in 1937, in which the United States Public Health Service, the Milbank Memorial Fund, and other co-operating agencies combined to study school children and others in New York City; (b) in Vanderbilt University, about 1938, where the School of Medicine with the aid of the Rockefeller Foundation began the study of a predominantly rural area in Tennessee; and (c) in North Carolina about 1939, by the State Health Department, the Medical School of Duke University, and the Rockefeller Foundation.

From all of these studies, incomplete as they must have been because of a lack of many objective criteria, the conclusion is unquestionable that a large part of the population is undernourished with respect to a considerable number of essential nutrients. In the Tennessee study, for example, 90 per cent. of the population examined up to April, 1939 (512 persons from 129 families), were found to be low in the total energy content of the diet; about 81 per cent. were low in a photometric test designed to measure night blindness—an indication of whether sufficient vitamin A and other nutrients are included in the dietary; about 44 per cent. were either border-line or definitely subnormal in vitamin C status; about 20 per cent. were deficient in protein; a total of 26 per cent. had lower hemoglobin (red coloring matter in the blood) than is deemed desirable, and 44 per cent. had lower red cell counts than the currently accepted minimum standards for a comparable sex and age group, as suggested by Youmans (18).

SUBJECTS OF THE STUDY

In the Pennsylvania mass studies in human nutrition as they were conducted from 1935 through the early part of 1941, the 2511 subjects represented the following groups: A total of 418 of these were members of 100 typical urban families of a broad range of cash income, living in towns and cities of sub-metropolitan size; 490 were members of 100 rural families likewise widely selected as to farm income, representing three major types of farm enterprise; and 1603 were school children in five communities, not members of the two groups of families previously described. The sample of school children was selected within each of the communities in such a way as to be representative of the socio-economic and racial composition of the community as a whole.

More specifically, the subjects may be grouped into the following units:

Family Unit 1. Family Unit 1 included 418 members of 100 urban sub-metropolitan families selected to represent a broad group of income. These were tested from 1935 to 1937. The vitamin A intake and dark adaptation status of these family members have been described by Mack and Sanders (9), and the full report of this unit of the study is in preparation by Sanders and Mack (17).

Family Unit 2.* This includes 490 members of 100 rural families chosen to represent three kinds of farm enterprise—fruit growing, dairy farming combined with general agriculture, and general farming. In each of the three localities, which were typical of these three major types of agricultural enterprise, the families were selected so as to represent as broad a distribution of farm incomes as was characteristic of the communities in which the selections were made. These families were examined from 1937 to 1940.

Child Unit 1. The first child unit in the study embraced the 128 children of grade-school age in Family Unit 1. They have been analyzed as a separate group, as well as with the other members of their families, for comparison with other grade-school children in the study, the rest of whose families was not included. These children have been counted but once in the total of 2511 persons in this part of the report.

Child Unit 2. In Unit 2 among the child groups, 428 children were chiefly from families of industrial workers; only about three per cent. of the families in this city of 82,000 inhabitants had family incomes of more than $2500. At the time of the study in this community, 1936-1937, there was a depression in the chief industry around which the town was built—railroad shops. These children have been reported in detail by Zayaz, Mack, Sprague, and Bauman (19).

* Reported Milbank Memorial Fund, Eighteenth Annual Meeting, April 2, 1940, and published in proceedings of that meeting.

Child Unit 3. This unit was selected in a community in which a college constituted the chief center of activity. The sample included the entire fifth grade of the public school and some of the grade-school children in a college demonstration school during the year when the measurements were made (1937-1938). The children attending the public school came chiefly from families whose fathers were college teachers or research workers, or who were connected with the college in some manner, or who operated stores or boarding houses in the town. Although there were no families in the town with extremely high incomes, on the other hand few families were on relief. The average family educational score of the children in this group was higher than that of any other group in the Pennsylvania mass studies throughout the period covered by this report. The nutritional state of the children in this unit has been described by Mack, Smith, Logan, O'Brien, Stewart and Dodds (12). These included 147 children.

Child Unit 4. In Unit 4 of the child study, the chief community industry was anthracite coal mining. Most of the people in the community had medium incomes, but some incomes were quite high and some quite low. The people in this community likewise represented a broad range of racial and national backgrounds. The population from which the sample of children was drawn numbered 25,000. These children, 813 in number, were studied from 1937 to 1940.

Child Unit 5. In Unit 5 of the child study, the children from Family Unit 2 whose parents were engaged in fruit-growing (34 children of grade-school age) were combined with 27 other rural children from families of similar farm enterprise, in order to compare the growing children from horticulturists' families with those of other rural families, and with different communities of urban children. The children of this unit who were members of some of the families in Family Unit 2 were counted but once in compiling the total number of subjects upon which this part of the report is based.

Child Unit 6. The subjects in Child Unit 6 were the 84 children of grade-school age in the rural families engaged in dairy combined with general farming in Family Unit 2. The land in the community from which this sample was taken was especially rich, and the farms generally had an air of prosperity. As stated, the selection in this community represented the general income range of the region as a whole.

Child Unit 7. The children of Unit 7 were the 50 grade-school-age members of families already described as representing a general farming community. The locality where the sample was taken was an agricultural region where farms were not so prosperous as in Unit 6; general farming on soil of medium to low fertility constituted the chief family occupation.

Those in Units 6 and 7, who were included also in Family Unit 2, came but once in the total count of subjects in this part of the report.

Child Unit 8. The children of Child Unit 8 were not included in the family study. They were 77 in number, and they came from families who were running the crossroads grocery store, helping on farms in the neighborhood, operating or working on small general farms, running a gasoline filling station, or engaging in other miscellaneous occupations in a small rural village and its adjacent countryside. The children were in attendance in the intermediate grades of a consolidated and two nearby one-room rural schools. These children were tested in 1938.

Child Unit 9. In Child Unit 9, the children came from three neighboring one-room schools, in a region of very poor farm land. About one-third of the children in this group were members of poor families living outside of the limits of the nearest town, because of cheaper rent, and were not engaged in agricultural pursuits at all; in fact many were on direct governmental relief. Nevertheless, they went to the rural schools because they did not have the tuition needed for attendance in the town school. None of these children, whether from farms or from the out-of-town poor suburb already described, was in the highest income group of this study. In fact, 73.4 per cent. of them had family incomes below $1000 a year. This unit of the child nutrition study, composed of 111 children, was tested in 1941.

METHODS OF THE TESTS

Dietary Records—In all units of the work, dietary records were supervised by staff members with the assistance of visiting registered nurses, and the nutritional tests were applied during or near the close of the diet-recording period. The methods of diet record-keeping and of measuring nutritional status were those described by Mack and Smith (10).

Tests for Nutritional Status—The following nutrition tests were made on the two family groups:

Accepted Techniques

Medical examination.
Dental examination for caries.
Amount of hemoglobin in the blood.
Red-cell count (beginning in 1937).
Body build measurements.

Accepted Techniques, But Interpretation of Findings Still Controversial

Blood ascorbic acid (beginning in 1939-1940).
Skeletal mineralization.



Figure 1.—In the Pennsylvania studies, a photoelectric microphotometer makes photographic tracings through certain paths in an X-ray (as for example in the path designated in these large heel bones—calcanea), in order to determine the amount of mineral in bones. The tracings may be measured to obtain an accurate value for the amount of mineral in the skeletal area traced.

(A) Direction of microphotometric tracing through the Roentgenogram of the calcaneum of a small child.

(B) Direction of tracing of an adult X-ray film.

Techniques of Which the Connection With Nutritional Status Is Still Controversial

Skeletal maturity (for children only).
Plantar contact.
Dark adaptation.
Capillary wall strength (now obsolete; gave promise of value in nutrition studies before more objective methods were introduced).

Advice of the family physician was taken on medical history, if the family had a physician. Otherwise this was obtained as accurately as possible from the family itself.

The same group of tests has been employed in the child nutrition studies and, in addition, a physical examination by a pediatrician has been made, with a nutritional status score assigned according to a grading plan. A thorough dental examination likewise has been made in the latter series of studies, with a score given on the basis of the prevalence of dental caries. In this test, a perfect score was assigned in cases where no caries was found either by a clinical examination or from a study of dental X-rays. Another arbitrary score was assigned on the basis of the condition of the gums; and a test for the solubilizing effect of fresh saliva on dental enamel ground finely was made on some of the subjects.

Subjects who were known to have a chronic or temporary illness which might interfere with the nutrition tests were not included in the study. Funds were inadequate for medical examinations of the two family units. In Community 2 of the child-nutrition study, each child was given an examination by the school physician, and in the other communities by a pediatrician associated with the study, in order to exclude those whose responses to the nutrition tests might be affected by conditions other than dietary intake, and in order to find clinical evidences of nutritional state.

The methods of making the nutrition tests as applied in this early part of the study have been described in detail by Mack and Smith, in *Methods of Conducting Mass Studies in Human Nutrition*, 1939 edition (10).

The arbitrary classes assigned on the basis of the response to some of the tests have been described by Lowther, Mack, Logan, O'Brien, Smith, Sprague, Shaw, and Dodds (8). Class 1, or the optimum class for the respective tests, includes a range of responses to this test believed by the authors to be achievable by subjects with good dietary histories.

From data of these two basic studies on the 2511 persons mentioned, various comparisons may be made, which indicate trends in nutritional status in different groups of the populations in the study.

FINDINGS OF THE STUDY
FAMILY GROUPS

The results of the analyses of the diet records and of the nutrition tests for the 100 urban and the 100 rural families mentioned in this report will be given in detail by individual cases in forthcoming bulletins of the Ellen H. Richards Institute.

Figure 2 summarizes the nutrition status findings on the urban and rural families.

Economic Status

In Figure 2, it is seen that a broad selection both of urban and of rural children characterized the two family groups. Those marked Group A in the urban family unit had a total family cash income of $5000 a year or above. Group B had an income of $4999 to $2500; Group C from $2499 to $1000; Group D below $1000, but not on direct government relief; and Group E had incomes at least partly from relief. The incomes of the rural families, marked L, M, N, O, and P were comparable with the respective urban series in income; the income grouping in both cases were based upon cash receipts.

The families were selected on the basis of income, and, in the case of the rural groups, also as to type of farm enterprise. Education of the adult family members was not a selection criterion. It is interesting, therefore, to note how the families grouped themselves on this factor. Whereas all adults in 20.1 per cent. of the urban families were college graduates, only 3.3 per cent. of the rural families ranked this high educationally. Considerably more of the rural families, however, were in the second educational group, in which at least one member was a college graduate, with slightly larger percentages in the third and fourth groups (all adults high school graduates, and at least one adult a high school graduate, respectively). The urban exceeded the rural, on the other hand, in the percentage of families in which no member was a high school graduate—53.4 as compared with 30.1 per cent. for the rural families.

Weight Status

In contrast with the urban group, the subjects in the rural unit had fewer cases of underweight, although the mean difference was not highly significant. The Pryor (14) standards, based on sex, age, height, and iliac width, were used for subjects up to 24 years of age, and the medico-actuarial standards for those above that age. The percentages of subjects of the correct weight, according to the standards, were very similar in the two groups—60.0 and 64.0 per cent., respectively, with the percentage of overweight slightly higher for the rural family members.

Skeletal State

The growing children in the rural families were slightly poorer

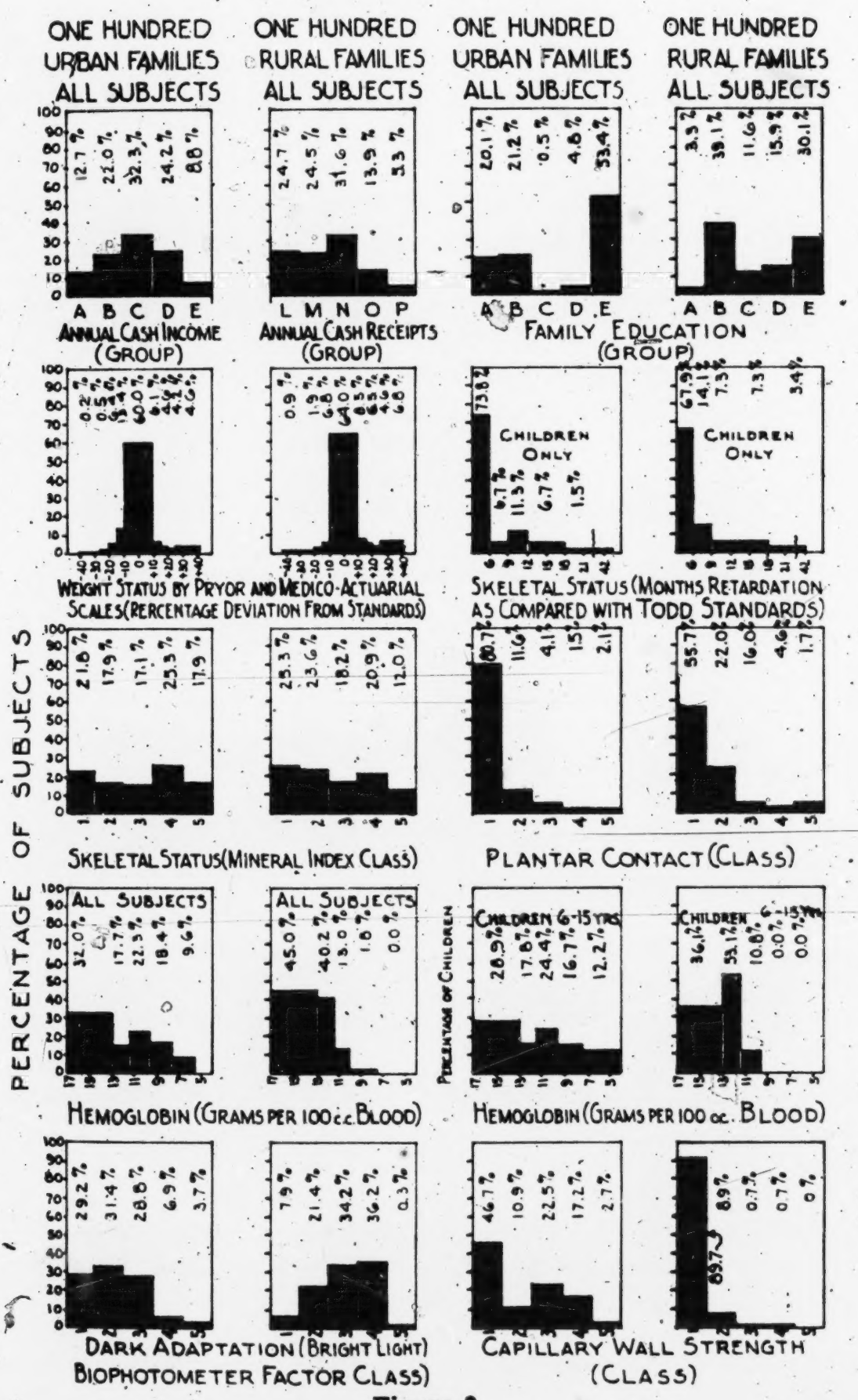


Figure 2

Comparison of Income, Education, and Nutrition Status Findings of Urban and Rural Families.

(Note: The plantar contact and capillary wall strength tests, used in Part I of this study, have been omitted in Part II.)

than the urban children according to the test used for skeletal maturity, which is valuable for comparative purposes only, although the measured degree of skeletal mineralization was slightly better for the former group. The differences between the two groups in these two respects, however, were not notable.

Plantar Contact

A higher percentage of urban family members (80.7 per cent.) than of rural (55.7 per cent.) had excellent arches of the feet, as shown by the ratio of the sitting to the standing plantar contact — a factor which may have some relationship to nutritional state, although no interpretation of the plantar contact findings is attempted.

Hemoglobin Values

When all family members for the two units were grouped together, 45.0 per cent. of the rural in comparison with 32.0 per cent. of the urban had hemoglobin values of 13.0 grams per 100 c.c. of blood, and over. This favorable difference in behalf of the rural families was further substantiated by the fact that no rural subject had a hemoglobin concentration below 7.5 grams per 100 c.c. of blood, whereas 9.6 per cent. of the urban family members were in this low category. When the children of grade-school age were separated from the rest of the family, the hemoglobin values were seen to be distinctly higher for the rural than for the urban children. A comparison of the hemoglobin values for these two groups of families has been given in detail by Mack, Smith, Logan, O'Brien, Shaw, and Dodds (11).

Red Cell Counts

Red cell counts were made on the blood of the rural family members only, with 41.24 per cent. having 4.76 million per 100 c. mm. and over; 19.02 per cent. from 4.75 to 4.51; 19.87 from 4.50 to 4.26; 11.11 per cent. from 4.25 to 4.01; and 8.76 per cent. having 4.00 and below.

Dark Adaptation

Much controversy exists as to the proper interpretation of findings with the dark adaptation test. In the Pennsylvania mass studies, the biophotometric test has been given in a highly standardized manner, and the instruments used have been calibrated with great care, at frequent intervals by optical engineers. If the vitamin A in the diet is at least one of the factors operative in determining dark adaptation, it is interesting to consider why the responses to this test by the rural subjects were generally poorer than those of the urban subjects.

Although the diets of the rural people were not so good in vitamin A content as would be expected, their responses to this test were poorer on a dietary intake basis than was the case with the urban groups of families. It is possible that their greater length of time

in the sun may have made greater demands upon their vitamin A reserves, because of the more extensive bleaching of visual purple—the phototropic substance in the retina of the eye which depends for its manufacture upon the intake of vitamin A. It is possible, also, that other factors in the dietary may have been inadequate to the extent that they interfered with dark adaptation. See Part II.

Capillary Wall Strength Not a Specific Test

It has long been known that capillary wall strength was not a specific test for undernutrition with respect to vitamin C or any other single nutrient. In fact, when these studies had been in progress only a short time, in 1935, it was concluded from observations in this laboratory, as well as from those of other investigators, that low response to this test was associated with multiple deficiencies rather than with a shortage of any one nutrient factor. The test was continued in this laboratory until 1941, however, in order to ascertain what interrelationships between response to this test and diet might exist. These results are soon to be published.

In the two family groups under discussion, it is striking to note the high capillary wall strength values of the rural family members, with the urban group falling somewhat lower in this respect. The values for the five respective groups in this case are the following: Class 1, no capillary break up to 60 cm. of negative pressure with the Dalldorf resistometer; Classes 2 to 5, breaks of greater intensity according to the definitions of Logan (7) at progressively lower negative pressures.

General

Among the rural families of the three localities included in the first 100-family rural unit, those in the generally less prosperous farming community were not so high in their classification in some of the tests as were those in the locality where dairy farming coupled with general farming was conducted with relatively high annual farm cash incomes. In other tests, there were no significant differences between the two. With only a few exceptions, the responses to the nutrition tests of families in the fruit-growing region were little different from those of comparable socio-economic status in the urban centers.

Comparison of Diets

Detailed analyses of the diets of the two groups of families will be given in forthcoming publications, as has been stated. Some of the outstanding results of the nutrition tests, however, will be related to diets very briefly in this report.

The relatively higher hemoglobin content of the blood of members of the rural families, particularly of young children, may be explained by higher consumption of iron and protein containing foods, espe-

cially a higher intake of meat. A tendency for children to begin at an early age to simulate the diets of older members of the family undoubtedly resulted in their higher status with respect to this factor.

A smaller utilization of milk and eggs, and in some cases even of some types of vegetables by many of the rural families, than would have been anticipated may have been associated with a low average response to the dark adaptation test. Moreover, there was a definite indication in the study that more vitamin A was needed by some of the rural people than by urban people, since responses to the dark adaptation test were not so good on the average by rural as by urban people of similar vitamin A intakes. This might have resulted from the greater exposure to sunlight of the rural subject, as has been noted.

The fact that skeletal status was no higher on the average in the rural than in the urban subjects appears to be related to the fact that the total amounts of the various nutrients were no higher in the main for the rural than for the urban families. This was related at least in part to the tendency for some rural children to imitate their elders in their food consumption habits, which, in the case of meat, resulted in increased consumption at an early age and consequent higher hemoglobin status; but in the case of milk, the consumption by many rural children was smaller than is desirable. This probably accounts, at least to some degree, for the fact that skeletal status in rural was no higher than in urban children.

CHILD GROUPS

The findings with respect to the nine groups of grade-school children are presented very succinctly in Figure 3. The different results may be summarized briefly as follows:

Family Income

In Figure 3, the incomes marked 1, 2, 3, 4, and 5 refer to the groups already described, in the same descending order as in the family units, in which letter rather than numerical designations were used.

In Child Unit 1, composed of the children of grade-school age in Family Group 1, a somewhat normal distribution with respect to cash income is seen. This is reasonable since the group of urban families from which these children came was chosen to represent a broad range of incomes. In the case of all of the other child units, the children were selected to represent a certain community, and hence the incomes characteristic of the community are found.

In Child Unit 2, a small industrial city of long-time depression, few incomes above $5000 a year were represented, with the greater number of incomes—as in that community as a whole—falling between $2500 and $1000, and below $1000 a year.

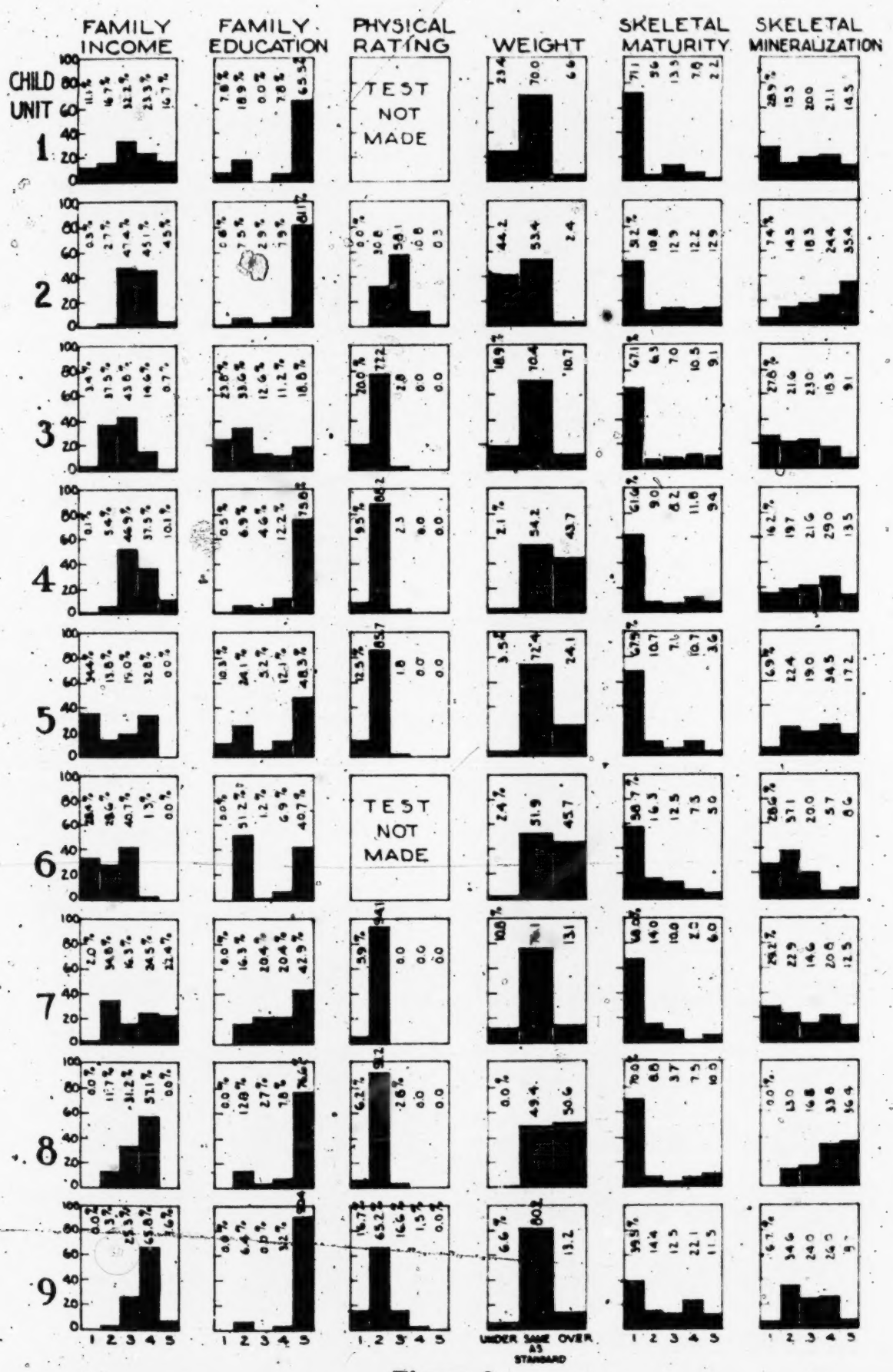


Figure 3

Distribution of the nine groups of grade-school children as to socio-economic status, physical rating by a pediatrician, weight, and skeletal status. See pages 17 and 18 for explanation of reason for such tests as plantar contact and capillary wall strength.

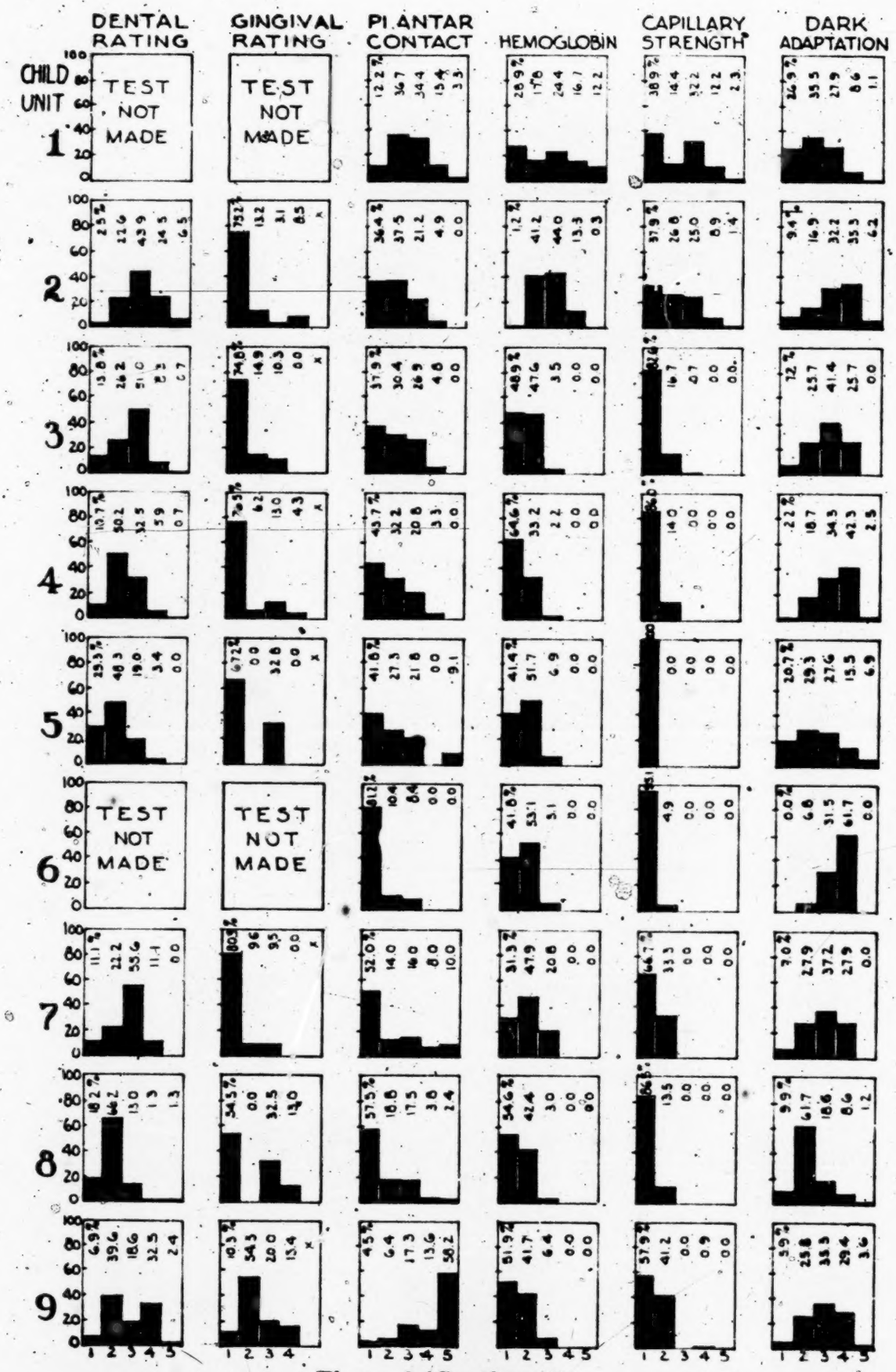


Figure 3 (Continued)

Distribution of the nine groups of grade-school children as to dental, gingival (gum), plantar contact, hemoglobin, capillary wall strength, and dark adaptation ratings. (Note: The plantar contact and capillary wall strength tests, used in Part I of this study, have been omitted in Part II.)

The family incomes of the children in Child Unit 3, living in the college community, were few at the two extremes, and highest in the second and third groups.

The family incomes of the children in the anthracite community (Child Unit 4) were slightly higher than those in the former industrial city (Child Unit 2), but were considerably lower than those in the college community.

The children of the horticultural farm families (Child Unit 5) and of the families engaged in dairy and general farming (Child Unit 6) were the highest in income, in general, of any of the groups.

The children belonging to the agricultural families engaged in general farming in a region in which the land was not especially good (Child Unit 7) had but a small percentage in the highest income group, with the rest of the cases scattered broadly through the remaining arbitrary income groups.

In Child Unit 8, selected from one consolidated and two neighboring one-room rural schools, there were no children either in the highest or the lowest income groups; the percentages in the three intermediate groups became greater as incomes declined.

In Child Unit 9, composed of children of low socio-economic status in three neighboring one-room rural schools, incomes were still further askew toward the lower side, as may be seen in the figure under discussion (Figure 3).

Family Education

Except in the cases of Child Unit 3 (college community), Child Unit 5 (children of fruit-growing families), and Child Unit 6 (children of dairy and general farmers), the percentage of families was greater in the lower groups, as based on the education of adult members, and was smaller in the higher education groups.

Rating for Nutritional Status by Medical Examination

The children ranking generally lowest in nutritional status as rated by an examining physician were those in the groups of lowest socio-economic status, as may be seen in Figure 3. It is striking, however, that such a relatively small percentage of the children was to be found in the highest arbitrary group, even in the economically more favored child units. The physical examination score is based on the general appearance of nutritional well-being, as judged by a skilled pediatrician, and is determined by such points as skeletal state, musculature, condition of the skin and of the mucous membranes, sub-cutaneous tissue, pallor, and other factors pertaining to general nutritional state which may be observed during a clinical examination. This indicates a point which is borne out in the more objective tests; namely, that children in all socio-economic groups

are below optimum, in the main, in over-all nutritional state, with the percentage of those showing undernutrition in the various respects which are now observable or measurable increasing as incomes and family educational state decrease.

Weight Status

The greatest percentage of underweight was found in Child Unit 2, with higher percentages of underweight in Units 1, 3, 7, and 9, than in 4, 5, 6, and 8. The less depressed industrial and the more prosperous rural communities, and the small rural village, therefore, had less underweight, proportionately, than the college community, the poorer general farming community, and the most depressed rural community, a goodly number of which—in the latter case—was not engaged in agriculture, but was only living outside the nearest town limits to find cheaper living quarters.

Skeletal Status

Skeletal maturity is seen to be lowest for Child Unit 9 (the lowest income rural community) and next lowest for Child Unit 2, the most depressed industrial community. The other communities were not notably different from each other in this respect. It might be noted in passing, however, that the urban child groups in areas not suffering from long-time depression (Child Units 1 and 3) were equal or superior to most of the rural groups. Skeletal maturity, as has been noted, is a comparative test only.

In skeletal mineralization, the results are different for each of the units, with Child Units 1, 3, 6, and 7 being higher than the other groups. This measurement is made by ascertaining the amount of mineral in the bones indirectly from X-rays, using a photoelectric microphotometer for making objective measurements of this factor. Although standards have not been set for the desirable amount of mineral in the bones of growing children of grade-school age, it may be assumed that children with a higher degree of mineralization are better nourished than others of a similar age group with less dense skeletal mineralization.

Dental Status

The children in Units 1 and 6 were not given a dental examination because a limited budget precluded the employment of a doctor of dental surgery at the time when these two groups were tested. With respect to the other groups, it is seen that few children were to be found in the highest arbitrary class—that in which no dental caries or only a small degree of dental caries was found.

In Child Unit 2, the most depressed industrial community, for example, only 2.5 per cent. of the children fell in this highest classification, with only two children in this community group found to be

free from dental caries altogether. These were respectively a 13-year-old boy and a 12-year-old girl.

In Child Unit 3, the college community, 13.8 per cent. of the children were rated in Class 1 in this respect, but none of the children in this class was absolutely free from dental caries.

In Child Unit 4, selected from a somewhat more prosperous industrial community, 10.7 per cent. of the children were in the highest class, with five of these children having their permanent teeth free from all evidences of present or past caries.

In Child Unit 5 (a rural unit made up of children whose parents were fruit growers), 29.3 per cent. were in the highest dental rating class, but none of the children within this class was completely free from dental caries.

In Child Unit 7, the rural group of children whose parents were general farmers, 11.1 per cent. were in Class 1 on the basis of their dental caries rating, with no children in this group completely free from caries.

In Child Unit 8, made up of children in an agricultural region attending the middle grades of a consolidated and two one-room schools, 18.2 per cent. were in Class 1 on the basis of dental status, with none of the children perfect with respect to absence of caries.

In Child Unit 9, the most depressed rural community, 6.9 per cent. of the subjects were in Class 1 on the basis of dental status, with one child only perfect with respect to absence of dental caries.

To summarize the dental status in so far as caries are concerned, eight children past the deciduous tooth stage, only, were found with teeth free from dental caries—one of the most universal nutritional disorders—a deficiency the etiology of which has not yet been fully ascertained.

With respect to the condition of the tissues of the gums, the figure under discussion will show a wide difference among the various child units. Child Unit 7, for example, had 80.9 per cent. of the children rated by the examining doctor of dental surgery as normal with respect to the absence of visible gingival lesions or inflammation. In Community 9, on the other hand, only 10.3 per cent. of the children were so rated, with the remaining groups intermediate between these extremes.

In the figure, the three classes which follow Class 1 are these: Class 2 represents slight inflammation, Class 3 somewhat more distinct inflammation, and Class 4 severe inflammation of the gingiva. The ratings were done by visual inspection and were arbitrary. Only one doctor of dental surgery made the examinations throughout the study, however, and an attempt was made by him to standardize the use of the four category definitions. These findings are based upon the

opinions of a doctor of dental surgery who examined the subjects, and hence are arbitrary, as mentioned.

Plantar Contact

It has not been established what relationship, if any, exists between flat feet in children and dietary deficiencies. It is believed by some who deal with the nutrition of children that a relationship exists between these factors, although objective data have not yet been presented to show wherein the relationship may lie. Without regard for nutrition implications, the data on plantar contact in this paper are presented in order to show the comparison between the various groups of children in this respect.

The highest rating group with respect to this factor was Child Unit 6, in which 81.2 per cent. of the children had virtually no change between the percentage of plantar contact while standing and that while sitting. The lowest group was Child Unit 9, in which only 4.5 per cent. of the children fell in this highest plantar contact classification. It is interesting to know that this lowest group was an extremely depressed economic group. This same comparison does not pertain throughout the remaining groups, since some of the high and some of the low Child Units economically are similar in this particular respect.

Hemoglobin Status

The hemoglobin values for the nine respective Child Units are interesting in that there is no apparent relationship between hemoglobin status and socio-economic status. The urban community of lowest incomes is an apparent exception in that only 1.2 per cent. of the children are in the highest arbitrary hemoglobin classification in this particular sample. Whereas, in the case of the urban and rural families, there was a distinct difference in hemoglobin status in favor of the families living on farms, that distinction does not hold throughout all of the child groups. The children in the preferred industrial community are higher than some of the rural units.

An explanation of the comparatively high percentage of children in Child Unit 9—the depressed rural group—who were in the two highest hemoglobin groups may be found in the fact that the results shown in the figure were obtained in the early fall, while gardens—which most of the families maintained—were still yielding leafy vegetables. These same children were in a longitudinal study which ran concurrently with the mass studies. In March, their percentages in the respective hemoglobin groups were as follows: Group (1) 0.9 per cent; Group (2) 7.5 per cent; Group (3) 36.4 per cent; Group (4) 55.2 per cent; and Group (5) none.

Capillary Wall Strength

The most noteworthy finding with respect to capillary wall

strength was the fact that some urban groups were distinctly lower than the rural in this respect although there were exceptions, notably the depressed rural sample—Child Unit 9.

Blood Plasma Ascorbic Acid

Child Unit 9 only received the blood plasma ascorbic acid test, with 6.45 per cent. having 50 mg. per 100 c.c. of blood and below, and 19.34 per cent. 60 mg. and below.

Dark Adaptation

The best Child Unit with respect to dark adaptation was Child Unit 1, with none of the groups particularly high in this regard.

Clinical Evidences of Undernutrition

In the early part of the study, as noted previously in this report, a medical examiner was not attached to the Pennsylvania mass studies in human nutrition because of financial limitations. Beginning in the latter part of 1936, however, a part-time pediatrician was employed, and the medical records were kept uniformly from that time on.

With respect to the children covered after that date, a brief summary of the more outstanding clinical findings in so far as they may relate to nutrition is as follows:

Ear discharges and other ear disorders of a possible nutritional origin were found in 5.9 per cent. of the children examined, irrespective of the community.

Heart irregularities were found in 11.5 per cent.

Evidences of past minor rickets were found in 11.1 per cent. and of past major rickets, such as rachitic rosary and excessively bowed legs, were found in 2.1 per cent.

Poor reflexes were found in 6.6 per cent. of the children receiving the medical examination. This may or may not be associated with undernutrition.

Of all of the subjects studied, only two boys—brothers of junior high school age—were free from dental caries, and were uniformly high in all of the tests given to them.

SUMMARY

This is a report of the dietary habits and state of 2511 urban and rural subjects, comprising two family and nine child groups, representing a broad range of incomes.

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DEFENDENT'S EXHIBIT 18 (1219)

Malnutrition Affects 999 Persons out of 1000!

Deficiencies in minerals and vitamins almost universal

ONLY 2 PERSONS IN 2,511 HAVE PERFECT DIET

Malnutrition Near Universal, Six Year Survey Indicates

By HOWARD W. BLAKESLEE
Wide World Science Editor

STATE COLLEGE, PENN. — Only one person in a thousand escapes malnutrition — that is the conclusion of a survey published today by the Ellen H. Richards institute at Pennsylvania State college.

The survey took six years, and is one of the most thorough ever made. It included both adults and children. The report is made in the college's chemistry bulletin, by Dr. Pauline Beery Mack, director of the institute, and her associates.

• • •

The study covered 2,511 Pennsylvanians. Just two rated high in all tests. All others showed deficiencies, the poor worse off than the rich, but both classes below the best rating.

Only eight were free of tooth decay, a trouble ascribed partly to deficient diet.

The majority were deficient not just in one nutrition test, but in several. The survey indicated that if one diet deficiency exists, other essentials are likely to be low.

There were many long-time lacks of adequate vitamins, proteins and minerals. Weight of 17 per cent of persons studied was under par. Sixty per cent of growing children were more than six months retarded in skeletal growth.

The bones of a large majority, both adult and children, were not satisfactorily mineralized.

• • •

Bone defects are linked with deficiencies in proteins, calcium, phosphorus, Vitamin D and other vitamins and minerals.

More than half were below the desirable standard in hemoglobin, or red blood content. This is evidence of under par protein and iron intake. Many were low in Vitamin A ratings.

"These findings," said the report, "suggest conditions which may be expected to prevail in other states, many of them less prosperous than Pennsylvania."

In one city where depression had been acute, one child out of every three examined gave evidence of having had rickets, an under-nutrition bone trouble.

Twenty-five per cent had gingivitis, inflammation of the gums, which is a forerunner of scurvy due to lack of Vitamin C. More than half had iron and protein deficiencies, which resulted in anemia.

• • •

Only 7.1 per cent of these children had good Vitamin A ratings.

In all communities, regardless of economic status, the average diets of the children were far below the daily intake levels of protein, vitamins and minerals recommended by the National Research council. The adult diets were no better than the children's.

Most of the people in the study were not aware of any actual illness due to food deficiencies.

• • •

"The borderline deficiencies," said the report, "are nevertheless serious because prolonged deficiencies build up into major disorders in later years. As science applies more refined methods for detecting obscure signs of deficiencies, it becomes apparent under-nutrition in some degree is almost universal."

Only 2 rated high

Survey took six years

More than half had anemia

Hemoglobin below standard

With one diet deficiency — other essentials low

Children retarded in skeletal growth

Bone defects linked to mineral deficiency

Diets below National Research recommendations

Deficiencies build into major disorders

Under-nutrition in some degree is almost universal

This authorised scientific release was published in the New York Times, the Minneapolis Star-Journal and other leading daily newspapers throughout the country

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DEFENDENT'S EXHIBIT 19

MEDICAL STATISTICS BULLETIN NO. 3

PHYSICAL EXAMINATIONS OF SELECTIVE SERVICE REGISTRANTS DURING WARTIME

AN ANALYSIS OF REPORTS FOR THE CONTINENTAL UNITED STATES AND EACH STATE

APRIL 1942 - DECEMBER 1943

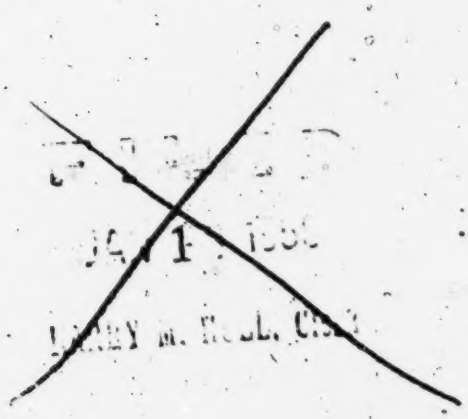
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
WASHINGTON, D.C.

NOVEMBER 1, 1944

1251

Physical Examinations of Selective Service Registrants During Wartime

An Analysis of Reports for the Continental United States and Each State April 1942-December 1943



Prepared by
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November 1, 1944

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SUMMARY

The data available from physical examinations of prospective inductees into the armed services of the United States constitute the greatest volume of reliable information concerning physical defects ever assembled for any large population group. While the primary purpose of obtaining this information is to determine the acceptability of men for service, it has great value both from the standpoint of medical research and public health programs. Only two previous reports on the results of these examinations have been published, both of which were based upon samples drawn from the reports of physical examinations made prior to September 1941. 1/ As is well known, the Selective Service System was not called on to furnish great numbers of men until after the entry of the United States into World War II on December 7, 1941. Between that time and December 31, 1943 the System, operating through 6,443 local boards, selected approximately 10,000,000 men for physical examination by local board examiners, armed forces' induction stations, or both. Of these about 3,600,000 were rejected and nearly 6,400,000 were found physically fit and were accepted for service in the Army, Navy, Marine Corps, and Coast Guard. In addition, 2,700,000 registrants and non-registrants voluntarily enlisted in the armed forces.

This report deals with the results of the physical examinations of over 9,000,000 men examined between April 1942 and December 1943. The study is based on a sample consisting of approximately 20 percent of these examinations.

During the period covered by the study rejections ranged from 31.4 percent for the month of January 1943 to 46.9 percent for December 1943. White rates were consistently lower than Negro rates throughout the whole period. The lowest Negro monthly rejection rate was 51.2 percent while the highest for whites was 42.9 percent. These racial differences held for each age group examined.

Rejections increased in direct relation to increasing age and from the middle 30's on reached over 50 percent of all registrants examined.

Wide variations in rejection rates were found for the various occupational groups. The highest rates were for domestic service workers, emergency workers and the unemployed, and farmers and farm managers. Students had the lowest rejection rates. Negroes had higher rejection rates

1/ Analysis of Reports of Physical Examination: Summary of Data from 19,923 Reports of Physical Examinations. Medical Statistics Bulletin No. 1, National Headquarters Selective Service System, Washington, D. C. November 10, 1941; and Causes of Rejection and Incidence of Defects: Local Board Examinations of Selective Service Registrants in Peacetime. Medical Statistics Bulletin No. 2, National Headquarters, Selective Service System, Washington, D. C., August 1, 1943.

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than whites in all occupational groups with the exception of domestic service workers.

The principal causes for rejection for white registrants examined during the entire period were (in order of magnitude): mental disease, musculoskeletal defects, cardiovascular defects, educational and mental deficiency, eye defects, hernia, neurological defects, ear defects, tuberculosis, and syphilis. For the Negroes, the major causes for rejection were: educational and mental deficiency, syphilis, mental disease, cardiovascular defects, musculoskeletal defects, hernia, eye defects, neurological disorders, gonorrhea and other venereal diseases, and defects of the feet.

Of the registrants examined 36.9 percent were reported to be free of physical defects. For the white group the percentage was 38.0 and for the Negroes 30.5. As age increased the proportion with "No Defects" decreased.

The most frequently recorded defects, not necessarily causes for rejection, for the whites were (in order of magnitude): eye defects, defects of the teeth, musculoskeletal defects, mental disease, underweight and overweight, defects of the feet, hernia, cardiovascular defects, ear defects, and educational and mental deficiency. For Negroes the most common defects were: syphilis, educational and mental deficiency, eye defects, musculoskeletal defects, cardiovascular defects, defects of the feet, mental disease, defects of the teeth, hernia, and underweight and overweight.

Rejection rates varied considerably between and within regions. The highest rejection rates were found in the south while the lowest rates were found in states in the northwest.

The leading causes for rejection varied from state to state and between regions. In the south the rejection rates were above the national average for educational deficiency and syphilis. In the eastern region cardiovascular defects were above the national average. Defects of the eyes and ears were more common than in the other regions. In the midwest, rejections for hernia were above the national average. Mental deficiency, dental defects, and defects of the abdominal viscera were also important causes for rejection in this region. In the far west rejections were above the national average for musculoskeletal defects, hernia, eye defects, and syphilis.

BACKGROUND OF THE DATA

The purpose of this study is to set forth in some detail the results of the physical examinations of over 9,000,000 men examined between April 1942 and December 1943. The study is based on approximately a 20 percent sample of the total physical examinations given in this period. The major factors considered are: (1) rejection rates by race, age groups, and occupation; (2) the principal causes for rejection, by race and age groups; (3) the incidence of all recorded defects, by race; and, (4) state and regional differences in results of physical examination.

The Selective Service System is charged with the difficult task of providing men for the armed forces without seriously interfering with the production of military supplies, essential civilian goods, and necessary agricultural products. Since the demands for men for the armed forces and essential production cannot be predicted with accuracy for long periods of time, because both are dependent on unknown factors influencing the course of the War, the policies of the Selective Service System and of the armed forces must be revised from time to time to meet the needs of the military situation. The changes in policy having greatest influence on the data of this study are those dealing with: (1) the selection by the Selective Service System of registrants for physical examination; (2) the standards set by the military authorities covering the physical examination procedure. The latter are to be found in the War Department Mobilization Regulations 1-9; the former are described in the following paragraphs.

Selection for Physical Examination. The selection of registrants for physical examination is the final step in a long process of selection which has been developed by the Selective Service System. Before a registrant is physically examined several factors are reviewed in detail to determine whether he is deferrable by reason of age, dependency, occupation, as an alien, or for other administratively or legally determined reasons. If in the opinion of the local board he is not eligible for a deferrable classification on any of these grounds, he is ordered to report for a physical examination. As a result of this selective process, 37.5 percent of the registrants 18-37 years of age had been deferred for other than physical reasons on January 1, 1944; 57.0 percent had been physically examined and accepted or rejected for military service. The remaining 5.5 percent were awaiting either physical examination or induction. Because of the operation of this selection policy the data available for this study are limited to the records of the group which was selected for physical examination and therefore may not be representative of the total male population eligible for service.

The problem is further complicated by the fact that a number of specific changes in policy which were made during the period covered by the study affected selection for examination. These changes in policy have influenced the pool of registrants available for induction. Certain policies have tended to increase and others to decrease this pool. These are briefly discussed below.

Factors Increasing the Pool of Registrants Available for Examination. Under the regulations in effect in February 1942 only registrants 21-35 years of age were subject to physical examination and induction. The declaration of war resulted in an immediate movement to increase the number of registrants liable for military service and in February 1942 the regulations were changed to include all registrants 20-44 years of age in the group subject to military service. Even registrants 45-64 years of age had been required to register, but there was no prospect of using these men for military service. In November 1942 the age group was further expanded by the inclusion of youths 18-19 years of age.

In December 1942 voluntary enlistment as a means of entering service was abolished for the age group 18-37 years of age. This was done to tighten controls over withdrawals from industry. It is of importance for this report because it assured inclusion of all 1943 physical examinations in the tabulations; whereas prior to December 1942 a varying proportion of the examinations for volunteers was made at recruiting stations. Consequently many of the earlier examinations are not represented in the tabulations.

The third factor tending to increase the pool of manpower available for examination was the reduction in standards, notably those concerning educational deficiency, syphilis, uncomplicated gonorrhea, and the morally unfit. The decision to induct men for limited service was also, in effect, a reduction in physical standards. 1/

1/ (a) Beginning August 1, 1942 the Army accepted educationally deficient registrants on a quota basis. After June 1, 1943, educational deficiency alone was not a cause for rejection.
(b) Registrants were inducted for limited service beginning July 15, 1942.
(c) Beginning October 1, 1942 the Army accepted on a quota basis, registrants with uncomplicated gonorrhea. The quota restriction was removed on February 1, 1943.
(d) On November 7, 1942 moral standards were relaxed permitting the induction of some registrants who were formerly considered unfit for service.
(e) Registrants with uncomplicated syphilis became acceptable in February 1943.

A final factor tending to augment the available pool of manpower was the changes in Selective Service deferment policies, particularly with reference to the curtailment of dependency deferments. 1/

Factors Decreasing the Pool of Registrants Available for Examination. On the other hand, four important factors operated in the direction of reducing manpower available for examination and induction. First, the armed forces' recognition that this is a young man's war resulted in the Presidential Order of December 1942 to withhold men over 37 years of age from induction. A second factor was the induction of increasing numbers of registrants in response to heavy calls by the armed forces for men. Thirdly, there was a rapid growth in deferments of essential workers for agriculture and industry. Finally, there was the prohibition until October 1, 1943 on the induction of pre-Pearl Harbor fathers on a nationwide basis.

These changes in policy resulted in considerable variation in the types of men examined from month to month. Further, those examined in 1942 varied somewhat from those examined in 1943. This was the result of the many important policy changes which were made at the end of 1942. The entire period is definitely weighted in terms of younger men, non-fathers, and occupations least essential to the war effort. The recognition of these factors permits refined interpretations of the data and does not seriously limit their use.

Physical Examination Procedure. During the period covered by this study, the procedure for physical examination consisted of a screening type of examination given by the local board physician, followed by a more complete examination at the induction station. 2/ In this program the function of the local board examining physician was twofold: (1) to secure a blood sample for the serological test for syphilis, and (2) to eliminate those registrants with manifestly disqualifying defects. 3/ The diagnosis of any defect in the List of Defects (Form 220) at the time of the local board "screening examination" was sufficient justification for disqualification and usually resulted in the registrant's reclassification into Class IV-F. Registrants who were not rejected at this examination were normally forwarded to the armed forces induction stations for a complete physical

1/ Class III-B was eliminated on April 12, 1943 and Class III-A was eliminated on December 11, 1943.

2/ Previously the local board examining physician had made a complete physical examination.

3/ The local board physician's guide in this screening examination was the List of Defects, Form 220 (originally issued December 31, 1941) and revised as of August 15, 1942 and January 16, 1943.

examination in accordance with the "Standards of Physical Examination During Mobilization" (MR 1-9, War Department). 1/ Thus the final decision as to a registrant's physical acceptability was left in the great majority of cases to the induction station physicians.

The physical examination at the armed forces induction station was carried on by means of "the assembly line technique". The physicians were of two types: (a) commissioned personnel of the armed forces and (b) civilian physicians whose services were contracted for through the War Department. In addition, non-commissioned personnel and civilians were used as technical assistants and clerks. Practically all physicians were specialists and were assigned to make that part of the total physical examination falling within their field of specialization. A medical work sheet was prepared for each registrant by non-commissioned or clerical personnel. Entries were recorded on this work sheet by each examiner. The chief medical officer then evaluated the findings and determined whether the registrant was acceptable for military service. The "Report of Physical Examination and Induction" (Form 221) was prepared from the medical work sheet by non-commissioned or clerical personnel of the induction station and signed by the chief medical officer or his designated representative. 2/

1/ Revised October 15, 1942 and January 22, 1943.
2/ A sample copy of Form 221 and additional details of the actual methods used in processing these data will be found in Appendix A.

REJECTION RATES

As is well known, a large portion of the men given physical examinations under the Selective Service Act have been found unfit for military service due to physical defects. While the standards maintained by the military forces have been admittedly high, the prevalence of disqualifying defects has become a matter of national concern not only from the viewpoint of the armed forces but from the standpoint of national health as well. In this section of the report the rejection rates are analyzed according to time periods, race, age, and occupational groups.

Table 1 shows that, before Pearl Harbor, when the physical standards were at their highest level, 52.8 percent of all men examined were rejected as unfit for military service. From July 1942 through December 1943, the monthly rejections ranged from 33.1 to 46.2 percent of all registrants examined. 1/ The lowest rejection rate of 33.1 percent in the period January-March 1943 was probably due to the lower medical standards then in force and to an amendment to the Selective Service Act extending compulsory military service to include 18 and 19 year old registrants. 2/ The higher rejection rates for April-December 1943, averaging approximately 44 percent, can be attributed to the operation of several factors. First, a depletion of physically fit manpower resulted from a continual draining off of those registrants qualified for induction. Second, it was a time of considerable reprocessing of previously examined and rejected registrants. Third, the average age of examined registrants was gradually increasing.

Negro rejection rates were consistently higher than those for white registrants. During 1942-1943 the combined local board and induction station rejection rate for Negroes was approximately one and one-half times the rate for white registrants. At the same time, it is interesting to note that the Negro rates as shown in the last column of Table 1 varied proportionately less than the white rates shown in the adjacent column. Negro rejection rates ranged less than 9 percentage points between 1940 and the end of 1943, whereas the white rates varied 22 percentage points from the highest to the lowest rate in that period. This lack of consistency in rejection rate trends for white and Negro registrants is unexpected since the changes in standards should have been reflected in both races. The modification of the standards

1/ Local board and induction station rejection rates for individual months are shown in Table 1, Appendix C. The number of registrants examined and rejected at induction stations from July 1942-December 31, 1943 are shown in Table 2, Appendix C. The method of determining the combined local board and induction station rejection rate is given in Appendix C.

2/ The amendment was in effect in November 1942, but registrants of these ages were not forwarded in large numbers until January-March 1943.

on syphilis, gonorrhea, and illiteracy should have advantageously affected the Negro rejection rates because of the high prevalence of those defects among that race. However, the rejection rate for Negroes has never fallen below 50 percent in Selective Service experience. The modification of standards and even the inclusion of 18-19 year old registrants did not lower the rejection rates among Negroes.

Table 1
Local Board and Induction Station Rejection Rates
per 100 Registrants Examined, by Race
November 1940-December 1945

Time Period	Local Board			Induction Station			Local Board and Induction Station		
	Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
November 1940-September 1941	45.8	43.3	47.2	16.0	15.1	23.1	52.8	51.9	59.4
July-September 1942 2/	10.8	10.0	18.5	33.0	31.0	45.0	40.3	37.9	55.2
October-December 1942 2/	8.2	5.9	19.3	33.1	31.8	41.0	38.6	35.8	52.4
January-March 1943	6.6	5.2	14.6	28.4	26.3	44.4	33.1	30.1	52.5
April-June 1943	6.7	5.8	11.4	37.3	34.7	52.8	41.3	38.3	58.2
July-September 1943	6.1	5.4	8.9	40.4	36.8	56.9	44.0	40.2	60.7
October-December 1943 3/	5.6	5.1	7.3	43.0	39.3	57.3	46.2	42.4	60.7

1/ Includes all races other than Negro.
2/ Race breakdown of local board rejection rates is estimated.
3/ Local board rejection rates are estimated.

Table 2 presents rejection rates by age, race, and place of rejection for the period between September 1942 and June 1943. During this period the white rejection rate was 33.6 percent and the Negro rate 52.9 percent. An inspection of the table indicates that Negro rejection rates were higher than those for white registrants in each age group from 18 through 46 years of age. The difference between the rejection rates for the two races was great at age 18, diminished somewhat between 19 and 23, generally increased from 24 through 28 and again declined from 28 through 45.

There are other interesting regularities in Table 2. (a) The total white rejection rate (local board and induction station combined) was nearly three times as great for age 45 as for age 20. (b) The local board Negro rate likewise tripled in size between those ages, but the induction station rejection rate for Negroes less than doubled, as did the combined Negro rate. (c) The difference between Negro and white local board rejection rates increased with age, but the difference between their induction station rates increased for men in their 20's but decreased in the 30's and 40's. It should be remembered that local board rejections were for obvious defects and for syphilis in contrast to the general causes judged at the induction station.

Table 2
Local Board and Induction Station Rejection Rates per 100 Registrants Examined, by Year of Birth and Race
September 1942-June 1943

Age in 1943	Year of Birth	Local Board			Induction Station			Local Board and Induction Station		
		Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
All Ages		7.7	6.2	16.5	31.1	29.2	45.6	36.4	33.6	52.9
18	1925	6.9	6.5	11.9	22.2	21.2	38.1	27.6	26.3	45.4
19	1924	4.7	4.3	8.8	21.5	19.8	38.5	25.2	23.2	45.7
20	1923	4.2	3.7	8.6	22.3	20.5	37.0	25.5	23.5	42.4
21	1922	4.1	3.5	8.4	23.1	21.4	33.2	26.2	24.0	38.8
22	1921	4.0	3.0	8.1	24.6	22.9	32.3	27.6	25.3	37.7
23	1920	5.1	4.0	10.4	27.3	25.6	36.1	31.0	28.6	42.8
24	1919	7.3	5.5	15.8	32.4	30.2	44.3	37.4	34.0	53.1
25	1918	7.4	5.7	16.4	32.0	29.8	45.3	37.0	33.8	54.3
26	1917	7.8	6.0	18.2	32.8	30.9	45.6	38.0	35.0	55.5
27	1916	8.3	6.7	18.9	33.8	31.7	47.6	39.4	36.2	58.5
28	1915	8.9	6.9	20.7	34.5	32.4	49.3	40.3	37.1	59.8
29	1914	9.6	7.4	21.6	35.6	33.7	47.9	41.8	38.6	59.1
30	1913	10.2	8.1	21.5	37.0	35.0	49.7	43.5	40.3	60.5
31	1912	10.8	8.5	23.2	38.7	36.6	51.6	45.4	42.0	62.8
32	1911	11.5	9.2	23.8	39.9	37.7	53.6	46.9	43.4	64.6
33	1910	12.2	9.9	25.9	41.7	39.7	53.9	48.9	45.7	64.9
34	1909	12.8	10.6	24.9	43.5	41.7	55.0	50.7	47.9	66.2
35	1908	13.0	10.7	26.0	44.8	43.1	56.7	52.0	49.2	68.0
36	1907	14.4	11.7	28.1	47.0	45.5	57.1	54.7	51.8	69.1
37	1906	14.2	11.9	27.2	48.0	46.6	57.9	55.4	53.0	69.4
38	1905	15.8	12.5	30.2	51.4	49.7	61.3	59.1	56.0	73.0
39	1904	14.8	11.4	30.2	46.1	44.5	55.3	54.1	50.8	68.8
40	1903	13.9	10.6	29.2	47.1	45.6	55.9	54.4	51.4	68.8
41	1902	14.6	11.4	28.0	50.1	48.2	60.4	57.4	54.0	71.5
42	1901	14.2	11.6	29.8	52.9	51.6	62.5	59.6	57.2	73.7
43	1900	15.3	11.3	29.8	54.3	52.6	62.0	61.3	58.0	73.5
44	1899	14.7	12.2	29.3	56.9	55.8	65.3	63.2	61.2	75.4
45	1898	15.0	12.9	27.7	60.3	59.1	68.8	66.3	64.4	77.4
46	1897	18.5	15.5	36.4	60.1	58.8	69.9	67.5	65.2	80.8

1/ Includes all races other than Negro.

FIGURE 4

REJECTION RATES IN RELATION TO AGE

SEPTEMBER 1942 THROUGH JUNE 1943

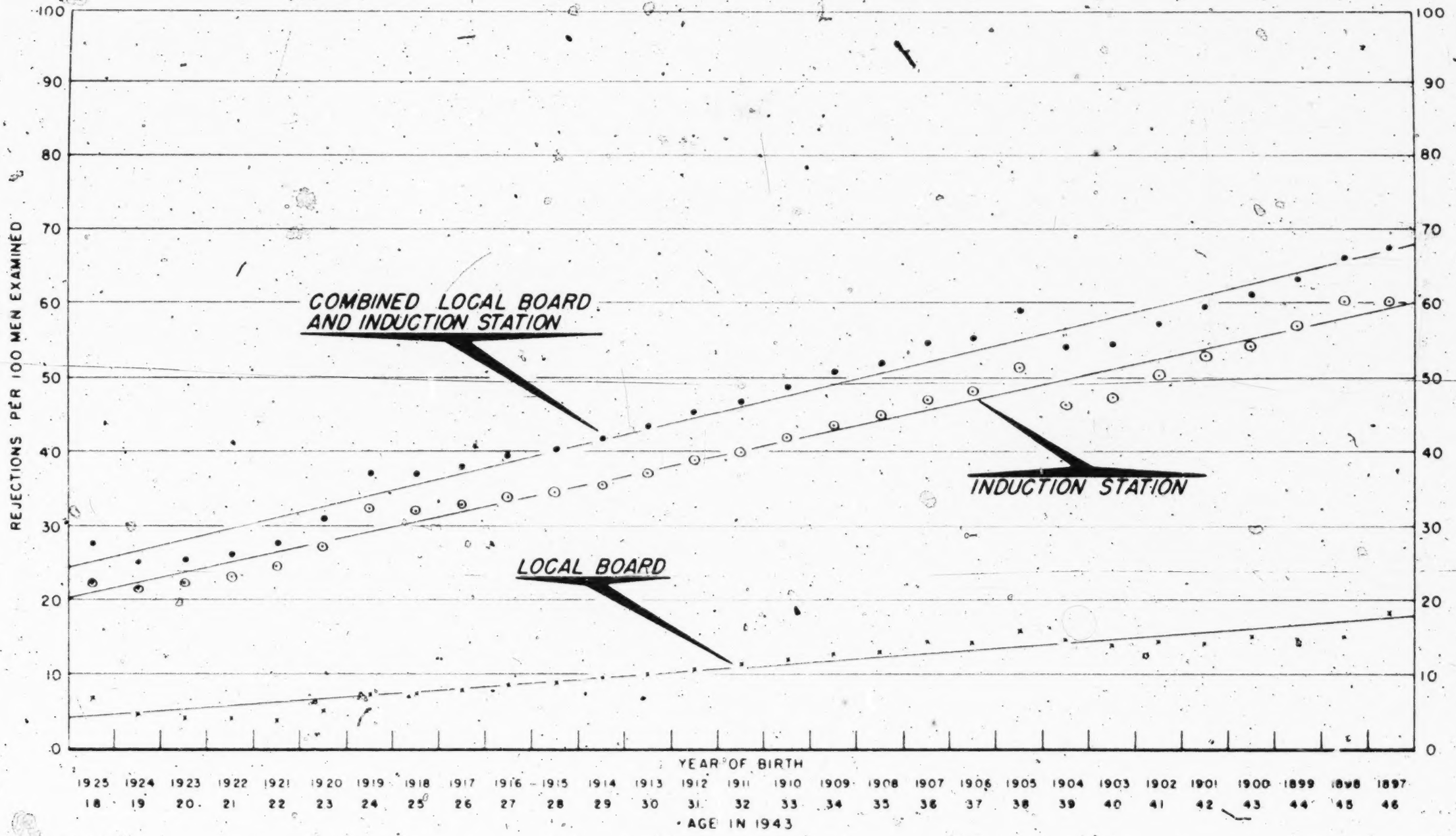


Figure 1 graphically indicates the increase in rejection rates experienced with advancing age. The rejection rates for each age were distinctly lower than those in the earlier periods covered by previous Medical Statistics Bulletins. 1/ They increased approximately 1.4 percentage points per additional year of age, in contrast to a more rapid increase found in an earlier study. Modification of the standards of acceptance doubtless lowered the age specific rejection rates. Even with the reduced standards of acceptance the rejection rate for all registrants passed 50 percent at 34 years of age. For white registrants the rejection rate exceeded 50 percent at age 36, but for Negroes it was reached at age 24. The age specific rejection rates are probably the best indication of the general unfitness of men over 30 years of age to take their place in the armed forces.

Certain age trend inconsistencies are apparent in Figure 1. These are: (1) an inspection of the points in relation to the line fitted for the combined local board and induction station rejection rate shows that most of the rejection rates for registrants born after 1919 and before 1905 fall below the line while those for registrants born in the years 1905-1919 are above the line; (2) rejection rates increased sharply for men born from 1921 to 1919; (3) rejection rates for those born in 1925 were higher than for men born in 1924-1921.

The inconsistencies noted in the preceding paragraph are probably due mainly to differences in the length of time since the various groups had registered. The longer an age group has been registered, the more of its physically fit men have been drawn off through induction and enlistment; hence the greater the likelihood that its current rejection rates will be affected upward. For example, men born in 1905-1919 were registered in the first registration (October 1940) and many of them had been processed for induction, as well as reprocessed under lowered standards, before the groups immediately younger and those immediately older became militarily liable. Consequently a large proportion of the physically fit men in the 1905-1919 year of birth group had been drawn off by the fall of 1942, the beginning of the period shown in Figure 1.

Similarly, the increase in rejection rates from 1921 to 1919 may be explained by the registration dates. Men born in 1919 had been processed since the first registration, in October 1940; those born in 1920 had registered in July 1941 and February 1942; while those born in 1921 had been processed less than seven months from registration until September 1942.

The fact that rejection rates for youths born in 1925--the 18 year old registrants--were higher than those for the groups immediately older is largely explained by the fact that 18 year old registrants

1/ Medical Statistics Bulletin No. 2, page 4, and No. 1, page 5.

examined were not fully representative of their age group as to physical fitness. Contributing factors were: (a) large numbers of physically fit youths born in 1925 enlisted in the armed forces before they became 18 years of age, thus depleting the Selective Service pool of physically fit 1925 youths; and (b) rejection of 18 year olds for physical and mental immaturity.

Rejection Rates by Occupational Groups:

Table 3 indicates that 59.6 percent of domestic service workers were rejected for military service upon examination. Among emergency workers and the unemployed the rejection rate was 56.5 percent and farmers and farm managers had a rejection rate of 56.4 percent. Farm laborers and foremen had a rejection rate of 52.8 percent. No other occupational groups showed rejection rates in excess of 50 percent. At the other extreme were students with a rejection rate of 25.7 percent. This was the only occupational group showing a rejection rate of less than 30 percent. Operatives and kindred workers showed the next lowest rejection rate (37.2 percent).

Table 3
Rejection Rates Per 100 Registrants Examined
by Occupation and Race
April 1, 1942-December 31, 1945

Occupational Group	Total	White 1/	Negro
All Occupations	42.6	40.8	56.1
Professional and Semiprofessional	42.2	41.9	49.1
Farmers and Farm Managers	56.4	54.4	64.5
Proprietors, Managers and Officials, except Farm	46.4	46.1	57.9
Clerical, Sales and Kindred Workers	37.5	37.4	39.2
Craftsmen, Foremen and Kindred Workers	40.7	39.8	54.9
Operatives and Kindred Workers	37.2	35.7	52.8
Domestic Service Workers	59.6	62.1	58.8
Protective Service Workers	42.7	42.2	56.9
Service Workers, except Domestic and Protective	49.1	48.5	50.0
Farm Laborers and Foremen	52.8	49.1	63.5
Laborers, except Farm and Mine	46.6	41.8	58.2
Emergency Workers and Unemployed	56.5	55.6	60.6
Students	25.7	25.6	28.6
Nonclassifiable Returns and No Entry	44.5	43.1	54.5

1/ Includes all races other than Negro.

There were racial differences with reference to the occupational groups showing the highest and lowest rejection rates. Among white registrants domestic service workers showed a rejection rate of 62.1 percent which was the highest among white registrants of any occupational group. Emergency

workers and the unemployed showed the next highest rate of rejection, (55.6 percent) and 54.4 percent of farmers and farm managers were rejected on examination for service. No other occupational group of white registrants showed rejection rates exceeding 50 percent. At the other extreme, white students demonstrated a low rejection rate of 25.6 percent and operatives and kindred workers showed a rejection rate of only 35.7 percent.

In the case of Negro registrants, there were three occupational groups which had rejection rates in excess of 60 percent. Negro farmers and farm managers had a rejection rate of 64.5 percent, the highest rejection rate of any occupational group regardless of race. Farm laborers and foremen had a rejection rate of 63.5 percent and ranked second to farmers. Emergency workers and the unemployed ranked third with a rejection rate of 60.4 percent. Negro students had a rejection rate of 28.6 percent which was the lowest rate for any occupational group among the Negroes. Only one other occupational group--clerical, sales, and kindred workers--had a rejection rate of less than 40 percent.

The rejection rates by occupational groups reveal that farmers, unskilled workers, and unemployed had relatively high rejection rates while students had the lower rejection rates. The data also reveal that operatives, clerical workers, and skilled craftsmen had lower rejection rates than professional workers, proprietors, managers, officials, and laborers.

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PRINCIPAL CAUSES FOR REJECTION

This section discusses the principal causes for rejection during the time periods April 1942-March 1943 and April 1943-December 1943. 1/ The entire time period covered by this study was divided into two parts for discussing principal causes for rejection since numerous changes in regulations and policies were made in December 1942 and January 1943 which resulted in changes in the causes for rejection in the last nine months of 1943 in comparison to the period from April 1942-March 1943. Approximately two and one-half to three months elapse after changes in regulations are made before the examination forms are received reflecting these changes in policies and regulations. The major changes which influenced these data are: the Presidential Order of December 1942 which made registrants 18-37 years of age subject to induction and eliminated the enlistment of registrants within this age group; the revision of the List of Defects (Form 220) which was revised August 15, 1942 and January 16, 1943; the revision of War Department Mobilization Regulations, (MR 1-9) as of January 22, 1943, and the provisions for the induction of registrants with syphilis beginning in February 1943.

The data in this section are based upon samples of Reports of Physical Examination and Induction (Form 221) received at National Headquarters during the above-mentioned periods. 2/ While the samples are not of uniform size they represent a certain number of examinations selected at random out of the total number of registrants examined during the period. Therefore, the entire sample for the period April 1942-December 1943 consists of approximately 1,900,000 out of a total of approximately 9,200,000 examinations made or more than a 20-percent sample for the entire period.

Several of the causes for rejection showed appreciable differences in the two time periods in their relative importance in comparison to all causes for rejection. In the later period defects of the eyes, ears, teeth, cardiovascular system, syphilis, and gonorrhea formed a smaller proportion of all defects than they did up to April 1943. This was in part the result of modifications in standards of acceptance which permitted increased numbers of registrants with some of these defects to be inducted.

1/ The term "principal cause for rejection" may be defined as the first disqualifying defect recorded as cause for rejection on the Form 221.

2/ The samples selected for analysis were as follows: April 1942-July 1942, 100 percent; November 1942, 12½ percent; December 1942-May 1943, 25 percent; June 1943-September 1943, 16 2/3 percent; November 1943-December 1943, 10 percent. Prior to November 1943 the sample was based upon a percentage of the forms received at National Headquarters in the months specified, while after November 1943 the sample was based upon a percentage of the forms for registrants examined in the months specified.

On the other hand, educational and mental deficiency, mental disease, defects of the feet, and non-medical causes for rejection became relatively more important in the period April 1943-December 1943 than they were in the earlier period. The increase in the importance of these defects may have resulted from the decrease in the importance of the other defects already discussed.

The overall local board and induction station rejection picture for the period from April 1942-March 1943 indicates that mental disease accounted for one in every eight rejections and that next in order of importance were syphilis, musculoskeletal defects and cardiovascular defects which together with mental disease accounted for 40 percent of all rejected registrants. In the period April 1943-December 1943 mental disease was again the leading cause for rejection among all registrants, this defect being responsible for approximately 18 percent of all rejections at the local boards and induction stations combined. Educational and mental deficiency, musculoskeletal defects, and cardiovascular defects ranked next in importance and these defects plus the leading defect constituted 48.0 percent of all rejections. (See Figure 2).

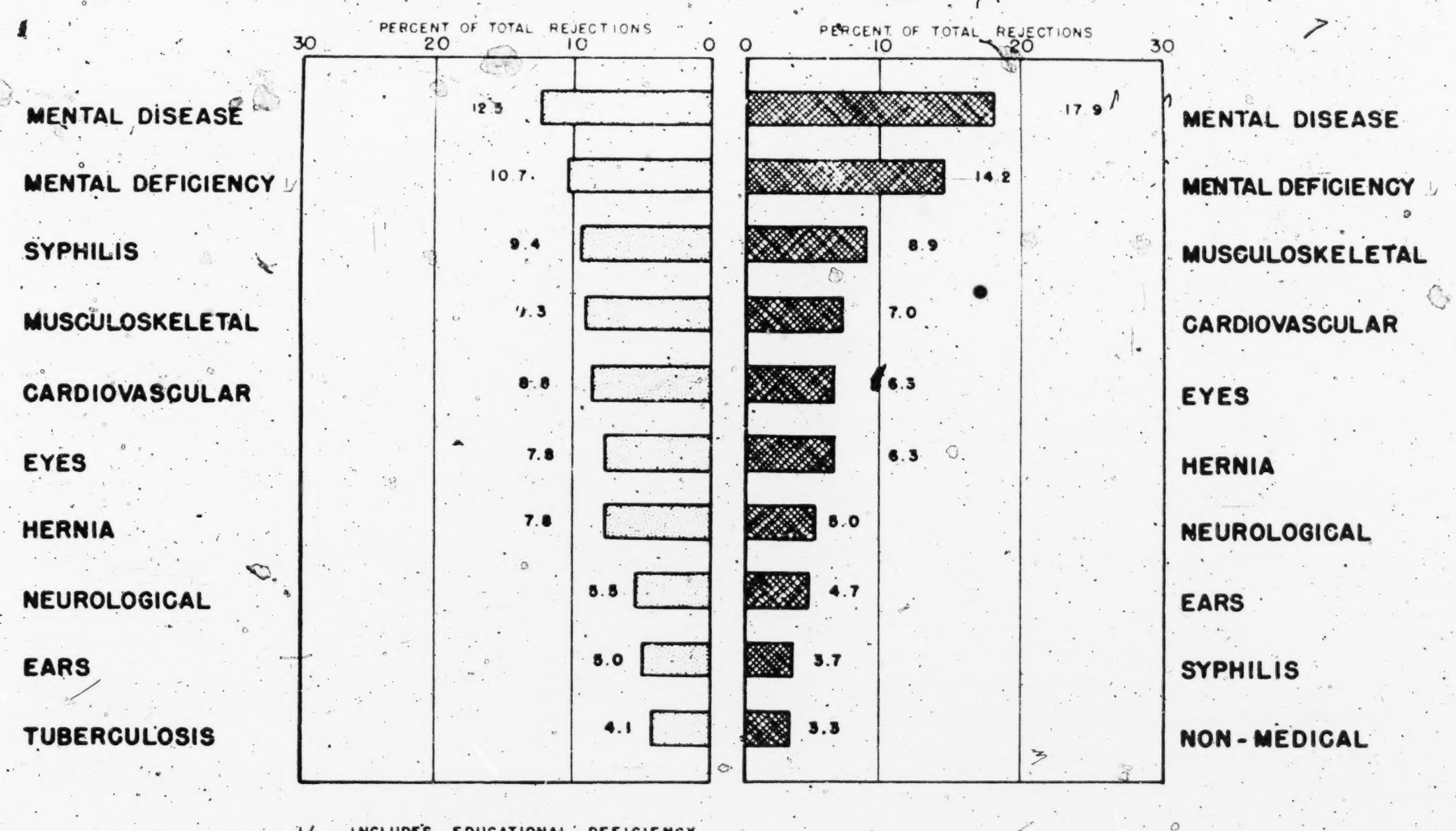
The ten leading causes for rejection present racial differences of sufficient importance to warrant discussion. Table 4 presents the ten leading causes for rejection during the two selected time periods by race and indicates the percent of all rejections accounted for by each of the ten leading causes. Figure 3 presents the same data in a graphical manner.

Mental disease led the list for white registrants in both time periods and constituted 14.2 percent of all rejections in the first period and 19.2 percent of rejections in the later period. In both time periods, musculoskeletal defects were second in importance among white registrants, being responsible for 10.1 and 9.8 percent of all rejections in the respective time periods. The next eight leading causes for rejection showed distinct changes in rank position between the first and second time periods. Educational and mental deficiency increased in importance from the sixth to the third rank position as a cause for rejection among white registrants. This defect also increased from 8.1 to 9.1 percent of all white rejections. Hernia and eye defects exchanged rank position between the first and second time period, but both defects formed a considerably smaller portion of all rejections in the second period than prior to April 1943. Tuberculosis and syphilis were the ninth and tenth causes for rejection prior to April 1943 while syphilis did not appear among the ten leading causes for rejection after that time and tuberculosis became the tenth leading cause for rejection in the later time period.

FIGURE 2

THE TEN LEADING CAUSES FOR REJECTION

ALL RACES



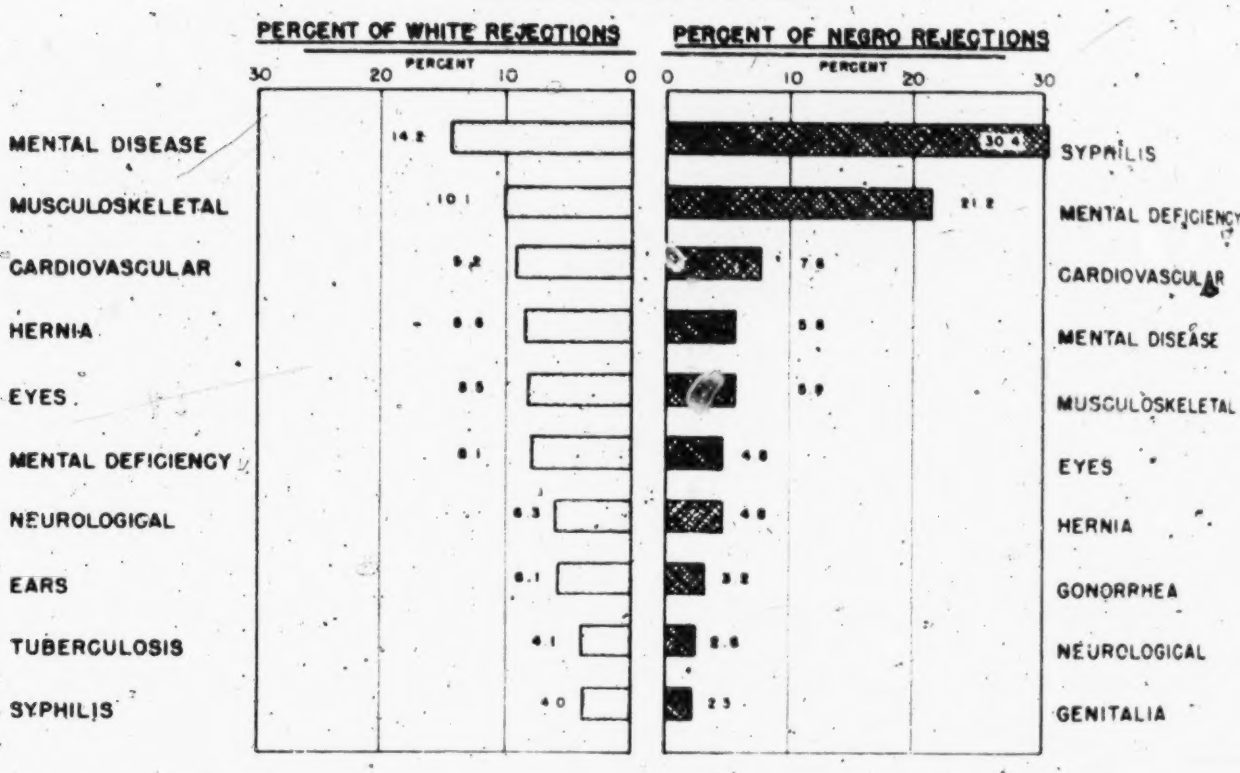
1/ INCLUDES EDUCATIONAL DEFICIENCY

1272

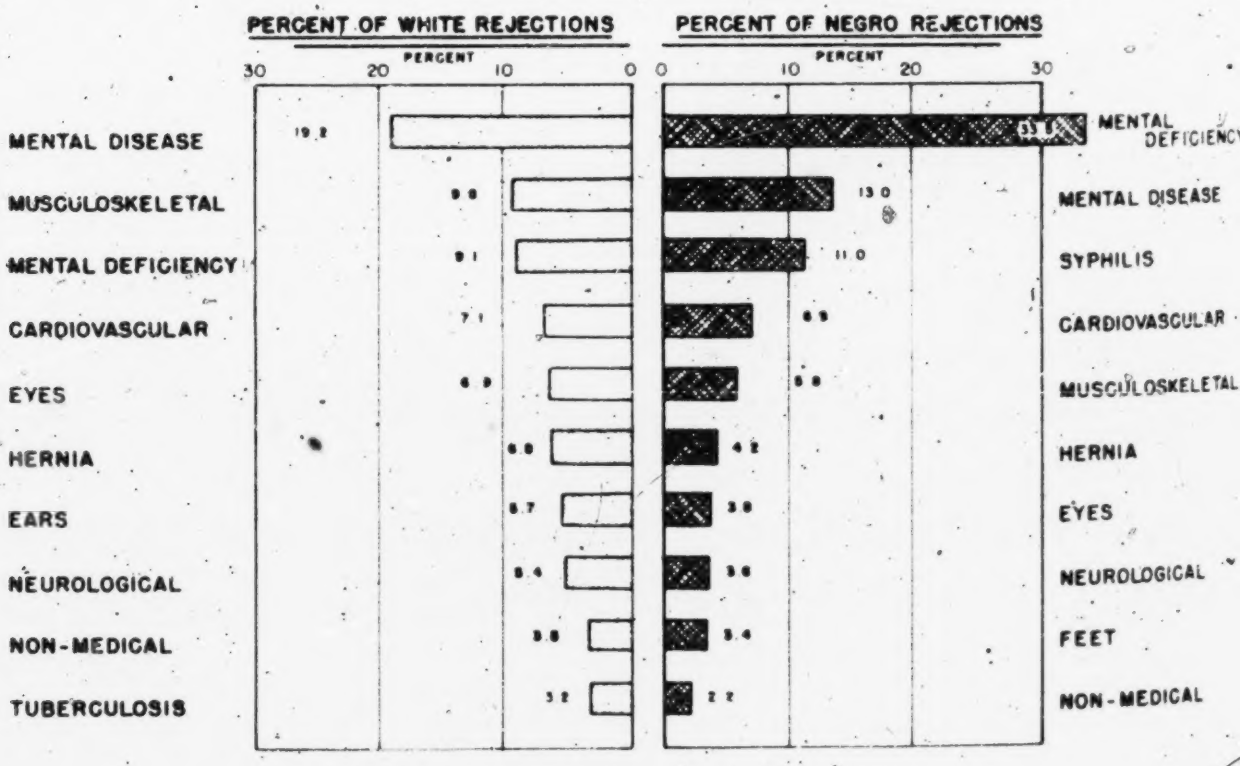
FIGURE 3

THE TEN LEADING CAUSES FOR REJECTION

APRIL 1942 - MARCH 1943



APRIL 1943 - DECEMBER 1943



1/ INCLUDES EDUCATIONAL DEFICIENCY

Table 4
The Ten Leading Causes for Rejection and the Percent Each Forms of Total Rejections, by Race

April 1942-March 1943				April 1943-December 1943			
White 1/	Percent	Negro	Percent	White 1/	Percent	Negro	Percent
Mental disease	14.2	Syphilis	30.4	Mental disease	19.2	Educational and mental deficiency	33.5
Musculoskeletal	10.1	Educational and mental deficiency	21.2	Musculoskeletal	9.8	Mental disease	13.0
Cardiovascular	9.2	Cardiovascular	7.6	Educational and mental deficiency	9.1	Syphilis	11.0
Hernia	8.6	Mental disease	5.8	Cardiovascular	7.1	Cardiovascular	6.9
Eyes	8.5	Musculoskeletal	5.8	Eyes	6.9	Musculoskeletal	5.8
Educational and mental deficiency	8.1	Hernia	4.8	Hernia	6.8	Hernia	4.2
Neurological	6.3	Eyes	4.8	Ears	5.7	Eyes	3.8
Ears	6.1	Gonorrhea and other venereal	3.2	Neurological	5.4	Neurological	3.6
Tuberculosis	4.1	Neurological	2.6	Nonmedical	3.5	Feet	3.4
Syphilis	4.0	Genitalia	2.3	Tuberculosis	3.2	Nonmedical	2.2

1/ Includes all races other than Negro.

The modification of the medical standards affected the Negro list of leading causes for rejection more appreciably than the list for white registrants. Syphilis, the main cause for Negro rejections up to April 1943 became the third most important cause for rejection in the period after April 1943. In this period it followed educational and mental deficiency and mental disease. Syphilis was the cause of 30.4 percent of rejections among Negroes in the earlier time period and was responsible for only 11.0 percent in the later period. Educational and mental deficiency combined constituted 21.2 percent of Negro rejections in the first period and 33.5 percent of rejections subsequent to March 1943. Mental disease shifted from the fourth to the second leading cause for rejection and comprised 5.8 percent and 13.0 percent of all rejections in the respective time periods. Most of the other leading causes for rejection shifted position slightly as a result of the marked changes in the importance of syphilis and educational and mental deficiency. Gonorrhea did not appear among the ten leading causes for rejection in the later period; this was a direct result of changes in the regulations permitting registrants with uncomplicated gonorrhea to be inducted. Defects of the genitalia also failed to appear as one of the ten leading causes for rejection among Negroes in the period after March 1943. Gonorrhea and defects of the genitalia were replaced by defects of the feet and non-medical causes after March 1943. Table 5 indicates a similar percent distribution of causes for rejection for all the broad defect groups and permits a detailed comparison of the importance of each of the defect groups in both time periods and by race.

Table 5
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations Combined, by Race

Principal Cause for Rejection	April 1942-March 1943			April 1943-December 1943		
	Total	White 1/	Negro	Total	White 1/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	7.8	8.5	4.8	6.3	6.9	3.9
Ears	5.0	6.1	0.7	4.7	5.7	0.8
Teeth	2.1	2.4	0.8	1.4	1.6	0.4
Mouth and gums	0.4	0.5	0.2	0.3	0.3	0.1
Nose	0.7	0.9	0.2	1.1	1.4	0.3
Throat	0.1	0.1	0.1	0.1	0.1	*
Lungs	2.2	2.4	1.3	2.1	2.3	1.3
Tuberculosis	3.7	4.1	2.0	3.0	3.2	2.0
Cardiovascular	8.8	9.2	7.6	7.0	7.1	6.9
Blood and blood-forming	0.1	0.1	*	0.1	0.1	*
Hernia	7.8	8.6	4.8	6.3	6.8	4.2
Kidney and urinary	1.3	1.4	0.6	1.4	1.6	0.8
Abdominal viscera	1.7	2.0	0.4	1.6	1.9	0.5
Genitalia	1.4	1.2	2.3	1.4	1.3	1.2
Syphilis	9.4	4.0	30.4	3.7	1.7	11.0
Gonorrhea and other venereal	0.9	0.3	3.2	0.3	0.1	1.1
Skin	0.7	0.7	0.5	0.8	0.9	0.5
Hemorrhoids	0.5	0.5	0.5	0.5	0.5	0.4
Varicose veins	1.3	1.4	0.8	1.1	1.2	0.8
Educational deficiency	7.7	5.2	17.8	10.2	6.3	25.0
Mental deficiency	3.0	2.9	3.4	4.0	2.8	8.3
Mental disease	12.3	14.2	5.8	17.9	19.2	13.0
Neurological	5.3	6.3	2.6	5.0	5.4	3.6
Musculoskeletal	9.3	10.1	5.8	8.9	9.8	5.8
Feet	1.1	1.1	1.2	2.6	2.4	3.4
Endocrine	1.3	1.6	0.3	1.0	1.3	0.3
Neoplasms	0.6	0.7	0.2	0.8	0.9	0.3
Infectious and parasitic	0.1	0.1	0.1	0.1	0.1	0.1
Underweight and overweight	2.3	2.6	1.2	3.0	3.4	1.5
Nonmedical reasons	0.7	0.8	0.4	3.3	3.5	2.2

1/ Includes all races other than Negro.
* Less than 0.1 percent.

A more detailed analysis of the principal causes for rejection is possible if each time period is discussed separately. Tables 3 and 4 in Appendix C indicate the percent distribution of principal causes for rejection at local boards and induction stations separately and by race for the two time periods. These tables serve as the basis for the discussion which follows.

Local Board Rejections April 1942-March 1943

Local board rejections in the period from April 1942-March 1943 were primarily for musculoskeletal defects in the case of white registrants and syphilis for Negro registrants. These defects comprised 20.0 percent and 69.1 percent of all local board rejections for the respective races. Syphilis (13.7 percent) and neurological defects (11.5 percent) constituted the next two important causes for the rejection of white registrants. Musculoskeletal defects (7.5 percent) and hernia (4.4 percent) were second and third causes for rejection of Negro registrants during this period.

Induction Station Rejections April 1942-March 1943

Causes for rejection at induction stations during this period differed markedly from those at local boards with mental disease the cause of 17.7 percent of all rejections among white registrants and educational and mental deficiency comprising 35.0 percent of all rejections among Negro registrants. Cardiovascular and eye defects were of second and third importance as causes for rejection of white registrants at the induction station and cardiovascular defects and mental disease were the second and third most important causes for rejection of Negro registrants rejected at the induction station.

Local Board Rejections April 1943-December 1943

In the period from April 1943-December 1943 musculoskeletal defects were the predominant cause for rejection of white registrants upon local board examination and accounted for 20.2 percent of all rejections. Hernia and neurological defects were next in order of importance as causes for the rejection of white registrants. Among Negroes, syphilis was responsible for 50.3 percent of all local board rejections and was followed in importance by hernia and musculoskeletal defects.

Induction Station Rejections April 1943-December 1943

The causes for rejection at induction stations were considerably different from those of local board rejections in this period as they were in the earlier period. Mental disease constituted 21.5 percent of all white rejections and was followed by educational and mental defi-

ciency and musculoskeletal defects which were responsible for 9.7 and 8.0 percent of white rejections. Educational and mental deficiency were responsible for 39.2 percent of Negro rejections. This defect was followed by mental disease (15.0 percent) and cardiovascular defects (7.5 percent) as the second and third most important causes for rejection.

Internal Composition of Broad Defect Groups

In the remaining portion of this section the internal composition of the broad defects is discussed. The data on which the discussion is based appear in Appendix C, Table 5. The defects are discussed in the order in which they appear in that table rather than in the order of their importance as causes for rejection.

Eye Defects. Eye diseases were the predominant eye defect, occurring in 43.5 and 46.7 percent of all eye defects in the two periods, respectively. Defective vision ranked second among eye defects in both periods. However, this type of eye defect was of considerably less importance among the Negroes than eye diseases. On the other hand, bilateral blindness occurred more frequently in Negro than in white registrants but occurred less frequently in respect to other eye defects in the period April 1943-December 1943 than in the period April 1942-March 1943. The same relationship occurred for unilateral blindness which constituted only 6.1 percent of eye defects if the second period as compared to 12.5 percent in the first period.

Ear Defects. Otitis media was the predominant ear defect recorded in both periods and formed relatively the same percentage of the total number of ear defects in both of the time periods. It was followed by the miscellaneous group of ear defects. There were no marked changes between the two time periods, except that bilateral deafness and unilateral deafness became less important in relation to all ear defects after March 1943 in comparison to the period April 1942-March 1943. It is noticeable that bilateral deafness, unilateral deafness and defective hearing were of considerably more importance in relation to total ear defects among Negroes than was the case in white registrants. Otitis media accounted for more than 60 percent of all ear rejections but in many of these cases perforated ear drums were also present.

Teeth Defects. During both time periods dental defects were of insignificant importance as a cause for rejection. However, of the few registrants rejected for teeth abnormalities the leading type of defect in both races was missing teeth followed in the first period by dentures and in the second period by dental caries. Nearly one-half of all registrants rejected for dental defects were rejected for missing teeth; in the early period 20 percent were rejected for dentures and in the later period 24.2 percent for dental caries. It is noticeable that in both periods dental caries were of more importance in relation to all dental defects among Negro than among white

registrants and that dentures were less prevalent among Negro than white registrants.

Nose Defects. Prior to April 1943 simusitis was the predominant nose defect causing rejection, followed by vasomotor rhinitis; while in the period April 1943-December 1943 these two causes for rejection changed positions in relative importance. It is noticeable that nasal diseases and deformities were of more importance among Negroes than was vasomotor rhinitis and in both time periods nasal diseases and deformities ranked second for this race. Simusitis on the other hand was also of more importance among defects of the nose in Negroes than among white registrants, being responsible in the earlier period for more than 50 percent of all nose rejections and for 44.2 percent in the later time period.

Throat Defects. In both time periods miscellaneous throat defects were predominant over defects of the tonsils. In the first period these defects constituted 68.4 percent of all throat defects and in the later period 51.4 percent. It is significant that in both time periods the importance of tonsil defects among the Negroes exceeded other throat defects, being responsible for 60.5 percent of throat rejections in the earlier period and 51.9 percent in the later period.

Lung Defects. While defects of the lungs were not among the ten leading causes for rejection they were relatively important as a cause for rejection. This group does not include tuberculosis. The distribution for specific types of lung defects was the same in both time periods with asthma accounting for more than 60 percent of those rejected for pathological conditions of the lungs. Asthma formed a relatively larger proportion of lung defects among the Negro registrants than among white registrants.

Tuberculosis. Tuberculosis ranked among the ten leading causes for rejection. Essentially, the group is composed of pulmonary tuberculosis either active, arrested, or suspected. In the first period the active cases and suspected cases each formed 33.1 percent of the total with arrested pulmonary tuberculosis comprising 29.4 percent. Among Negroes, the arrested form of tuberculosis was the most prevalent with the unspecified or suspected type second and the active type third. In the second period active tuberculosis was most important, followed by suspected or unspecified tuberculosis; arrested tuberculosis was third. For Negroes during the second period, the importance of active tuberculosis exceeded that in white registrants, as did the arrested type. However, the suspected or unspecified type was of slightly less importance among the Negro than the white registrant.

Cardiovascular. Cardiovascular defects were among the more important causes of rejection. Within the group, the early period showed arterial hypertension as the most prevalent cardiovascular condition in both races, with the importance of this particular defect very marked among the Negro race. However, beginning in April 1943 valvular heart disease slightly outweighed arterial hypertension as the most prevalent specific defect within the group. It is significant, however, that in the case of Negroes arterial hypertension was by far the most important subdivision of cardiovascular disease. The data indicate that rheumatic heart disease and tachycardia were less frequently a cause for rejection among the Negro race than they were among white registrants. The two defects just mentioned formed a far smaller percentage of the total cardiovascular rejections for Negro than they did for white registrants.

Hernia. Hernia appeared among the 10 leading causes for rejection. Nearly 89 percent of all rejections for this defect were the result of inguinal hernia and approximately 7 percent of the rejections were due to abdominal hernia. The relative importance of abdominal hernia in comparison to inguinal hernia was greater among the Negro than the white registrants, occurring approximately twice as frequently as the cause for rejection among Negroes as for all other races. Inguinal hernia occurred less frequently among Negroes but still comprised more than 83 percent of all hernia rejections for that race.

Kidneys and Urinary System. This group of defects was relatively unimportant as a cause for rejection. Laboratory findings were the basis of 44.8 percent of the rejections for this cause in the period prior to April 1943 and were responsible for 57.6 percent after that. It is noticeable that urinary findings were more important as a cause for rejection among Negroes than white registrants.

Abdominal viscera. The abdominal viscera group of defects was predominantly composed of gastric ulcer which constituted 65.3 percent in the first time period and 75.1 percent in the second. However, it is important that in the earlier period, the distribution among the Negroes was approximately equal between gastric ulcer and other gastro-intestinal defects. In both periods the importance of the other gastro-intestinal defects was greater among the Negroes than it was among white registrants.

Genitalia. This group of defects was not one of the more prevalent causes for rejection. In the earlier time period the group was led by miscellaneous defects of the genitalia and undescended testicle. Nearly 79 percent of the Negro rejections in this group resulted from miscellaneous defects of the genitalia. In the later

period undescended testicle became more important, forming 44.6 percent of all rejections for this group while the prevalence of miscellaneous defects among the Negroes was still greater among that race, constituting 68.6 percent of all rejections for defects of the genitalia.

Syphilis. Syphilis as a cause for rejection was subject to change in regulations during the two time periods. Registrants with syphilis became inductible in February 1943 and while the effects of this provision were not immediately felt they were definitely reflected in the period April 1943-December 1943. Prior to April 1943 positive serology with no other findings was the predominant type of defect within the group constituting 72.5 percent of all rejections, while miscellaneous syphilis ranked second with 24.6 percent. In that period the importance of positive serology among the Negroes was slightly higher than for white registrants (74.0 percent). In the later period the importance of positive serology had greatly diminished due to the fact that registrants having only a positive serology were generally inducted. For all races this type of rejection constituted only 51.9 percent of all rejections for syphilis with 24.7 percent of the rejections being based on a diagnosis of neurosyphilis and 21.6 percent based on diagnosis of other types. However, among white registrants the differences were even more striking with 31.6 percent of all rejections for syphilis being based upon positive serology. Among white registrants 43.0 percent of syphilitic rejections were the result of a diagnosis of neurosyphilis and 24.0 percent were for other or miscellaneous types of syphilis. In the case of the Negro, however, 63.3 percent of all syphilis rejections in that race continued to be based upon positive serology alone with 20.3 percent based upon miscellaneous types and 14.2 percent diagnosed as neurosyphilis.

As the induction of syphilitics goes forward rejections for neurosyphilis will constitute a larger proportion of the total rejections for syphilis and, although there is a racial difference in respect to neurosyphilis the observed difference might be less but for the fact that a larger proportion of white registrants with uncomplicated syphilis has been inducted than Negroes. Therefore, the backlog of potential inductible syphilitics is relatively greater among the Negroes than the whites. (See Table 6).

It is noticeable that the change in the importance of positive serology among white registrants decreased from 71.9 percent syphilitic rejections in the period April-June 1942 to 7.2 percent in the period November-December 1943. During the same period neurosyphilis rose from 5.6 percent of white syphilitic rejections to 77.5 percent among these registrants. Cardiovascular syphilis rose from 0.6 percent to 4.0 percent in the span of this period while miscellaneous or other types decreased in importance from 21.9 percent to 11.3 percent. In the case of Negroes there was a decrease in the importance of positive serology from 77.6 percent of all syphilitic rejections to 13.7 percent. It is obvious, however, that the

decrease was not as rapid nor did it progress as far as among white registrants. Neurosyphilis increased from 0.7 percent to 61.1 percent of syphilitic rejections. Cardiovascular syphilis increased from 0.2 percent to 12.4 percent of rejections and the miscellaneous types decreased from 21.5 to 12.8 percent. These figures indicate that positive serology remained the most important syphilitic diagnosis among Negroes up to November 1943.

Table 6
Percent Distribution of Types of Syphilis Among Registrants Rejected at Local Boards and Induction Stations
April 1942-December 1943

Month of Receipt of Form 221	White 1/					Negro				
	Total	Neuro-syphilis	Cardio-vascular syphilis	Other	Positive serology	Total	Neuro-syphilis	Cardio-vascular syphilis	Other	Positive serology
April-June 1942	100.0	5.6	0.6	21.9	71.9	100.0	0.7	0.2	21.5	77.6
November-December 1942	100.0	4.5	0.1	25.5	69.9	100.0	0.9	0.2	26.6	72.3
January 1943	100.0	4.7	0.2	22.7	72.4	100.0	0.7	0.1	23.5	75.7
February 1943	100.0	8.4	0.2	28.2	63.2	100.0	0.6	0.3	29.1	70.0
March 1943	100.0	12.6	0.3	21.8	65.3	100.0	1.8	0.3	21.5	76.4
April-May 1943	100.0	27.6	0.7	30.1	41.6	100.0	5.3	0.7	21.5	72.5
June-July 1943	100.0	53.2	1.2	18.5	27.1	100.0	11.7	1.6	17.5	69.2
August-September 1943	100.0	64.1	2.0	17.7	16.2	100.0	25.9	2.8	23.8	49.5
November-December 1943	100.0	77.8	4.0	11.3	7.2	100.0	61.1	12.4	12.8	13.7

1/ Includes all races other than Negro.

Gonococcus Infection and Other Venereal Diseases. Gonococcus infection was the predominant defect among this group comprising, in the first period, more than 91.2 percent of all rejections within the group while in the second period it comprised 85.3 percent. It is noticeable however, that other venereal infection was of more importance among the Negro than white registrants. In the first period, 10.8 percent of Negro rejections in this group were for other venereal infections while in the later period 19.2 percent among Negroes were for other venereal infections.

Educational and Mental Deficiency. This group constituted one of the most important causes for rejection. It is composed of three main subdivisions, educational deficiency, mental deficiency, and the specific diagnoses of morons, imbeciles and idiots. Until June 1, 1943, registrants who could not read or write as well as a

student who had completed four years in an American grammar school could be rejected. After June 1, 1943, all non-high school graduates were given a mental test or series of tests at the induction station. Those who failed were classed as mentally deficient and were rejected because of "failure to pass minimum intelligence standards". In the earlier period, these registrants would have been rejected, in many cases, for educational deficiency. For this reason mental deficiency and educational deficiency are generally grouped together for purposes of discussion. The line of demarcation between the two groups has never been clearly defined.

From April 1942-March 1943 educational deficiency comprised 73.8 percent of all rejections within this group, with morons, imbeciles, and idiots comprising 13.7 percent and mental deficiency 12.5 percent. The importance of educational deficiency among the Negro race was much greater than among white registrants, comprising 85.8 percent of all rejections within this group during this period in contrast to 65.6 percent among white registrants. Also, in the case of the Negroes mental deficiency ranked second, comprising 7.3 percent of the rejections within the group while morons, imbeciles, and idiots comprised only 6.9 percent. The picture between April 1943-December 1943 was different. While 71.7 percent of all rejections in the group continued to be for educational deficiency, mental deficiency had become relatively more important, comprising 21.6 percent of the rejections. Morons, imbeciles, and idiots became less important, comprising only 6.7 percent. In respect to the Negro race, the importance of educational deficiency diminished as a result of the change in induction station procedures. It now comprised only 74.6 percent of all rejections within the group while mental deficiency had become more important, comprising 22.5 percent. Morons, imbeciles, and idiots diminished greatly in importance, constituting only 2.9 percent of rejections within this group. In the case of white registrants, it is interesting to note that educational deficiency comprised a larger percentage in the later than in the earlier time period, being responsible for 69.0 percent of rejections in this group. Mental deficiency increased to 20.6 percent while the importance of morons, imbeciles, and idiots within the group decreased to 10.4 percent.

Mental Disease. This group constituted the leading cause of rejection among Selective Service registrants. It was predominantly composed of psychoneurotic disorders which constituted 51.6 percent and 56.7 percent of all rejections within the group in the two respective periods. Psychopathic personality was of second importance within the group, constituting 27.3 percent and 31.2 percent of the rejections, with grave mental and personality disorders third and chronic inebriety and drug addiction fourth. Among Negroes, psychopathic personality and

psychoneurotic disorders were of approximately equal importance as causes for rejection. Among white registrants psychoneurotic disorders far outweighted psychopathic personality. The relative importance of psychopathic personality was much greater among Negro than white registrants. Grave mental or personality disorders, as well as chronic inebriety and drug addiction, were of less relative importance among Negroes than white registrants.

Neurological Defects. This group of defects was of sufficient importance to appear among the ten leading causes for rejection. Miscellaneous diagnoses within the group accounted for the largest proportion of the rejections (36.9 percent and 42.8 percent in the respective periods). Approximately 20.4 percent of the neurological rejections in the earlier period and 17.2 percent in the later period were the result of epilepsy. Residuals of poliomyelitis ranked second among white registrants while post-traumatic cerebral syndrome ranked second among the Negroes in both periods. Epilepsy, which was of equal importance with post-traumatic cerebral syndrome among Negroes during the first period, was less important in the second period. Chronic encephalitis was relatively less important as a cause for rejection of Negro than of white registrants.

Musculoskeletal. This group of defects was one of the most important and appeared near the top of the ten leading causes for rejection. Residuals of injury constituted 31.5 percent and 34.1 percent of all rejections within the group for the respective periods. Congenital and miscellaneous defects ranked second in both periods, constituting 20.6 and 23.6 percent of rejections while amputations ranked third, constituting 13.3 and 11.3 percent. Racial differences within this group of defects were not very prevalent. However, residuals of injury and amputations were relatively more important among Negroes than white registrants. Osteomyelitis and muscular atrophy were less important in the Negro group than among white registrants.

Feet Defects. Pes planus accounted for the majority of rejections for foot defects in both periods--75.9 percent in the first and 84.8 percent in the second. It was relatively more important as a cause for rejection of Negroes than of white registrants. Other foot defects, such as clubfoot and hallux valgus, were relatively more important among white registrants.

Endocrine Disturbances. Diabetes mellitus accounted for four out of every ten rejections in this defect group during both periods. The proportion was the same for both white and Negro registrants. Fröhlich's syndrome was next in importance and was followed by thyroid disturbances, which were less important in the second period than in the first.

Neoplasms. Pilonidal cysts accounted for more than one-half of the white rejections for neoplasms during both periods. In contrast, this defect constituted only 6.9 percent of the total Negro rejections for neoplasms in the earlier period and 12.6 percent in the later. Other neoplasms were far more important for Negroes than for whites, while the malignant growths were of approximately equal importance for both races.

Weight and Height Deviation. Rejections for weight and height deviation were often recorded as gigantism, dwarfism, or as endocrine disorders. For this reason, the figures shown represent an understatement of the actual importance of weight and height deviation as causes for rejection. In the group of miscellaneous defects, underweight and underheight were relatively more important as causes for rejection than overweight and overheight respectively.

Age Specific Rejection Rates for Selected Defects

Rejection rates by age groups are available for some of the more important defect groups covering the period April 1942-March 1943. Table 7 indicates that tuberculosis rejection rates became progressively higher in each age group for both races. The rates for Negro and white registrants were almost identical in the 18-25 year age group. However, the rate for Negroes increased only slightly in the older age groups while the white rates increased markedly.

Table 7

Rejections for Selected Defects per 1000 Registrants Examined by Age Groups and Race
April 1942-March 1943

Defect Group	White 1/				Negro			
	18-25	26-29	30-37	38 & over	18-25	26-29	30-37	38 & over
Mental disease	34.6	54.7	75.5	91.8	30.5	25.2	36.9	63.2
Tuberculosis	9.4	13.4	19.7	30.9	9.2	10.9	12.9	15.7
Cardiovascular	27.7	34.6	43.1	60.9	30.9	40.3	54.3	76.8
Syphilis	5.2	14.5	27.4	36.5	111.5	181.9	225.2	269.0
Mental deficiency	9.1	8.9	10.5	19.2	18.5	21.6	19.1	17.3
Educational deficiency	21.0	22.2	24.7	23.0	112.1	111.2	97.9	81.2
Neurological	21.1	21.4	25.1	38.3	11.9	12.9	17.0	22.7

1/ Includes all races other than Negro.

For both races cardiovascular system rejection rates increased with advancing age, but the increase was more rapid among Negro than white registrants.

The rejection rate for syphilis increased from 5.2 per 1,000 examined for white registrants in the age group 18-25 years to 36.5 in the group 38 years of age and over. Among Negroes the rejection rate for syphilis increased from 111.5 in the age group 18-25 years to 269.0 in the age group 38 years and over.

Among white registrants the rejection rate for mental disease increased regularly with increasing age. In the case of Negroes the group 18-25 years of age had a higher rejection rate than the group 26-29 years of age. At age 30 the rejection rates for this defect rose to a point exceeding the rate for the 18-25 year old group and continued to increase in the older age groups. The rejection rate for this defect was consistently lower for Negroes than white registrants in all age groups.

The rejection rates for neurological disorders among white registrants were approximately the same for the age groups 18-25 and 26-29 and increased beyond the age of 30 with a pronounced increase in the rejection rate in the group 38 years of age and over. The rejection rate for this defect was consistently lower among Negro than white registrants and the same type of increase was noted in the age group 30-37 years and the group 38 years of age and over.

The rejection rate for mental deficiency remained relatively constant for white registrants except in the age group 38 years of age and over. The rate in the latter group was nearly twice that for men under 38 years of age. This fact is not observed in the Negro rejection rate for mental deficiency. The rejection rate for this defect remained relatively constant among Negroes of all ages.

Rejections for educational deficiency followed a consistent pattern for white registrants in all age groups. It varied from 21.0 in the age group 18-25 to 24.7 in the age group 30-37. The rate for this defect among Negroes was considerably higher than for white registrants, being 99.8 per 1,000 Negroes of all ages who were examined. In the case of this race there was a definite downward trend from 112.1 in the age group 18-25 years to 81.2 for the group 38 years of age and over.

INCIDENCE OF ALL RECORDED DEFECTS

This section deals with the incidence of all recorded defects among inducted and rejected registrants in contrast to the discussion of the principal causes for rejection contained in the previous section. Many of the rejected registrants had other defects in addition to the principal cause for rejection and in many cases inducted registrants had one or more recorded defects which were non-disqualifying in nature. The tabulation covering the period April 1942 through December 1943 showed an average of 1.0 defects per registrant examined. 1/ The rate for white registrants was slightly above this, and that for Negroes was slightly below. It was found that 36.9 percent of all registrants examined had no recorded defect; the figure for white registrants being 38.0 percent and for Negroes 30.5 percent. Several defects which were not important as causes for rejection were found among the first ten recorded defects. Probably not all minor defects have been recorded and, if recorded, it is certain that all defects have not been coded since only those which were listed in the summary of defects on Form 221 have been transposed to code. It still remains however that the major defects have been recorded. No attempt has been made to measure the extent of acute illnesses among the examined registrants.

Data on the incidence of illness in other surveys are not comparable with the present data on the incidence of recorded defects. 2/ A survey of illnesses measures the acute conditions arising from a pathological defect while the examination of Selective Service registrants confines itself to a record of pathological defects without reference to any acute illness which may have resulted from it. This fact is best illustrated in recording defects of the tonsils. An infection of the tonsils may cause two or three periods of illness annually but the defect is recorded only once and represents an existing pathological condition without reference to resulting illnesses. The registrant is either qualified for military service because the recorded defects are of insufficient importance to cause disqualification or is rejected for service because the defect is a disqualifying pathological condition.

Defects most frequently recorded on Form 221 do not appear in the same order as do the leading causes for rejection. Minor abnormalities

1/ This is considerably lower than the 1.6 defects per person shown in Medical Statistics Bulletin No. 2 (p. 10). However, a change in coding procedure may account for this decrease. For the peacetime examinations, defects listed in the detailed physical examinations were coded, whereas during wartime the coding was confined to certain lines which summarized the defects and the complete list of defects did not always appear in the summary.

2/ Collins, Selwyn D. The Sickness Surveys; Types, History and Some Results. Thomas Nelson and Sons, 1941, chapter 12, pages 185-213.

are not important enough for rejection but form an important part of the total defect picture. The ten most frequently recorded defects by race are indicated in Table 8 in order of importance:

Table 8
A Comparison of the Ten Most Frequently Recorded Defects With the Ten Leading Causes for Rejection, by Race
April 1942-December 1943

White 1/		Negro	
Incidence of Recorded Defects	Causes for Rejection	Incidence of Recorded Defects	Causes for Rejection
Eyes	Mental disease	Syphilis	Educational and mental deficiency
Teeth	Musculoskeletal	Educational and mental deficiency	Syphilis
Musculoskeletal	Cardiovascular	Eyes	Mental disease
Mental disease	Educational and mental deficiency	Musculoskeletal	Cardiovascular
Underweight and overweight	Eyes	Cardiovascular	Musculoskeletal
Feet	Hernia	Feet	Hernia
Hernia	Neurological	Mental disease	Eyes
Cardiovascular	Ears	Teeth	Neurological
Ears	Tuberculosis	Hernia	Gonorrhea and other venereal
Educational and mental deficiency	Syphilis	Underweight and overweight	Feet

1/ Includes all races other than Negro.

Several defects appearing on the above list of recorded defects do not appear on the lists of leading causes for rejection. Teeth, for example, are second on the white list and eighth on the Negro list but do not appear on the list of important causes for rejection for either race. Additional examples of this nature are underweight and overweight, for Negro registrants, and feet defects for white registrants.

On the other hand, certain types of defects appear on the list of leading disqualifying defects although they did not occur frequently enough to appear on the list of all recorded defects. Such defects are: neurological disorders, tuberculosis and syphilis for white registrants, and neurological disorders, gonorrhea and other venereal diseases for Negroes.

Table 9 indicates the incidence of each broad defect group per 1,000 registrants examined. Table 6, Appendix C gives a more detailed breakdown of defects within each of these broad groups.

Table 9
Incidence of Defects in Examined Registrants, by Race
April 1942-December 1943 1/

Defect Group	Incidence per 1000 Examined		
	Total	White 2/	Negro
All Defects	1000.2	1008.7	953.2
Eyes	136.1	147.9	70.7
Ears	35.1	39.3	11.5
Teeth	113.0	124.7	47.7
Mouth and gums	14.5	15.1	11.2
Nose	25.8	29.4	5.6
Throat	7.3	7.4	6.4
Lungs	15.4	16.0	12.0
Tuberculosis	19.1	19.9	14.6
Cardiovascular	51.0	49.8	57.7
Blood and blood-forming	0.6	0.7	0.1
Hernia	50.2	52.1	40.2
Kidney and urinary	11.5	12.3	7.2
Abdominal viscera	11.0	12.2	4.3
Genitalia	33.7	34.1	32.0
Syphilis	50.2	20.8	214.7
Gonorrhea and other venereal	6.3	2.3	28.7
Skin	14.0	15.2	7.2
Hemorrhoids	11.3	11.6	9.1
Varicose veins	16.2	17.3	9.7
Educational and mental deficiency 3/	50.7	36.8	128.2
Mental disease	67.5	70.6	50.3
Neurological	28.0	29.6	19.0
Musculoskeletal	86.1	90.8	59.6
Feet	54.6	55.0	52.5
Endocrine	8.5	9.6	2.5
Neoplasms	9.4	10.2	4.9
Infectious and parasitic	0.6	0.6	0.5
Underweight and overweight	65.5	70.4	37.8
Other medical	7.0	7.0	7.3

1/ Forms 221 are included for the periods April-July 1942, November-December 1942, January-February 1943, and November-December 1943.
2/ Includes all races other than Negro.
3/ Includes registrants rejected for educational deficiency before June 1, 1943 and for failure to meet minimum intelligence standards after that date as well as those rejected for mental deficiency.

Eye Defects. Eye abnormalities led the list of recorded defects for white registrants and were third on the list for Negroes. This is in contrast to the importance of "conditions of the eye" as cause for rejection. This type of defect most frequently restricted a registrant to limited service. Eye defects were recorded in 136.1 of every 1,000 registrants examined; the figure was 147.9 among white registrants and 70.7 among the Negroes. Thus eye abnormalities were twice as frequent among white as Negro registrants. Bilateral blindness occurred infrequently in both races, but unilateral blindness occurred in approximately 7 registrants per 1,000 with the occurrence being slightly less for Negro than white registrants. Refractive error (defective vision) was the most frequently recorded condition of the eye, occurring in 100.4 white registrants and in 36.4 Negro registrants per 1,000 examined. Diseases of the cornea and retina, cataract, and other eye diseases occurred nearly 40 times per 1,000 examinations. Again in the case of this defect the incidence among Negroes was less than that for white registrants.

Ear Defects. Ear defects were relatively infrequent among Negro registrants. This is illustrated by the incidence of 39.3 ear defects per 1,000 white registrants and 11.5 per 1,000 Negroes examined. Otitis media led the list of ear defects among white registrants while defective hearing was the most prevalent ear abnormality among Negroes. Bilateral and unilateral deafness were not frequently recorded ear conditions but the latter occurred twice as frequently as the former. Serious conditions of the ear such as deafness, otitis media and severe defective hearing were almost always disqualifying, but in spite of this fact the defect was more important as a recorded defect than as a cause for disqualification.

Teeth Defects. The changes in regard to dental examination between peacetime and wartime were very drastic. The result has been that dental defects ceased to be the leading cause for rejection. The decrease in importance was reflected even in the number of dental defects recorded in wartime. Since this type of defect was not disqualifying probably not all cases of carious and missing teeth were recorded in the summary of defects. In spite of these changes 113 registrants per 1,000 examined were found to possess dental defects. The figure for white registrants was 124.7 and for Negroes 47.7. Missing teeth were the most prevalent defect and dentures were next in importance. These occurred in 53.1 and 36.2 registrants per 1,000 examined respectively. In the case of Negro registrants missing teeth and dental caries were the most prevalent.

Special tabulations covering the period April-July 1942, given in Table 10, indicate that every 1,000 registrants examined at the induction station had 6,339 missing teeth, 795 non-restorable

carious teeth and 1,272 restorable carious teeth. The difference between races was quite marked with respect to missing teeth, 6,648 per 1,000 white as compared to 2,745 per 1,000 Negroes examined. However, non-restorable carious teeth among the Negroes were more prevalent than among white registrants; the reverse was true with respect to restorable carious teeth.

Table 10

Number of Missing, Non-restorable and Restorable Carious Teeth per 1,000 Registrants Examined at Induction Stations April-July 1942

Disposition Following Examination	Missing Teeth	Non-restorable carious	Restorable carious
All races	6,339.3	794.9	1,272.5
Inducted	5,975.4	616.4	1,243.6
Rejected	6,996.7	1,117.3	1,324.7
White 1/	6,647.9	794.0	1,285.7
Inducted	6,231.5	611.8	1,256.8
Rejected	7,414.5	1,129.5	1,338.8
Negro	2,745.5	804.5	1,119.2
Inducted	2,719.9	674.5	1,076.0
Rejected	2,782.8	994.5	1,182.2

1/ Includes all races other than Negro.

Mouth and Gum Defects. Defects of the mouth and gums occurred in 14.5 registrants per 1,000 examined. The incidence of this group of defects was approximately equal among white and Negro registrants. Gingivitis and pyorrhea were the predominant defects falling within this group.

Nose Defects. This group was found infrequently among Negro registrants but was prevalent in 29.4 white registrants per 1,000 examined. Nasal obstruction constituted approximately 60 percent of recorded defects in this group. This particular defect was 7 times more prevalent among white than Negro registrants.

Throat Defects. Defects of the throat were of little concern as a cause for rejection and were recorded as a defect in only 7.3 cases per 1,000 examined. The group was primarily composed of defective

tonsils. The overall frequency was approximately the same for white and Negro registrants.

Lung Defects. Most defects of the lungs were severe enough to be disqualifying. The incidence of recorded defects of this type was about 15 per 1,000 registrants examined. The incidence among white registrants was 16 and among Negroes 12 per 1,000 examined. Asthma constituted the leading single defect within this group and accounted for about one-half of the recorded lung defects in both races.

Tuberculosis. During 1942 and 1943 the majority of the examined registrants were forwarded to induction stations where a routine chest x-ray was taken. In peacetime, chest x-rays were not taken routinely at local boards. This is a major factor in the increase in the recorded incidence of tuberculosis from 9.7 per 1,000 local board examinations in peacetime to 19.1 per 1,000 local board and induction station examinations during wartime. 1/ Pulmonary tuberculosis constituted about two-thirds of all tuberculosis recorded. The pulmonary type was almost equally divided between active and arrested pulmonary tuberculosis, occurring in 6.1 and 6.7 registrants per 1,000 examined, respectively. An additional 5.4 registrants per 1,000 were classified as having suspected pulmonary tuberculosis.

The recorded incidence of all forms of tuberculosis was higher among white registrants than Negroes. These findings confirm the similar situation reported in a previous Selective Service study. 2/ Numerous references in the literature seem to substantiate the greater incidence of tuberculosis among white persons although it is a well known fact that the mortality rate for this disease is much higher among Negroes than whites. These data, plus the fact that there is a slight preponderance of active tuberculosis in comparison to arrested tuberculosis in the Negro, would seem to indicate early exposure and unimpeded development of the pulmonary type of the disease.

The group of rejected registrants found to have suspected or unspecified pulmonary tuberculosis warrants further consideration and clinical study. Recheck x-rays would reveal that at least a portion of this group would be found acceptable after examination by specialists to determine the actual existence or absence of pulmonary tuberculosis.

1/ Medical Statistics Bulletin No. 2, page 26.
2/ Medical Statistics Bulletin No. 2, page 10.

Cardiovascular Defects. The incidence of cardiovascular disease in wartime was 51.0 per 1,000 registrants examined. This recorded incidence was appreciably lower than that recorded in peacetime. 1/ This difference may be largely the result of not recording functional murmurs and non-persistent hypertension in the wartime examination. Hypertension and valvular heart diseases were the most important subdivisions of this broad group of defects. Hypertension was recorded in 18.4 and valvular heart disease in 12.9 registrants per 1,000 examined.

The incidence of cardiovascular defects among Negro registrants exceeded the incidence for white registrants, being 57.7 and 49.8 per 1,000 respectively. Hypertension was particularly prevalent among the Negroes and accounted for most of the difference between the two races. In the case of valvular heart disease and cardiac hypertrophy the incidence among Negroes was slightly greater than that for white registrants. Other types of cardiovascular defects showed a lower incidence among the Negroes than the white registrants.

The figures for rheumatic heart disease represent an understatement of the true incidence since the end-result of the disease and not the etiology was often recorded.

Blood and blood-forming organs. This group of defects had an incidence of less than one case per 1,000 registrants examined. The incidence of the group in the Negro race was negligible.

Hernia. Hernia occurred in 52.1 white and 40.2 Negro registrants per 1,000 examined. Inguinal hernia was the most prevalent type in both races, but abdominal hernia was twice as frequent among Negro as white registrants.

Kidneys and urinary system. This group of defects occurred in 11.5 registrants per 1,000 examined. In most cases the recorded defect was based upon laboratory findings with no specific diagnosis being made. Nephritis and other specific diagnosis of kidney and urinary pathology were made in only 4.7 cases per 1,000 examined. The incidence of this group of defects in the Negro race was appreciably less than in the white race (7.2 for Negroes and 12.3 for white registrants per 1,000 examinations).

Abdominal viscera. This type of defect was present in about 11 registrants per 1,000 examined and is almost equally divided between gastric ulcer and other gastrointestinal defects. It is noteworthy, however, that gastric ulcer was more prevalent among the white than among the Negro registrants and that among the Negroes this defect was less prevalent than other gastrointestinal defects.

1/ Incidence in peacetime 83.1 per 1,000 examined. Medical Statistics Bulletin No. 2, page 27.

Genitalia. This broad group of defects was recorded in 33.7 registrants per 1,000 examined. The incidence of these defects was approximately equal for white and Negro races with varicocele the most prominent subdivision among white registrants, occurring in 17.1 cases per 1,000 examined, and miscellaneous genitalia defects the most prevalent subdivision among the Negroes, being recorded in 20.9 cases per 1,000 examined. The incidence among Negroes in all other sub-groups was appreciably less than for white registrants.

Syphilis. The incidence of this defect as found in this study is significantly higher than that previously reported. During the period covered by this report 50.2 registrants per 1,000 examined were found to have syphilis; the rate for white registrants being 20.8 and for Negroes 214.7. The diagnosis in both races was predominantly on the basis of positive serology with no specified classification being made as to the stage of the disease. All forms of syphilis except neurosyphilis occurred approximately ten times as frequently among Negro as among white registrants. In the case of neurosyphilis the ratio of incidence between the Negro and white registrants was 1 to 4. Complications of syphilis, such as neurosyphilis and cardiovascular syphilis, were recorded infrequently among registrants examined. Neurosyphilis occurred in 1.8 registrants and cardiovascular syphilis in 0.2 registrants per 1,000 examined.

Gonococcus Infection and Other Venereal Diseases. The incidence of other groups of venereal diseases was 6.3 per 1,000 with the rate for white registrants 2.3 and for Negro registrants 28.7. This group was largely made up of gonococcus infections which were found in 5.9 registrants per 1,000 examined. The incidence for white registrants was 2.2 and for Negroes 26.6. Other types of venereal infection were insignificant when compared with syphilis and gonorrhea.

Skin. This group of diseases was numerous and it is probable that not all cases diagnosed were reported. The group had very little importance as a cause for rejection and was of only minor importance as a recorded defect. It occurred in 14.0 cases per 1,000 examined, being recorded twice as frequently among white as Negro registrants.

Hemorrhoids and Other Rectal Defects. This group of defects was found in 11.3 registrants per 1,000 examined, with the figures for white registrants 11.6 and for Negroes 9.1. The frequency of this defect among examined registrants indicates it to be relatively unimportant in comparison with other defects.

Varicose Veins. Varicose veins occurred in 16.2 cases per 1,000 registrants examined with a prevalency among white registrants of 17.3 and among Negroes of 9.7. It is not a principal defect in most instances and unless ulcerated is usually not a cause for rejection.

Illiteracy and Mental Deficiency. It has never been possible to clearly separate registrants found illiterate from those who are mentally deficient. There is considerable overlapping in these two categories with illiterate registrants being recorded under both. This has been especially true since June 1, 1943 when illiteracy per se was no longer considered a cause for rejection. The fact remains that if either of these defects is recorded it is more than likely that the registrant will be rejected for service. This group of defects was recorded for 50.7 registrants per 1,000; 36.8 for white registrants and 128.2 for Negroes. Only a small portion of the group was comprised of morons, imbeciles and idiots. The main portion is composed of those registrants who were educationally or mentally deficient. Serious mental deficiency (morons, imbeciles, and idiots) occurred in 6.2 cases per 1,000 registrants examined. The incidence of this defect was only slightly greater among Negro than white registrants. However, educational deficiency showed a wider race discrepancy, with the ratio of incidence between white and Negro being 1 to 4. The same ratio applied to "mental deficiency unspecified" where the recorded rate for white registrants was 9.0 and for Negroes 35.3 per 1,000 examined.

Mental Disease. This group of diseases was one of the leading causes for rejection and one of the most important defect groups recorded. Mental disease was recorded for 67.5 registrants per 1,000 examined, with an incidence of 70.6 for white and 50.3 for Negro registrants. Psychoneurotic disorders, psychopathic personality, and grave mental or personality disorders led the list as subdivisions of this group, occurring in 60.8 per 1,000 registrants examined. The incidence of psychopathic personality was higher among Negroes than white registrants. In the case of all other types of mental disease the recorded rate among Negroes was appreciably lower than for white registrants.

Neurological Defects. Neurological defects were recorded more frequently for white registrants than Negroes, the incidence being 29.6 for white and 19.0 for Negro registrants. The largest specific subdivisions of this group were epilepsy, post-traumatic cerebral syndrome and residuals of poliomyelitis. The miscellaneous group of neurological defects constituted 11.9 recorded cases per 1,000 registrants examined, and while this group forms the most important subdivision within the group, it has so many component parts that other headings actually carry more importance. In the case of post-traumatic cerebral syndrome the incidence among Negroes exceeded that for white registrants.

Musculoskeletal. The incidence of musculoskeletal defects was 86.1 per 1,000 registrants examined; for white registrants it was 90.8 and for Negroes 59.6. Residuals of injury were the most frequently recorded musculoskeletal defect, occurring in 26.0 instances per 1,000 registrants examined. This category included, for the most part, disqualifying disabilities resulting from injuries, such as the limitation of motion of a joint and deformities resulting from fractures. The hands, knees, and elbows were most frequently affected. Amputations ranked second among the subdivisions of this group occurring in 10.2 cases per 1,000 examined, with spinal malformations (scoliosis, lordosis, and kyphosis) ranking third with an incidence of 10.0. Miscellaneous musculoskeletal defects, including the congenital ones, were of utmost importance and reached nearly the same incidence as residuals of injury, occurring in 25.1 cases per 1,000 examined.

Feet. Defects of the feet continued to be an important recorded defect although they became relatively unimportant as a cause for rejection. Pes planus (flat feet) predominated in this grou. of defects, occurring in 48.3 out of a total of 54.6 feet defects per 1,000 registrants examined. The occurrence of pes planus was equal in both white and Negro registrants but was more frequently a cause for rejection among Negroes.

Endocrine Disturbances. This group of defects was recorded in 8.5 cases (9.6 for white and 2.5 for Negroes) per 1,000 examined. Diabetes mellitus, Frohlich's syndrome, and thyroid disturbances formed the bulk of the group and all three had approximately the same recorded incidence. Goiter, which commanded so much attention in World War I, has been recorded rather infrequently in the current war and the definite "goiter belt", which was so easily determined from the results of the examinations in World War I, no longer exists. The addition of iodine to the diet in the susceptible areas has been largely responsible for this change.

Neoplasms. This group of defects was recorded 9.4 times per 1,000 registrants examined. The group included pilonidal cysts which occurred in 4.5 registrants per 1,000 examined. Other neoplasms were also a sizable subdivision under this heading. They are responsible for a very large share of the neoplasms recorded for Negroes among whom pilonidal cyst is not prevalent to any great degree. The occurrence of malignant growths was negligible as would be expected from the age composition of the group examined. The overall incidence of neoplasms was over two times as great among white registrants as Negroes.

Infectious, Parasitic, and Epidemic Diseases. This group is not frequently recorded as a defect since registrants with acute infections or epidemic diseases are not normally examined until their acute condition improves.

Other Defects. This group included a wide variety of specific defects and the sum total of all of these defects constituted an incidence of 72.5 per 1,000 registrants examined. Thus this non-distinct group became one of the largest of the recorded defect groups. The overall incidence of the group was 77.4 for white and 45.1 for Negroes in every 1,000 examined. Overweight and underweight constituted the most important sub-group under this major heading, overweight being recorded twice as frequently as underweight. Defects of weight were a little more than half as prevalent among Negroes as white registrants.

STATE AND REGIONAL DIFFERENCES IN RESULTS OF PHYSICAL EXAMINATION

The data presented in the preceding sections present an overall picture of the national situation in regard to examined registrants but do not necessarily portray the situations in the individual states. Actually, of course, certain states vary considerably from others in matters of health just as they do in other characteristics such as wealth, economic activity, racial composition, and education. It is the purpose of this section to consider briefly some of the more important state and area differences in rejection rates, physical defects, and principal causes for rejection.

Rejection Rates

Table 1 in Appendix D presents state rejection rates for February 1943-August 1943. Separate rejection rates are calculated for local board examinations, induction station examinations, and for local board and induction station examinations combined. The combined local board and induction station rejection rates for all races indicate that all of the thirteen southern states were above the national average, but of the thirty-five northern and western states, only Vermont, Colorado, and New Mexico were above the national average. The lowest rejection rates were found in the northwest. On the other hand, over 50 percent of all registrants examined were rejected in seven states, all of which were located in the south. (See Figure 4).

A comparison of Figures 4 and 5 reveals that rejection rates for white registrants were highest in the southern states and in Colorado and Vermont. The lowest rejection rate for white registrants occurred in Kansas, Delaware, New Jersey, and in the northwest section of the country. The actual rates varied from 25 percent in Oregon to almost 50 percent in North Carolina.

Negro rejection rates were not calculated for states having less than 0.3 percent of total Negro registrants. The rejection rate for Negroes was higher than for white registrants in all states. In 17 states it exceeded 50 percent of the men examined while in an additional 11 states it exceeded 40 percent. Only in Kansas was the Negro rejection rate less than 35 percent (33.4). These extremely high rejection rates among Negroes played a important role in the high total rejection rates for the southern states. The rejection rates for Negroes varied from more than 71 percent in North Carolina and Arkansas to 33.4 percent in Kansas. (See Figure 6).

FIGURE 4

COMBINED LOCAL BOARD AND INDUCTION STATION REJECTION RATES PER 100 REGISTRANTS EXAMINED FEBRUARY 1943 THROUGH AUGUST 1943

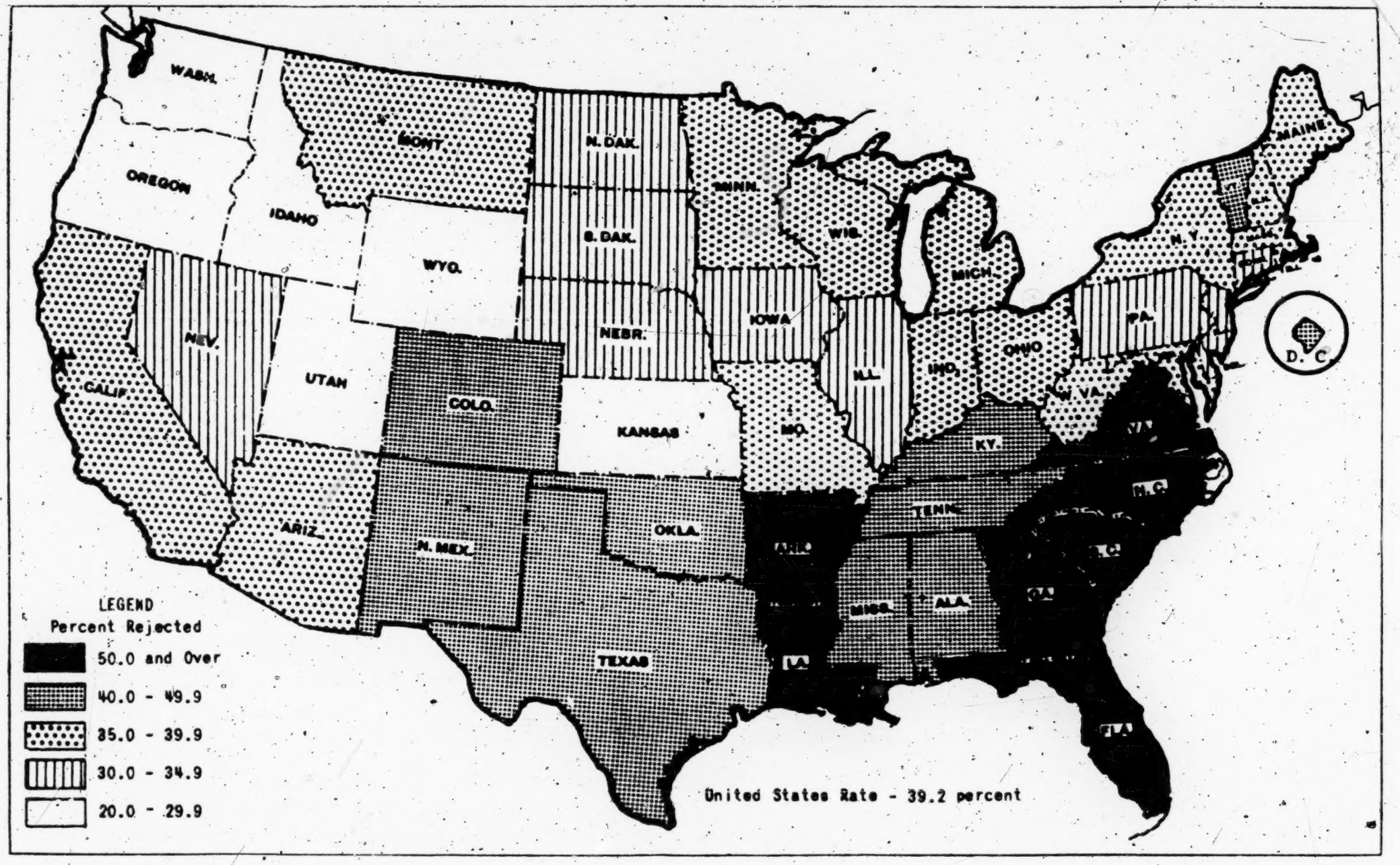


FIGURE 5

COMBINED LOCAL BOARD AND INDUCTION STATION REJECTION RATES PER 100 REGISTRANTS EXAMINED

FEBRUARY 1943 THROUGH AUGUST 1943

WHITE REGISTRANTS 1/

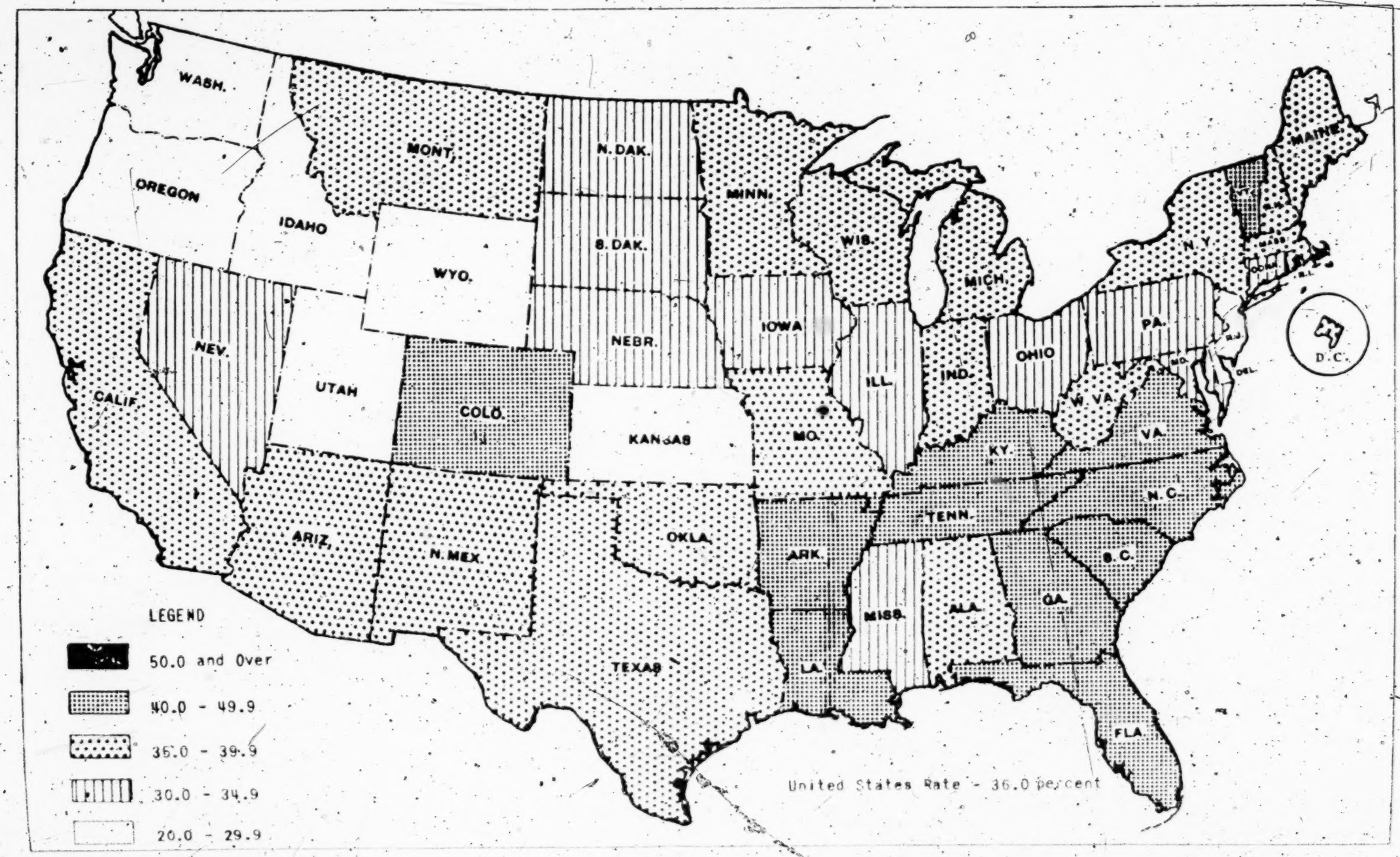


FIGURE 6

REJECTION RATES PER 100 REGISTRANTS

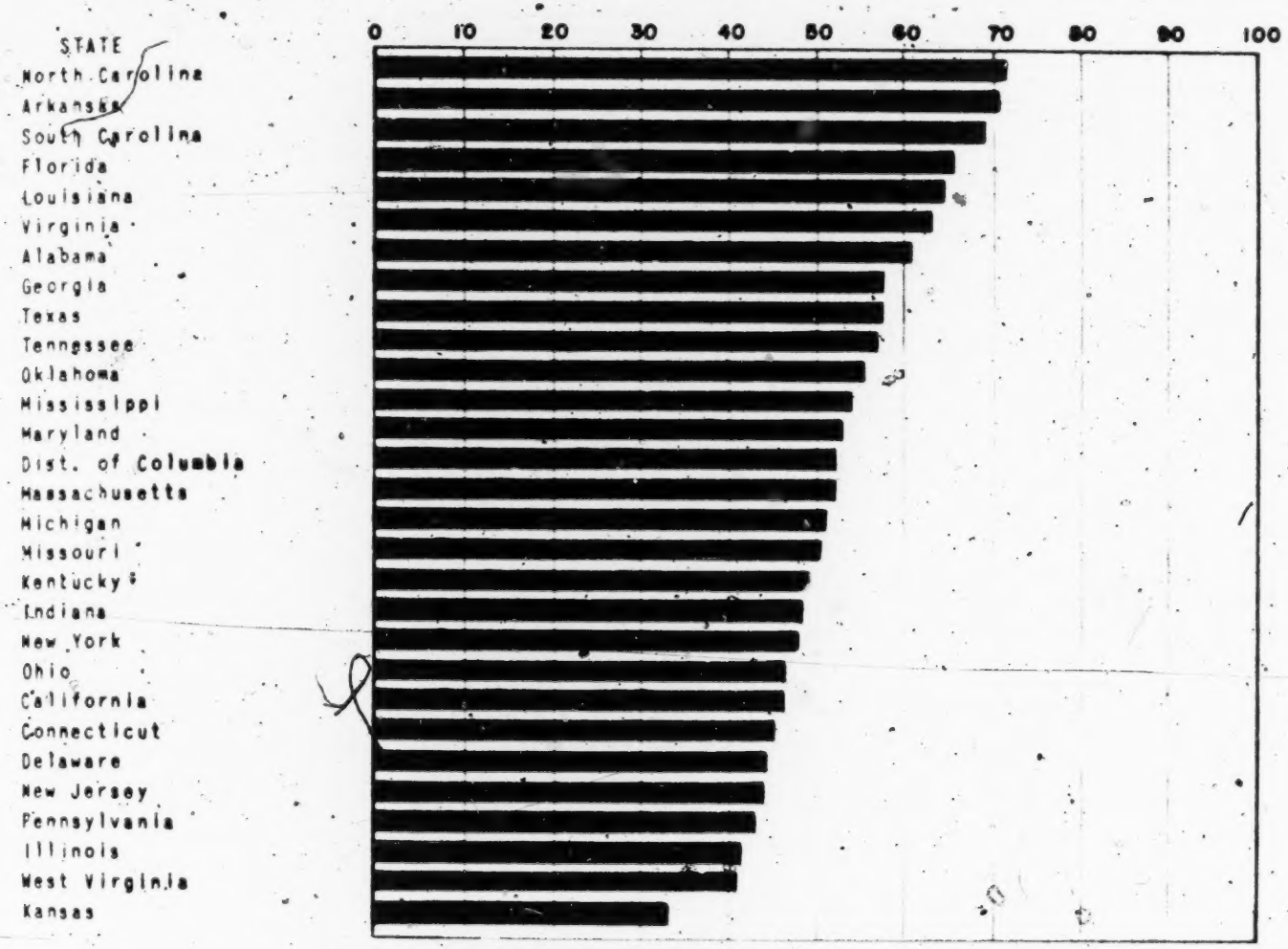
EXAMINED BY STATES

FEBRUARY 1943 - AUGUST 1943

NEGROES 1/

United States Average

Negro 56.9



1/ Negro rates are not calculated for states having less than 0.3 percent of total Negro registrants.

The differences in rejection rates in the various states are the result of several factors operating simultaneously. First, there are actual differences in the health of individuals in the various sections of the country. This is probably the primary reason for the variation in rejection rates between states and areas. The actual differences in the health of the people may be the result of environment, climate, economic status, and the availability of medical care. Secondly, standards of examination and acceptability may be applied differently in the various areas. This should not occur but cannot be completely eliminated when human judgment is involved in interpreting standards which cannot be measured objectively. Finally, the type of registrant forwarded for examination in one state may not correspond to the type being forwarded from another state. Some areas have more registrants deferred than others. Therefore differences in rejection rates between states are applicable to the specific period in question and not to all periods or all registrants. The general trends by race and areas, however, should be representative of total conditions.

"No Defect" Rates

The proportion of registrants with no defects, as discussed in this section, includes registrants who had no defects and those whose defects were of insufficient importance to be recorded in the physician's summary of defects on the Form 221. For rejected men, at least one defect was always recorded in the summary, but for inducted men this was not always done.

As Table 11 shows, 36.9 percent of the registrants examined during 1942 and 1943 had no defects recorded; the figure was 38.0 for white and 30.5 for Negroes.

Table 11
Percent of Examined Registrants Who Had No Defects
April 1942-December 1943

Race	April 1942-December 1943	April 1942-March 1943	April 1943-December 1943
Total	36.9	36.0	38.6
White 1/	38.0	36.8	40.3
Negro	30.5	31.3	29.1

1/ Includes all races other than Negro.

The percent of white registrants with no defect was higher during April 1943-December 1943 than in the preceding period; that of Negroes was lower. The discussion in this section is limited to April 1942-March 1943, the period for which detailed data are available.

Table 12 shows the proportion of registrants in the various age groups who were examined during April 1942-March 1943 and who had no defects recorded. With increasing age, the proportion of registrants with no defects increased. A smaller percentage of Negroes than of whites had no defects; this was true for each of the age groups.

Table 12
Percent of Examined Registrants for Whom No Defects Were Recorded, by Age Group, April 1942-March 1943

Race	Age Group				
	18-44	18-24	25-29	30-37	38-44
Total	36.0	45.3	33.4	28.1	20.3
White 1/	36.8	45.8	34.0	29.0	21.0
Negro	31.3	41.4	30.3	24.0	15.4

1/ Includes all races other than Negro.

The no-defect rates for individual states are presented in Table 2, Appendix D, by race and age group, and in Figures 7, 8, and 9. The states varied a great deal in the proportion of men with no defects. Among white registrants aged 18-44, there was a range of one percent in Vermont to 59 percent in Kansas. For Negro registrants, it was 2.6 percent in Massachusetts and 56.6 percent in Kansas.

The marked variation between states is due in large part to variations in diagnosis or in summarizing the defects recorded on the Form 221. In some states, only disqualifying defects of rejected men and the more serious defects of inducted men were recorded in the summary; in others defects of minor importance were also summarized. The extremely small proportion of registrants who were free from defects in the New England States reflects the policy of summarizing minor as well as major defects. This practice was apparently not followed in many of the states which had high rejection rates but which also showed a high proportion of registrants with no defects. Examples of the latter are Florida, Alabama, and Mississippi, whose rejection rates were above the national average, and whose no-defect rates were lower than would be expected.

FIGURE 7

PER CENT OF REGISTRANTS EXAMINED HAVING NO RECORDED DEFECTS 1/

APRIL 1942 - MARCH 1943

ALL REGISTRANTS

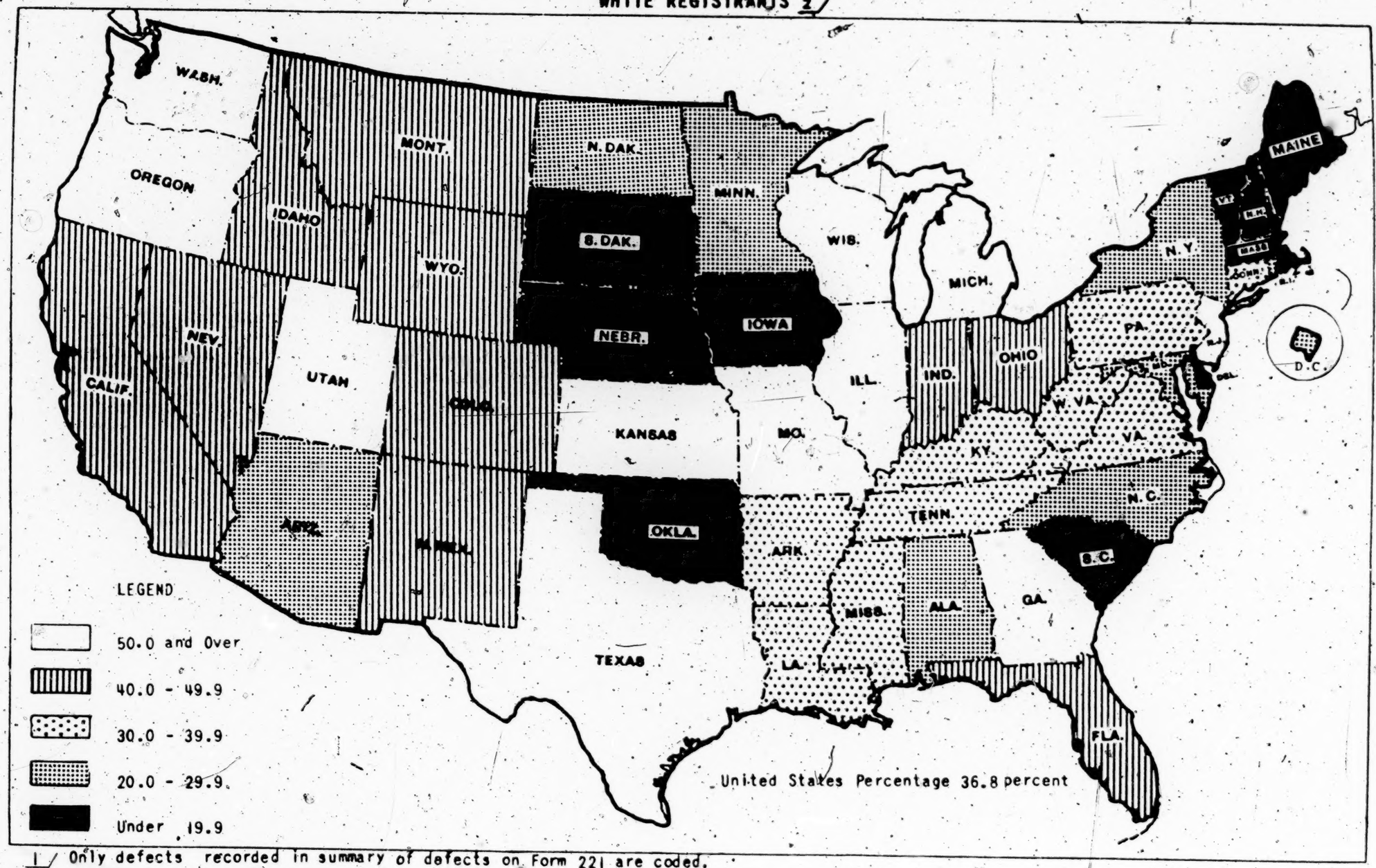
1/ Only defects recorded in summary of defects on Form 221 are coded.

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2381

FIGURE 8

PER CENT OF REGISTRANTS EXAMINED HAVING NO RECORDED DEFECTS 1/
APRIL 1942 - MARCH 1943
WHITE REGISTRANTS 2/



1/ Only defects recorded in summary of defects on Form 221 are coded.
2/ Includes all races except Negro.

2382

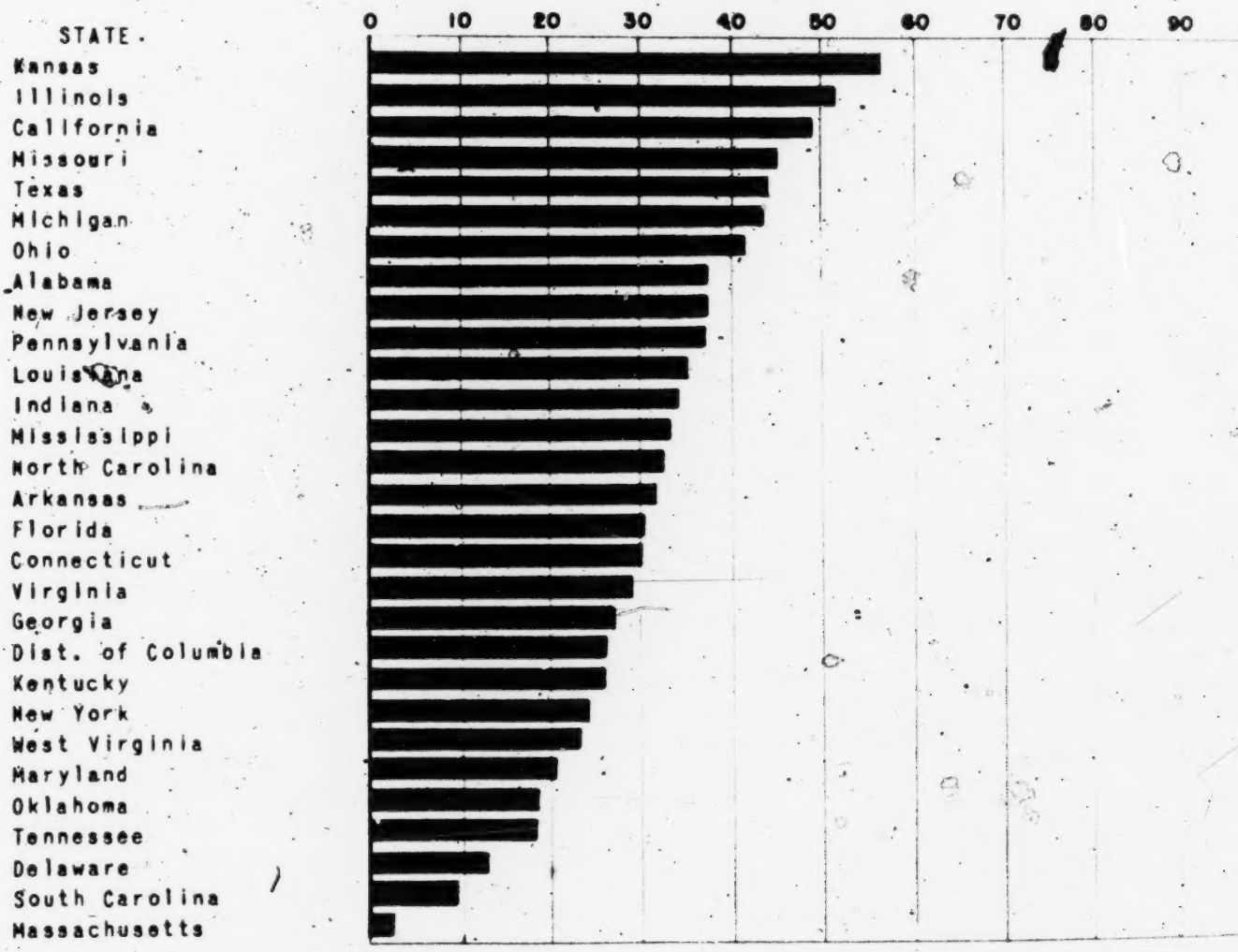
1503

PERCENT OF REGISTRANTS EXAMINED
HAVING NO RECORDED DEFECTS 1/
APRIL 1942 - MARCH 1943

NEGROES 1/

PERCENT WITH NO RECORDED DEFECTS

United States Average
Negro 31.3



1/ Negro percentages are not calculated for States having less than 0.3 percent total Negro registrants.

1305

Ten Leading Causes for Rejection by States

Table 4 in Appendix D presents the individual state rejection rates per 1,000 white registrants examined for each of the ten leading causes for rejection in the United States. These data are, again, for the period April 1942 through March 1943. It is obvious that the ten leading causes for rejection in the entire United States will not be identical with the ten leading causes for rejection in the individual states. It is also obvious that various sections of the country will have different leading causes for rejection. Therefore, for purposes of this discussion the United States has been divided into four geographical regions; East, South, Midwest, and West. 1/

Table 13 compares the rank position of the ten leading causes for rejection in the United States with the rank position of these same causes for rejection in the individual states within the four geographical regions. This table applies to white registrants only. It was found that in a limited number of states defects of the abdominal viscera, teeth, genitalia, and mental deficiency were among the ten leading causes for rejection even though these defects were not among the first ten causes for rejection in the nation as a whole. The table indicates that the eighth, ninth, and tenth causes for rejection in the United States, namely: educational deficiency, tuberculosis, and syphilis held a rank position of eleventh or greater in some of the individual states. Regional differences in this respect are discussed in the following paragraphs.

In the East it is noticeable that cardiovascular defects seemed to be responsible for more rejections than in the other areas as evidenced by their higher rank position in the area. Musculoskeletal defects, on the other hand, generally ranked lower among the states in this region than they did in the nation as a whole. Hernia and neurological defects were the cause of a slightly smaller proportion of rejections in this area while defects of the ears were relatively more important in the East than in the nation as a whole. The importance of defects of the eyes as a cause for rejection in the states in this area varied widely with this defect ranking as the first cause for rejection in one state and the seventh cause for rejection in another. The table also indicates that educational deficiency and syphilis were not generally among the ten leading causes for rejection in the individual states within this region and that their corresponding rank in the nation was taken over by other defects such as mental deficiency and defects of the abdominal viscera.

1/ See Table 3 in Appendix D, for the list of states comprising each region.

In the Midwest hernia generally carried a higher rank position as a cause for rejection than in the nation. Cardiovascular defects on the other hand, were responsible for a smaller proportion of rejections than in the entire nation as is indicated by the lower rank position of this defect in most states in this area. Educational deficiency was relatively unimportant in the states in this region and in only three of the thirteen states did this cause rank in the first ten causes for rejection. In nearly half of the states in this area syphilis was not among the first ten causes for rejection of white registrants. Mental deficiency, dental defects, and defects of the abdominal viscera assumed importance as leading causes for rejection in individual states in this region even though they were not among the first ten causes for rejection in the nation.

In the South educational deficiency and syphilis generally held higher rank as causes for rejection in the individual states than is true for white registrants in other areas. On the other hand, tuberculosis, neurological defects, cardiovascular defects and ear defects formed a smaller proportion of rejections in these states than in the entire United States. It is also noticeable that cardiovascular defects had a low rank position as a cause for rejection in several states in this area in comparison to all the states in the country. It is quite obvious that the prevalence of educational deficiency and syphilis among white registrants in the southern states influenced the other causes for rejection considerably in this area.

More states in the West showed musculoskeletal defects as the leading cause for rejection than was true for any other area of the nation. Mental disease was relatively unimportant as a cause for rejection in the states in this area as compared to states in other regions. Hernia, eye defects, and syphilis were relatively more important as causes for rejection of white registrants in the states in this region than in the nation. The region failed to establish a clear-cut pattern of leading causes for rejection. All but four of the ten leading causes for rejection in the nation were recorded as the first cause for rejection in at least one state in this area. The dispersion of the ten leading causes for rejection of white registrants in the nation in comparison with their rank position in the states within the region indicates that mental disease ranked from first in one state to eleventh in another. Musculoskeletal defects varied from the most important cause for rejection in five states to the fourth most important cause in two states. Cardiovascular defects carried a rank position from first to ninth in the states in this region; hernia ranks from second to eighth; eye defects from first to fifth; and neurological defects from third to twelfth. Educational deficiency predominantly ranked tenth or higher as a cause for rejection in these states. Tuberculosis was the leading cause for rejection in one state and was the sixteenth or higher cause for rejection in one state in this area. Syphilis varied from the second to the twelfth cause for rejection in the states in this region.

Table 13
The Ten Leading Causes for Rejection in the United States
Compared to the Rank Position of the Causes
in the States Grouped by Regions

April 1942-March 1943

White Registrants 1/

East

Ten Leading Causes for Rejection in Rank Order
Continental United States

Rank Position in State	Mental Disease	Musculoskeletal	Cardiovascular	Hernia	Eyes	Neurological	Ears	Educational Deficiency	Tuberculosis	Syphilis
1	11		1		1					
2	2	1	7		3					
3		3	4	2	3		1			
4		6		4	1		1	1		
5		2		2	3	2	4			
6		1		2	1	4	4			1
7			1	3	1	4		1	2	
8						3	1		4	1
9								1	3	
10							2	2	2	1
11									1	1
12								1		2
13								1		2
14								1	1	2
15								2		
16 & over								3		3

Midwest

Ten Leading Causes for Rejection in Rank Order
Continental United States

Rank Position in State	Mental Disease	Musculoskeletal	Cardiovascular	Hernia	Eyes	Neurological	Ears	Educational Deficiency	Tuberculosis	Syphilis
1	10	2	1							
2	1	7	1	2	2					
3	1	3	3	7						
4			5	2	4			1		
5	1	1	1	1	3	4	1			1
6			2		3	4	4			
7					1	2	3		2	2
8						2	3	1	1	1
9				1		1	1		5	1
10							1	1	2	2
11								2	1	1
12									1	1
13								2	1	1
14								3		
15								1		
16 & over								2		3

South

Ten Leading Causes for Rejection in Rank Order
Continental United States

Rank Position in State	Mental Disease	Musculoskeletal	Cardiovascular	Hernia	Eyes	Neurological	Ears	Educational Deficiency	Tuberculosis	Syphilis
1	10							3		
2	1	8	1					3		
3	1	3	3	4				2		
4		2	3	3	3			2		
5	1		1	2	7	1		1		1
6				3	3	2		1		3
7			4	1		6				2
8			1			4		1	1	3
9							7		1	2
10							5		2	
11							1		1	2
12									3	
13										
14									2	
15									1	
16 & over									2	

Far West

Ten Leading Causes for Rejection in Rank Order
Continental United States

Rank Position in State	Mental Disease	Musculoskeletal	Cardiovascular	Hernia	Eyes	Neurological	Ears	Educational Deficiency	Tuberculosis	Syphilis
1	1	5	2		1		1		1	
2		3	1	5						1
3		1	2	3	3	1				1
4	1	2	2	1	3	1		1		
5	3				4	1				2
6	2		3			3	1			1
7	1			1		1	7		1	
8			1	1			2		1	3
9	2					2			2	1
10						1		1	1	1
11	1								1	
12						1				1
13								1	1	
14								2		
15									2	
16 & over								6	1	

1/ Includes all races other than Negro.

Table 14

The Ten Leading Causes for Rejection in the United States
Compared to the Rank Position of the Causes
in the States Grouped by Regions

April 1942 - March 1943
Negro Registrants

	Rank Position	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16 & over
Other Areas	Neurological							2		2	7	3	2		1		
	Gonorrhea and Other Venereal					1		1		3	2	2		1	2	1	2
	Mental Deficiency				2		3				3	2	1	1		2	3
	Hernia			1	1		1	3	6	2	1	1	1				
	Eyes			1	2	4	4	5		1							
	Musculoskeletal				6	3	4	1		2							
	Mental Disease	1		11	2	1	1	1									
	Cardiovascular			3	4	6	2	1				1					
	Educational Deficiency			1	2	2	2	2		2	4						
	Syphilis	16			1												
South	Neurological									7	3	2	1				
	Gonorrhea and Other Venereal						1	2	6	2	1	1					
	Mental Deficiency			1	1	2		1	1	2	1	2	2	1			
	Hernia			1		2	5	3	1		1						
	Eyes				2	1	1	5	3	1							
	Musculoskeletal				5	5	2	1									
	Mental Disease		2	1	3	1	2	1			2		1				
	Cardiovascular			7	3	1	2										
	Educational Deficiency	2	9	2													
	Syphilis	11	2														
	Rank Position	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16 & over

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Table 14, which presents similar data for Negro registrants, has been confined to two groups: one comprising the 13 southern states and the other all other states for which Negro rates were calculated. 1/ Table 5 in Appendix D presents the individual state rejection rates per 1,000 Negro registrants examined for each of the ten leading causes for rejection in the United States. No clear-cut rejection rate trends would be expected among the states outside the South since they are located in all sections of the United States. The individual states in this group should reflect the conditions existing in the region in which they are located.

It is noticeable that cardiovascular and eye defects as well as mental deficiency held less importance as causes for rejection among Negroes in the southern states than was true for Negroes in the nation as a whole. Gonorrhea, on the other hand, was relatively more important as a cause for rejection in the states in this area than in the entire nation. Syphilis was the leading cause for rejection among Negro registrants in all but two southern states.

Outside the South, mental disease, eye defects and neurological defects frequently ranked higher than in the nation. On the other hand, educational deficiency was the second cause for rejection in one of this group of states, but ranked as low as the ninth cause for rejection in four states in the group.

1/ Negro rates were not calculated for states having less than 0.3 percent of all Negro registrants.

PREPARATION OF THE REPORT OF PHYSICAL EXAMINATION AND INDUCTION (FORM 221)

A Report of Physical Examination and Induction (Form 221) was prepared by the local board clerk for each registrant ordered to report for a local board physical examination (screening type). For reference purposes a completed sample of Form 221 appears at the end of this appendix.

Section I of the form was prepared by the clerk at the local board prior to the time the registrant appeared for "screening examination". This section contained identifying and general information concerning the registrant, such as: name, local board, order number, birthdate, address, race, education, marital-dependency status, occupation and employment status. This information was transcribed to Form 221 from the registrant's Classification Questionnaire (Form 40) and any subsequent information appearing in the registrant's Cover Sheet (Form 53).

The local board examining physician completed Section II of Form 221 at the time of the "screening examination". This section contained (a) a description of the defects claimed by the registrant, (b) remarks by the examiner as to the general physical condition of the registrant, (c) the recording of any specific defects diagnosed which appeared on the List of Defects (Form 220), and (d) the result of the serological test for syphilis. The examiner secured a blood sample for the latter test and the results were entered in the Form 221 at a later date.

Item 27 of Section II was completed by the local board after the "screening examination". A registrant found to have a defect appearing on the List of Defects (Form 220) might be classified in Class IV-F. Most registrants who passed this preliminary examination were forwarded to the induction station for a complete physical examination by the armed forces.

The results of the examination by the armed forces were recorded on pages 3 and 4 and included a summary of defects in the order of importance, the decision as to the acceptability of the registrant and the cause for rejection, if the registrant was not accepted. The Form 221 was then returned to the local board in order to record the registrant's reclassification as the result of the induction station examination. One copy of Form 221 was later transmitted to National Headquarters, Selective Service System. This copy was coded and tabulations were prepared from the punch cards.

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Codes and Coding Instructions

Codes were established for the transcription of most of the information appearing on the Form 221 to punch cards. These codes included the socio-economic data as well as the medical information. The broad outline of the medical defect code was largely based upon the Army Regulations (Mobilization Regulations 1-9) which prescribe the standards for men entering the military service. The code utilized broad defect groups, each group containing several subdivisions. The data in this bulletin are confined to 100-rubric detailed classifications in order to make the data comparable for the entire period covered by the study. 1/

There were slight differences in the coding of defects after September 1943 in comparison to the coding prior to that time. Through September 1943 the defects listed in item 78 of Form 221 and in items 58 and 59 of Form 221 (January 30, 1942) were coded for registrants examined at induction stations. The first defect listed in item 78 was termed the principal defect and was listed on the first defect card. Additional defect cards were prepared for the other defects listed in items 78, 59 and 58. Instructions provided, however, that no more than one defect would be coded for each broad defect group and a priority system was provided to aid in coding multiple defects within the same group. 2/ The defects mentioned in items 58 and 59 for accepted registrants were also coded.

For registrants rejected after local board examination the principal defect was the first defect listed in item 26 (a), and the medical defects recorded in items 26 and 25 were coded and transferred to additional cards.

After September 1943 the processing of Forms 221 was taken over by the Surgeon General's Office and a different punch card was used which provided for the coding of three defects on a single punch card and a maximum of three defects were coded for examinations processed after that date. In general, the source of the defects recorded remained the same and a similar system of priority within defect groups continued to be used.

1/ See Alphabetical and Numerical Indexes to Abridged Medical Defect Code, Selective Service System.

2/ Detailed information on the coding and tabulating of data from Forms 200 may be found in "Methods Used in Processing Data from the Physical Examination Reports of the Selective Service System". (Thomas I. Edwards and Louis P. Hellman, Journal of the American Statistical Association, June 1944, Vol. 39, pp 165-182.)

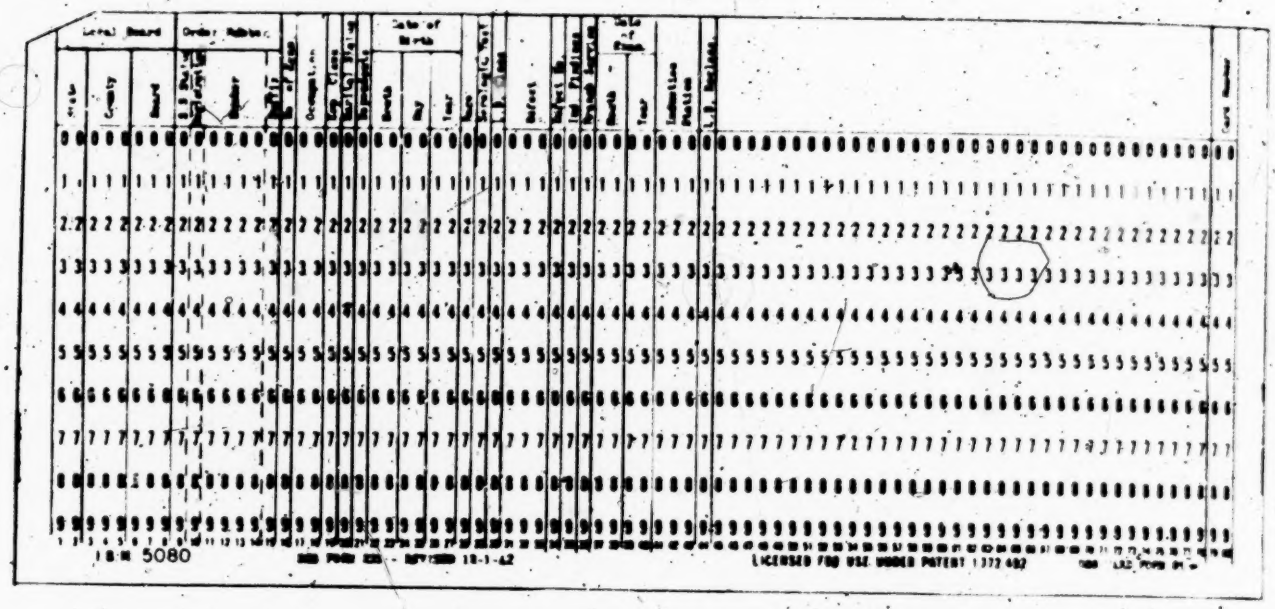


Figure 10. Punch Card Used for Processing Forms 221 During the Period April 1942 through September 1943

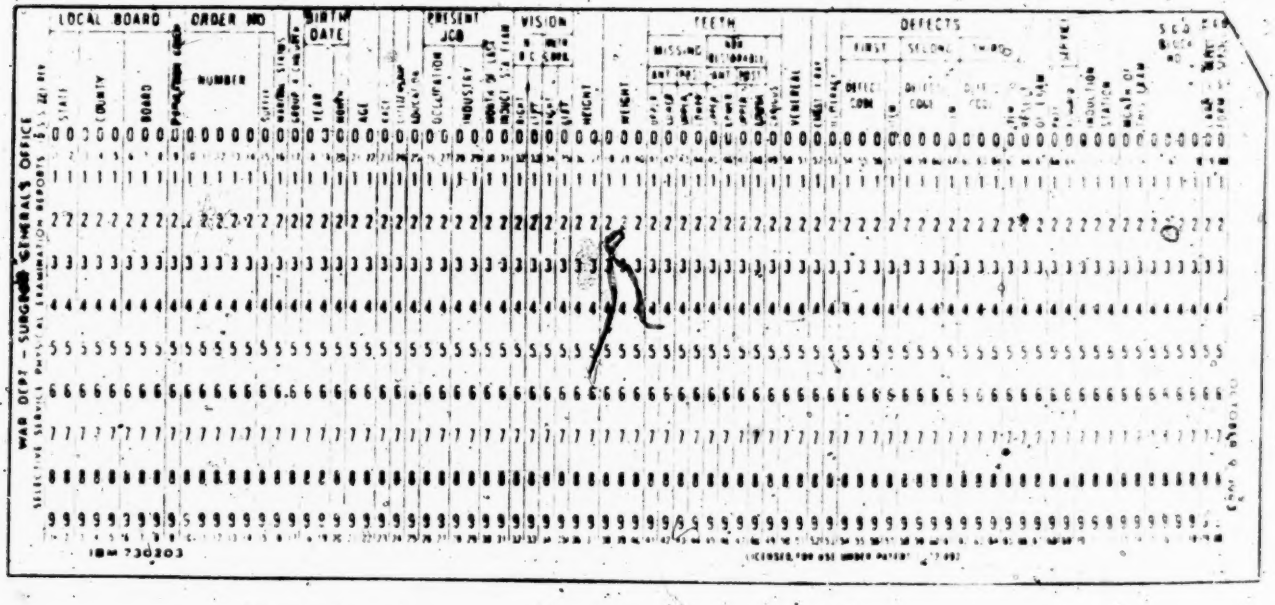


Figure 11. Punch Card Used for Processing Forms 221 During November and December 1943

Punch Cards

Figure 10 is a sample of the punch card used for processing Forms 221 through September 1943. The separate punch cards prepared for each defect contained identical information except in the defect columns and that in which the defect number was punched—as first, second, third defect, etc.

Figure 11 shows the punch card used by the Surgeon General's Office after September 1943 which provided for the coding of 3 defects upon 1 card. In addition this punch card provided for considerably more information as to specific measurements of vision, the number of missing and non-restorable teeth, and data as to height and weight. The socio-economic data was also expanded to include not only occupation but industry as well.

Sampling Procedure

Two methods of sampling were used during the time period covered by this study. Through September 1943 the samples were based upon the month in which the Report of Physical Examination and Induction was received in National Headquarters. The number of forms selected for the sample depended to a great extent upon the facilities for processing the forms. Forms were selected at random, depending upon the size of the sample desired. If a 25-percent sample was desired every fourth form was selected for coding and processing. Similarly if a 20-percent sample was desired every fifth form was selected, coded, and processed.

The selection of the sample after September 1943 was based upon the month in which the examination occurred. The sample was selected by withdrawing from the shipments the forms for registrants whose order numbers ended in 7 if a 10-percent sample was desired or the forms for registrants whose order numbers ended in 4 and 7 if a 20-percent sample was desired.

The size of the sample selected for study varied from month to month. The samples selected for analysis were as follows: April 1942-July 1942, 100 percent; November 1942, 12½ percent; December 1942-May 1943, 25 percent; June 1943-September 1943, 16 2/3 percent; November-December 1943, 10 percent.

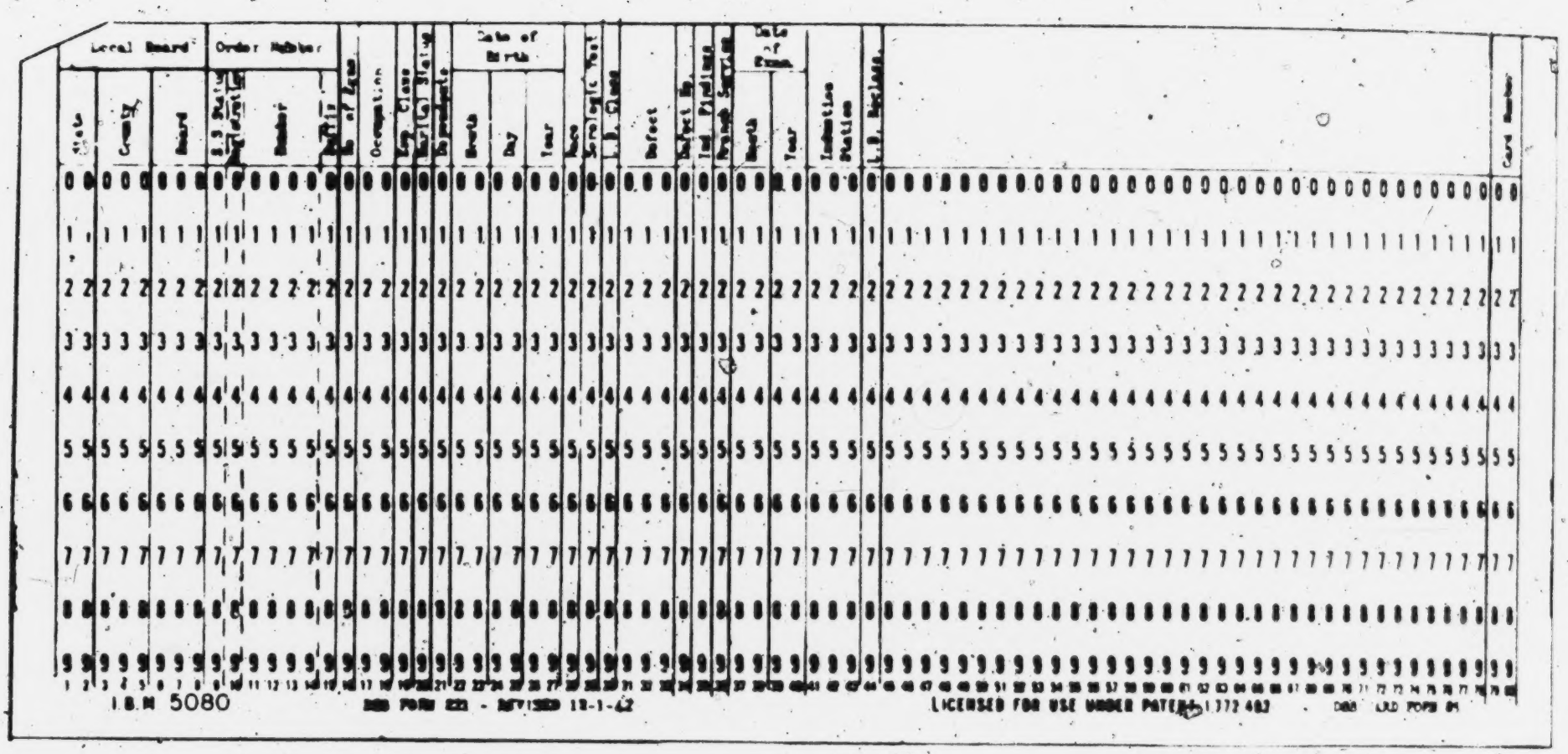
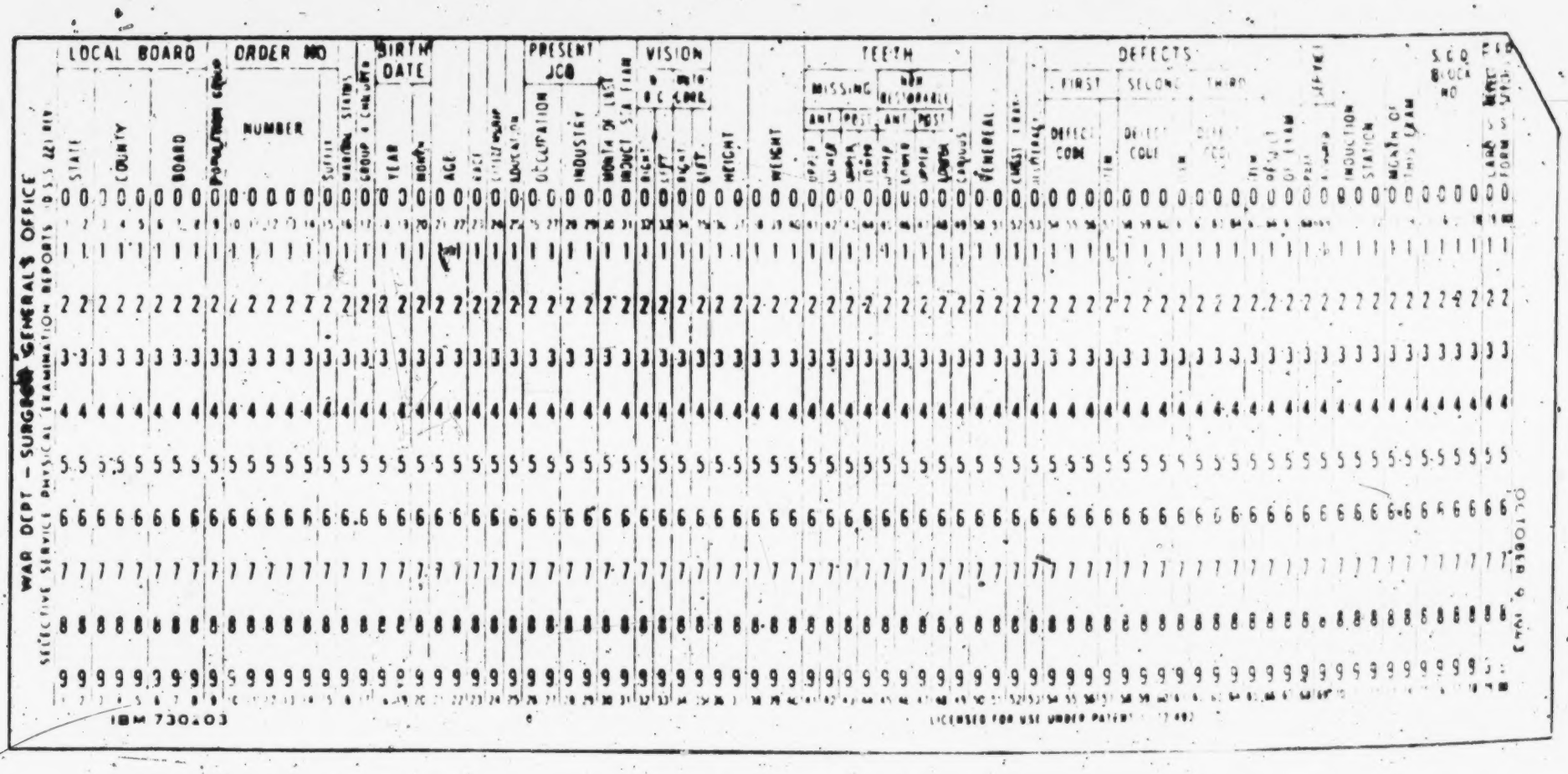


Figure 10. Punch Card Used for Processing Forms 221 During the Period April 1942 through September 1943



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Armed Forces' Original
D. S. S. Form 221
January 30, 1942

BUDGET BUREAU No. 33-R030
Approval expires September 30, 1942

Local Board No. 1 01
Thornton County 001
May 7, 1942 001

County Court House
Thornton, Maryland
(LOCAL BOARD DATE STAMP WITH CODE)

REPORT OF PHYSICAL EXAMINATION AND INDUCTION

First examination [X] Second examination [ ] Third examination [ ] Fourth examination [ ]
(To be filled in by local board clerk. Check number of examination made by local board)

SECTION I.—GENERAL (To be filled in by the local board clerk from the Selective Service Questionnaire, D. S. S. Form 40. Write "none" opposite the questions where no information is given. Do not leave any question blank.)

(To be filled in by Armed Forces)
(Armed Forces Serial No.)

Do Not Enter Anything in This Column
RESIDENCE
State
County
Place (Town)
Date (Entry)
Day
Month
Year
Source
Nativity
Year of birth
Race (Citizenship)
Education
Occupation
Marital

1. Name (page 1) CHARLES (First) JAMES (Middle) DOE (Last)
2. Address (page 1) 747 Eleventh Street (Street or rural route) Thornton (Town or city) Thornton (County) Maryland (State)
3. Social Security No. (Series I, line 5) 675-23-9114 4. Registrant's order number (page 1) 1062
5. Physical or mental defects or diseases (Series II, line 1) Heart trouble, poor hearing in both ears.
6. Treatment at an institution, sanitarium, or asylum (Series II, line 2) No (Yes or no)
7. Education (Number years completed) (Series III): Elementary school 8 High school 4 Vocational school college, or university
8. Occupation: (a) Title of present job (Series IV, line 2 (a), or Series V, line 1) Auto mechanic
(b) Duties (Series IV, line 2 (b)) Repair automobiles
(c) Title of last job, if unemployed (Series IV, line 3)
9. Years experience in this work (Series IV, line 2 (c), or Series V, line 2) 5
10. Income (Series IV, line 2 (d)): Average weekly (Weekly, monthly, annual) earnings $ 45.00
11. Employment class (Series IV, line 2 (e)): Permanent employee [X]; Temporary employee [ ]; Apprentice [ ]; Independent worker [ ]; Unpaid family worker [ ]; Employer [ ]; Student (Series IV, line 4 (a)) [ ]
12. Business of present employer (Series IV, line 2 (g)) Automobile repair
13. Marital status (Series VII, line 1): Single [X]; Widower [ ]; Divorced [ ]; Married, not separated [ ]; Married, separated [ ]
14. Number of dependents (Series VII, line 3 (a) fifth column except N. C.'s plus line 4 (a) fifth column)
15. Birthplace (Series IX, line 1) Detroit (Town or city) Michigan (State) U.S.A. (Country)
16. Birth date (Series IX, line 2) October (Month) 25 (Day) 1914 (Year)
17. Race (Series IX, line 3): White [ ]; Negro [ ]; Other (specify)
18. Citizenship: United States citizen (Series IX, line 4) Yes (Yes or no); Declarant alien (Series IX, line 7) (Yes or no)
19. Previous U. S. military service (Series XII): None [X]; Army [ ]; National Guard [ ]; Navy [ ]; Marine Corps [ ]; Coast Guard [ ]
20. Type of discharge (Series XII): Specify
21. Date of registrant's affidavit (top of page 8) 7 (Day) April (Month) 1942 (Year)

INSTRUCTIONS

1. An original and three copies of this form will be prepared for each registrant called up for physical examination. The original is designated as the Armed Forces' Original; the first carbon copy, the National Headquarters' Copy; the second carbon copy, the Surgeon General's (Army)—Bureau of Medicine and Surgery (Navy)—Commandant Marine Corps (M. C.) Copy; and the third carbon copy, the Local Board's Copy. Instructions are contained on each copy.
2. Forms of men rejected by the armed forces will be marked "Rejected by the Armed Forces" in large letters at the top of page 1.
3. If the registrant is not sent to the induction station of the armed forces, or is rejected by the induction station of the armed forces, this original will be filed, along with "Local Board's Copy" (3d copy), in the registrant's Cover Sheet (Form 53).
4. For registrants accepted by the induction station of the armed forces: If inducted by the ARMY, this original accompanied by F. B. I. Military Fingerprint Card will be forwarded from induction station to The Adjutant General, Washington, D. C.; if inducted by the NAVY or COAST GUARD, this original will be forwarded through the Main Recruiting Station to the Bureau of Navigation, Washington, D. C.; if inducted by the MARINE CORPS, this original will be sent to the Commandant, Headquarters, U. S. Marine Corps, Washington, D. C.
5. Fingerprints are required only on this original and only for registrants who are inducted. If inducted by ARMY, prepare F. B. I. Military Fingerprint Card.

ORIGINAL COPY

Figure 12

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SECTION II.—REPORT OF LOCAL BOARD EXAMINING PHYSICIAN AND LOCAL BOARD CLASSIFICATION.

22. If registrant's answer to Item 6 above is "yes," when and for what ailment(s)

23. Is registrant now or previously an enrollee in the Civilian Conservation Corps: No ☒; Yes ☐

24. Serological test (syphilis): Date 5-25-1942 Result Negative

Second serological test (syphilis): Date Result

25. Examining physician's remarks

26. (a) Do you find that the above-named registrant has any of the defects set forth in Part I of the List of Defects (Form 220)? (If in doubt, answer "no," and give details.) No (Answer yes or no) If answer is "yes," describe the defects, in order of significance

(b) Do you find that the above-named registrant has any of the defects set forth in Part II of the List of Defects (Form 220) (If in doubt, answer "no," and give details.) No (Answer yes or no) If answer is "yes," describe the defects, in order of significance

(c) I have examined the above-named registrant in accordance with Selective Service Regulations.

(d) Signature of examining physician John N. Smith

(e) Place Thornton (Town or city) Thornton (County) Maryland (State) (f) Date May 20, 1942

27. (a) This Local Board has classified the above-named registrant in Class I-A

(b) Signature of Member of Local Board E. M. Coquill

(c) Place Thornton (Town or city) Thornton (County) Maryland (State) (d) Date May 27, 1942

SECTION III.—NEAREST RELATIVE, PERSON TO BE NOTIFIED IN CASE OF EMERGENCY, AND DESIGNATION OF BENEFICIARY (To be filled out at the induction station of the armed forces for only those registrants accepted for military service.)

A. Nearest relative and person to be notified in case of emergency:

28. Nearest relative (Other than wife or minor child. Name in full)

29. Relationship 30. Address (Number and street or rural route. If none, so state) (City, town, or post office) (State or country)

31. Person to be notified in case of emergency (Name in full)

32. Relationship (If friend, so state) 33. Address (Number and street or rural route. If none, so state) (City, town, or post office) (State or country)

B. Designation of beneficiary:

34. The persons eligible to be my beneficiary are designated below:

(1) (Full name of wife; if no wife, or if she is deceased or divorced, so state) (Wife's full address)

(2) (Full name and address of each minor child and each dependent child over 21 years of age. If there are no children, so state. If the address is the same as the wife's, so state. Do not repeat address)

35. In the event of my leaving no widow or child, or their decease before payment is made, I then designate as my beneficiary the dependent relative whose name, relationship, and address are shown below:

(3) (If designation of beneficiary is declined, man must state in own handwriting: "I decline to designate any person as my beneficiary")

36. In the event of the death or disqualification of the last-named dependent relative before payment is made, I then designate as my beneficiary the dependent relative whose name, relationship, and address are shown below:

(4) (If beneficiary is named in line 35 but naming of alternate is declined, man must state in own handwriting: "I decline to designate an alternate beneficiary")

37. Signature of registrant (First name) (Middle name) (Last name)

38. Witnessed at on 19

(Signature of witness attesting) (Name of witness typed) (Grade and organization)

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SECTION IV.—PHYSICAL EXAMINATION RESULTS: (All Items Must Be Filled In. Indicate Normal or None Where Applicable. To Be Filled Out by the Medical Board at the Induction Station of the Armed Forces.)

Do Not Write in This Column

39. Eye abnormalities* None

40. Ear, nose, throat abnormalities Bilateral partial deafness

41. Mouth and gum abnormalities None

42. Teeth: (a) Indicate restorable carious teeth by circling; nonrestorable carious teeth by /; missing natural teeth by X.

	Right							Examiner's							
8	(7)	X	5	X	3	2	1	X	2	3	4	/	6	X	/
16	/	14	(13)	12	11	10	9	9	10	M	M	13	14	15	(16)

(b) Remarks, including other defects None

(c) Prosthetic dental appliances None

(d) Remediable dental defects

43. Skin Clear

44. Varicose veins None

45. Hernia None

46. Hemorrhoids None

47. Genito-urinary (non-venereal) Normal

48. Venereal diseases None

49. Feet Pes Planus, First Degree

50. Musculoskeletal defects Slightly stiff right arm

51. Abdominal viscera Normal

52. Cardiovascular system Hypertrophy of the heart with loud systolic murmur

53. Lungs Normal

54. Chest X-ray Normal

55. Mental Normal

56. Nervous system Normal

57. Endocrine system

58. Other defects and/or diseases or other remarks

59. Summary of defects in order of significance Hypertrophy of the heart systolic murmur, bilateral partial deafness, stiff right arm, pes planus, poor teeth.

60. Vision, without correction:
(a) Right eye 20/20
(b) Left eye 20/20

61. Vision, with correction:
(a) Right eye 20/20
(b) Left eye 20/20

62. Color perception*

63. Hearing:
(a) Right ear 5/20
(b) Left ear 5/20

64. Height 65½ inches

65. Weight 127 pounds

66. (a) Girth, at nipples; inspiration 32½ inches
(b) Girth, at nipples; expiration 30 inches
(c) Girth, at umbilicus 29 inches

67. Posture: Good ☐ Fair ☒ Poor ☐

68. Frame: Heavy ☐ Med. ☐ Light ☒

69. Color of hair Brown

70. Color of eyes Brown

71. Complexion Light

72. Pulse, sitting 80

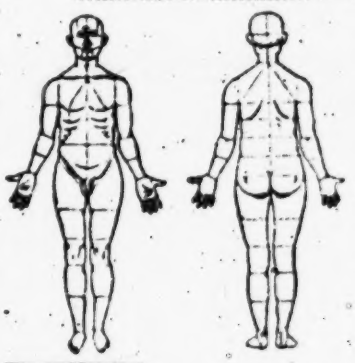
73. Pulse, after exercise*

74. Pulse, 2 minutes after exercise* 86

75. Blood pressure:
(a) Systolic 130
(b) Diastolic 82

76. Urinalysis:
(a) Specific gravity 1.024
(b) Albumin Negative
(c) Sugar Negative
(d) Microscopic*

77. Other data.



* When indicated.

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(PAGE 8)

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SECTION IV.—PHYSICAL EXAMINATION RESULTS—Continued.

78. I CERTIFY that the above-named registrant was carefully examined, that the results of the examination have been correctly recorded on this form and that to the best of my knowledge and belief—

(a) _____ (Enter name of registrant if this subsection is applicable) is physically and mentally qualified for general military service.

(b) _____ (Enter name of registrant if this subsection is applicable) is physically and mentally qualified for general military service after the satisfactory correction of the following remediable defects: _____

This registrant would have been accepted for general military service had the remediable defects herein specified been remedied at the time of this examination.

(c) _____ (Enter name of registrant if this subsection is applicable) is physically qualified for limited military service only by reason of _____

(d) _____ (Enter name of registrant if this subsection is applicable) is physically qualified for limited military service after the satisfactory correction of the following remediable defects: _____

This registrant would have been acceptable for limited military service had the remediable defects herein specified been remedied at the time of this examination.

(e) Charles James Doe (Enter name of registrant if this subsection is applicable) is physically and/or mentally disqualified for military service by reason of hypertrophy of the heart, bilateral deafness

(f) _____ (Enter name of registrant if this subsection is applicable) is disqualified for military service because of _____

(g) Signature Thomas E. Webber *Medical Examiner.* (h) Title Major, M.C.

(i) Name typed or stamped Thomas E. Webber, Major, M.C.

79. (a) _____ (Enter name of registrant if this subsection is applicable) was this date inducted for (general, limited) [strike out inapplicable word] military service into the (fill in appropriate Servi , such as Army, Navy, Marine Corps, or Coast Guard) _____ of the United States and sent to _____

(b) Charles James Doe (Enter name of registrant if this subsection is applicable) was this date rejected for service in the (fill in appropriate service such as Army, Navy, Marine Corps, or Coast Guard) _____

(c) Place Fort Meade (d) Signature Army Gordon F. Adams of the United States.

(e) Date June 3, 1942 (f) Name typed or stamped Gordon F. Adams, Colonel, Infantry (Grade and organization)

SECTION V—LOCAL BOARD CHANGE IN CLASSIFICATION AFTER EXAMINATION BY THE INDUCTION STATION, OF THE ARMED FORCES.

80. (a) Based on the entries in (a), (c), (d), (e), or (f) of Item 78, above, the Local Board has changed the above-named registrant's classification to Class IV-F.

(b) Based on the entries in (b) of Item 78, above, the Local Board has retained the above-named registrant in Class _____

(c) Place Thornton, Maryland (d) Date June 15, 1942

(e) Signature of member of local board _____

FINGERPRINTS—RIGHT HAND

1. THUMB	2. INDEX	3. MIDDLE	4. RING	5. LITTLE

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Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Continental United States

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.4	6.5	2.8	8.8	9.2	6.3	7.8	8.5	4.8
Ears	2.3	3.2	0.4	6.0	7.1	0.9	5.0	6.1	0.7
Teeth	1.8	2.2	0.9	2.2	2.5	0.7	2.1	2.4	0.8
Mouth and gums	0.5	0.6	0.2	0.4	0.5	0.2	0.4	0.5	0.2
Nose	0.3	0.4	0.1	0.9	1.1	0.3	0.7	0.9	0.2
Throat	0.1	0.1	0.1	3/	3/	3/	0.1	0.1	0.1
Lungs	1.8	2.2	0.8	2.4	2.5	1.6	2.2	2.4	1.3
Tuberculosis	2.6	3.3	0.8	4.1	4.4	2.9	3.7	4.1	2.0
Cardiovascular	4.3	5.3	2.2	10.6	10.5	11.5	8.8	9.2	7.6
Blood and blood-forming	0.1	0.2	3/	0.1	0.1	3/	0.1	0.1	3/
Hernia	8.3	9.9	4.4	7.6	8.1	5.1	7.8	8.6	4.8
Kidney and urinary	0.4	0.5	0.1	1.7	1.8	1.0	1.3	1.4	0.6
Abdominal viscera	0.9	1.1	0.2	2.0	2.3	0.5	1.7	2.0	0.4
Genitalia	0.9	0.9	0.9	1.6	1.3	3.3	1.4	1.2	2.3
Syphilis	30.1	13.7	69.1	1.0	0.7	2.6	9.4	4.0	30.4
Gonorrhea and other venereal	0.3	0.1	0.8	1.2	0.4	5.0	0.9	0.3	3.2
Skin	0.7	0.8	0.4	0.7	0.7	0.5	0.7	0.7	0.5
Hemorrhoids	0.5	0.6	0.4	0.5	0.5	0.5	0.5	0.5	0.5
Varicose veins	1.2	1.4	0.7	1.3	1.4	0.9	1.3	1.4	0.8
Educational deficiency	0.5	0.4	0.6	10.6	6.8	30.2	7.7	5.2	17.8
Mental deficiency	3.6	4.5	1.4	2.8	2.4	4.8	3.0	2.9	3.4
Mental disease	3.1	4.0	1.0	16.3	17.7	9.3	12.5	14.2	5.8
Neurological	8.8	11.5	2.1	4.2	4.4	3.0	5.5	6.3	2.6
Musculoskeletal	16.3	20.0	7.5	6.4	6.7	4.6	9.3	10.1	5.8
Feet	1.1	1.3	0.7	1.2	1.0	1.6	1.1	1.1	1.2
Endocrine	1.5	2.1	0.2	1.3	1.4	0.4	1.3	1.6	0.3
Neoplasms	0.4	0.5	0.2	0.7	0.8	0.3	0.6	0.7	0.2
Infectious and parasitic	3/	3/	3/	0.1	0.1	0.1	0.1	0.1	0.1
Underweight, overweight and other	2.1	2.5	1.0	2.4	2.6	1.3	2.3	2.6	1.2
Nonmedical reasons	0.1	0.2	3/	0.9	1.0	0.6	0.7	0.8	0.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Continental United States

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	60.7	Hernia	26.1
Musculoskeletal	13.3	Eyes	18.0
Teeth	7.3	Musculoskeletal	8.8
Underweight and overweight	4.9	Teeth	8.2
Feet	3.7	Genitalia	5.3
Other	10.1	Other	33.6

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

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Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Alabama

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.3	7.2	2.5	6.2	7.6	4.9	5.7	7.5	4.1
Ears	0.7	1.4	0.3	2.7	4.7	0.6	2.1	3.9	0.5
Teeth	0.7	1.4	0.3	1.5	1.9	1.1	1.3	1.8	0.9
Mouth and gums	0.6	1.0	0.3	0.1	0.2	0.1	0.2	0.4	0.1
Nose	0.1	0.2	-	0.3	0.6	0.1	0.3	0.5	3/
Throat	0.1	0.1	3/	3/	3/	3/	3/	3/	3/
Lungs	1.1	2.1	0.6	1.4	2.1	0.8	1.3	2.1	0.7
Tuberculosis	1.3	2.8	0.3	1.7	0.8	2.5	1.5	1.3	1.8
Cardiovascular	1.3	2.1	0.8	9.6	8.3	10.9	7.2	6.8	7.6
Blood and blood-forming	0.1	0.4	-	0.1	0.1	-	0.1	0.2	-
Hernia	5.0	8.9	2.6	5.5	7.3	3.8	5.4	7.7	3.4
Kidney and urinary	0.1	0.2	-	0.7	0.9	0.5	0.6	0.8	0.3
Abdominal viscera	0.5	1.0	0.2	1.2	2.3	0.1	1.0	2.0	0.1
Genitalia	0.7	0.8	0.6	7.1	1.3	12.8	5.3	1.1	8.9
Syphilis	52.6	16.2	75.6	0.7	1.0	0.4	15.5	4.6	25.0
Gonorrhea and other venereal	0.3	0.1	0.4	2.6	0.3	4.9	1.9	0.2	3.4
Skin	0.3	0.6	0.2	0.4	0.6	0.1	0.4	0.6	0.1
Hemorrhoids	0.3	0.4	0.2	0.3	0.3	0.4	0.3	0.3	0.4
Varicose veins	0.9	1.7	0.4	0.6	1.0	0.3	0.7	1.2	0.3
Educational deficiency	0.1	0.2	3/	30.6	15.4	45.6	21.9	11.7	30.7
Mental deficiency	5.0	8.8	2.6	2.4	3.1	1.7	3.1	4.4	2.0
Mental disease	1.6	3.3	0.6	10.5	19.8	1.4	8.0	15.9	1.1
Neurological	6.2	11.9	2.5	3.8	6.1	1.5	4.5	7.5	1.8
Musculoskeletal	13.7	22.6	8.1	5.9	8.3	3.5	8.1	11.7	5.0
Feet	0.6	1.1	0.2	0.3	0.5	0.1	0.4	0.7	0.2
Endocrine	0.5	1.1	3/	0.6	1.0	0.1	0.5	1.0	0.1
Neoplasms	0.2	0.4	0.1	0.5	0.9	0.1	0.4	0.8	0.1
Infectious and parasitic	-	-	-	0.1	3/	0.2	0.1	3/	0.2
Underweight, overweight and other	1.1	1.9	0.6	1.7	2.4	0.9	1.5	2.3	0.8
Nonmedical reasons	3/	0.1	-	0.9	1.2	0.6	0.7	1.0	0.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Alabama

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	48.2	Genitalia	24.5
Musculoskeletal	23.6	Hernia	19.1
Underweight and overweight	12.2	Eyes	15.7
Feet	3.6	Musculoskeletal	9.6
Teeth	2.3	Gonorrhea and other venereal	8.8
Other	10.1	Other	22.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Arizona

Cause for Rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	7.3	11.3	10.2
Ears	2.5	8.6	6.8
Teeth	1.0	1.2	1.2
Mouth and gums	0.4	0.2	0.2
Nose	1.2	0.7	0.8
Throat	-	-	-
Lungs	2.7	5.9	5.0
Tuberculosis	7.9	13.2	11.7
Cardiovascular	2.1	6.9	5.5
Blood and blood-forming	0.2	-	0.1
Hernia	4.3	6.4	5.7
Kidney and urinary	0.4	1.7	1.3
Abdominal viscera	0.6	1.0	0.9
Genitalia	0.8	0.8	0.8
Syphilis	35.9	1.5	11.6
Gonorrhea and other venereal	0.4	0.2	0.2
Skin	0.6	0.3	0.4
Hemorrhoids	1.2	0.3	0.6
Varicose veins	0.6	0.9	0.8
Educational deficiency	-	0.7	0.5
Mental deficiency	2.5	13.9	10.5
Mental disease	1.4	5.9	4.6
Neurological	4.5	2.4	3.0
Musculoskeletal	18.9	5.6	9.5
Feet	0.8	0.9	0.9
Endocrine	0.6	1.4	1.2
Neoplasms	-	0.2	0.1
Infectious and parasitic	-	-	-
Underweight, overweight and other	1.2	6.9	5.2
Nonmedical reasons	-	1.0	0.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Arizona

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	50.7	Eyes	18.8
Underweight and overweight	30.3	Hernia	18.5
Musculoskeletal	10.9	Tuberculosis	11.0
Teeth	1.9	Underweight and overweight	10.7
Feet	1.9	Mental deficiency	8.6
Other	4.3	Other	32.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Arkansas

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.7	6.8	2.5	6.6	7.6	4.2	6.1	7.4	3.5
Ears	1.5	2.6	0.3	3.4	4.4	0.7	2.9	4.0	0.5
Teeth	2.1	3.2	1.0	3.1	3.9	1.0	2.9	3.7	1.0
Mouth and gums	0.4	0.5	0.3	0.7	1.0	0.2	0.7	0.9	0.2
Nose	0.1	0.2	-	0.9	1.2	0.3	0.7	1.0	0.2
Throat	3/	-	0.1	0.1	3/	0.1	3/	3/	0.1
Lungs	1.1	1.6	0.6	4.0	4.6	2.3	3.2	4.0	1.6
Tuberculosis	2.5	4.1	0.8	3.3	3.7	2.4	3.1	3.8	1.8
Cardiovascular	1.0	1.3	0.6	14.2	12.8	17.9	10.6	10.4	11.1
Blood and blood-forming	3/	0.1	-	3/	3/	-	3/	3/	-
Hernia	7.8	9.8	5.7	6.0	6.4	4.8	6.5	7.1	5.2
Kidney and urinary	0.2	0.2	0.2	0.8	1.0	0.5	0.7	0.8	0.4
Abdominal viscera	0.4	0.6	0.2	0.6	0.8	0.2	0.6	0.8	0.2
Genitalia	0.9	0.6	1.1	2.6	1.3	5.9	2.1	1.2	4.0
Syphilis	44.3	17.9	71.3	0.9	0.5	1.5	12.6	4.1	29.1
Gonorrhea and other venereal	0.6	0.2	1.0	1.7	0.4	5.3	1.4	0.3	3.6
Skin	0.4	0.7	0.2	0.5	0.4	0.6	0.5	0.5	0.4
Hemorrhoids	0.4	0.6	0.3	0.6	0.6	0.5	0.5	0.6	0.4
Varicose veins	0.9	1.2	0.6	1.3	1.4	0.9	1.1	1.4	0.8
Educational deficiency	0.1	0.2	0.1	20.7	18.0	27.7	15.1	14.3	16.8
Mental deficiency	3.9	5.7	2.0	1.7	1.7	1.5	2.3	2.5	1.7
Mental disease	3.0	4.9	1.1	12.5	12.6	12.2	9.9	11.0	7.8
Neurological	6.7	11.5	1.7	2.4	2.5	2.2	3.6	4.4	2.0
Musculoskeletal	14.0	21.2	6.6	6.2	6.9	4.2	8.3	9.9	5.2
Feet	0.6	1.0	0.3	0.6	0.6	0.7	0.6	0.7	0.5
Endocrine	0.6	1.0	0.1	0.7	0.9	0.2	0.6	0.9	0.2
Neoplasms	0.4	0.6	0.2	0.5	0.6	0.3	0.5	0.6	0.2
Infectious and parasitic	3/	-	0.1	0.1	0.2	0.1	0.1	0.1	0.1
Underweight, overweight and other	1.2	1.3	1.0	2.6	3.1	1.3	2.2	2.8	1.2
Nonmedical reasons	0.2	0.4	-	0.7	0.9	0.3	0.6	0.8	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Arkansas

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	50.4	Hernia	23.6
Musculoskeletal	24.3	Teeth	12.9
Teeth	9.2	Eyes	10.4
Underweight and overweight	5.8	Genitalia	10.2
Ears	4.0	Musculoskeletal	8.0
Other	6.3	Other	34.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

California

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.5	4.6	1.5	7.9	7.9	9.9	7.3	7.2	7.6
Ears	2.0	2.1	0.5	7.3	7.5	2.7	6.2	6.4	2.1
Teeth	0.2	0.2	-	2.7	2.7	1.9	2.2	2.2	1.4
Mouth and gums	0.3	0.3	-	0.4	0.4	1.1	0.4	0.4	0.8
Nose	0.2	0.3	-	1.1	1.1	0.4	0.9	0.9	0.3
Throat	0.1	0.1	-	0.1	0.1	0.2	0.1	0.1	0.1
Lungs	1.6	1.7	0.5	2.6	2.6	2.1	2.4	2.4	1.7
Tuberculosis	4.7	4.7	4.0	6.4	6.4	6.7	6.0	6.0	5.9
Cardiovascular	1.8	1.9	-	10.6	10.5	11.1	8.8	8.8	8.0
Blood and blood-forming	0.1	0.1	-	0.1	0.1	-	0.1	0.1	-
Hernia	14.3	14.5	10.0	7.5	7.5	6.5	8.8	8.9	7.4
Kidney and urinary	0.1	0.1	-	1.4	1.4	0.7	1.1	1.2	0.7
Abdominal viscera	0.7	0.7	-	3.1	3.2	1.7	2.7	2.7	1.2
Genitalia	0.4	0.3	0.5	1.2	1.2	2.1	1.0	1.0	1.7
Syphilis	32.1	30.4	65.6	1.1	1.0	4.6	7.3	6.8	21.5
Gonorrhea and other venereal	-	-	-	0.4	0.3	2.7	0.3	0.2	1.9
Skin	0.7	0.7	-	0.8	0.8	0.6	0.3	0.8	0.4
Hemorrhoids	0.5	0.5	1.0	0.7	0.7	0.9	0.7	0.7	1.0
Varicose veins	1.0	1.0	1.0	2.6	2.6	0.4	2.3	2.3	0.7
Educational deficiency	0.1	0.1	-	5.7	5.7	5.3	4.6	4.6	3.9
Mental deficiency	1.5	1.5	-	0.5	0.5	0.9	0.7	0.7	0.7
Mental disease	1.5	1.6	-	15.9	15.9	14.9	13.0	13.1	10.8
Neurological	9.7	10.0	4.5	4.8	4.8	3.1	5.8	5.9	3.4
Musculoskeletal	17.2	17.7	7.4	6.5	6.5	8.6	8.7	8.7	8.3
Feet	1.0	1.0	2.0	0.8	0.7	3.1	0.9	0.8	2.8
Endocrine	1.5	1.6	1.0	1.7	1.7	0.9	1.6	1.7	1.0
Neoplasms	0.3	0.3	-	0.8	0.9	0.6	0.7	0.7	0.4
Infectious and parasitic	-	-	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight, and other	1.9	2.0	0.5	4.2	4.3	2.3	3.7	3.8	1.8
Nonmedical reasons	3/	3/	-	1.0	0.9	4.0	0.8	0.8	2.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

California

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	33.4	Hernia	26.3
Musculoskeletal	18.7	Eyes	13.0
Underweight and overweight	9.1	Teeth	9.4
Teeth	7.1	Musculoskeletal	8.1
Feet	4.8	Underweight and overweight	6.1
Other	6.9	Other	37.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Colorado

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.5	7.9	7.3
Ears	3.7	5.4	4.7
Teeth	1.3	1.7	1.5
Mouth and gums	0.8	1.3	1.1
Nose	0.4	1.9	1.3
Throat	0.3	0.1	0.2
Lungs	2.0	2.0	2.0
Tuberculosis	8.0	4.1	5.7
Cardiovascular	7.8	17.5	13.5
Blood and blood-forming	0.4	0.3	0.3
Hernia	8.7	9.4	9.1
Kidney and urinary	1.0	2.2	1.7
Abdominal viscera	1.3	2.6	2.1
Genitalia	0.8	1.6	1.2
Syphilis	8.7	1.4	4.4
Gonorrhea and other venereal	-	1.0	0.6
Skin	0.7	0.8	0.8
Hemorrhoids	0.8	0.8	0.8
Varicose veins	1.1	1.1	1.1
Educational deficiency	0.1	3.1	1.9
Mental deficiency	3.5	3.0	3.2
Mental disease	3.5	12.8	9.0
Neurological	10.5	3.5	6.4
Musculoskeletal	20.9	8.0	13.3
Feet	2.5	0.9	1.6
Endocrine	1.6	1.4	1.5
Neoplasms	0.9	0.5	0.7
Infectious and parasitic	0.1	0.2	0.1
Underweight, overweight and other	2.0	2.7	2.4
Nonmedical reasons	0.1	0.8	0.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Colorado

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	54.1	Hernia	32.8
Musculoskeletal	16.3	Eyes	10.5
Teeth	11.3	Musculoskeletal	7.9
Feet	9.7	Underweight and overweight	5.7
Underweight and overweight	3.8	Teeth	5.1
Other	4.8	Other	38.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Connecticut

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.5	5.5	5.5	10.6	10.4	16.9	9.4	9.3	13.4
Ears	4.0	4.0	2.8	9.0	9.3	-	7.8	8.1	0.9
Teeth	3.9	3.9	2.8	0.9	0.9	1.2	1.6	1.6	1.7
Mouth and gums	2.3	2.4	-	0.1	0.1	-	0.6	0.6	-
Nose	0.4	0.4	-	1.2	1.2	-	1.0	1.0	-
Throat	0.1	-	2.8	0.1	0.1	-	0.1	0.1	0.9
Lungs	1.9	1.9	2.8	3.1	3.1	2.4	2.8	2.8	2.5
Tuberculosis	3.2	3.1	5.5	2.7	2.6	7.2	2.8	2.7	6.7
Cardiovascular	4.9	5.0	2.8	11.3	11.3	16.9	9.9	9.8	12.6
Blood and blood-forming	0.2	0.3	-	0.3	0.4	-	0.3	0.3	-
Hernia	6.4	6.7	-	6.8	7.0	2.4	6.7	6.9	1.7
Kidney and urinary	0.2	0.3	-	1.6	1.6	1.2	1.2	1.3	0.4
Abdominal viscera	1.4	1.5	-	3.3	3.4	1.2	2.9	2.9	0.8
Genitalia	0.3	0.3	-	1.2	1.2	1.2	1.0	1.0	0.8
Syphilis	8.0	6.1	47.2	0.5	0.2	9.7	2.3	1.6	21.0
Gonorrhea and other venereal	0.3	0.1	2.8	3/	3/	-	0.1	0.1	0.8
Skin	1.3	1.4	-	0.6	0.6	-	0.8	0.8	-
Hemorrhoids	0.6	0.7	-	0.5	0.5	-	0.6	0.6	-
Varicose veins	2.3	2.4	-	0.5	0.5	-	1.0	1.0	-
Educational deficiency	-	-	-	3.3	3.1	8.4	2.5	2.4	5.9
Mental deficiency	3.1	3.2	-	1.4	1.4	1.2	1.8	1.8	0.8
Mental disease	3.5	3.4	5.5	24.1	24.3	10.1	19.3	19.5	14.3
Neurological	13.2	13.6	5.6	5.9	5.9	6.0	7.6	7.6	5.9
Musculoskeletal	22.0	22.6	8.3	3.9	3.9	3.6	8.0	8.2	5.0
Feet	2.3	2.4	-	0.3	0.4	-	0.8	0.8	-
Endocrine	3.1	3.2	-	1.4	1.4	-	1.8	1.8	-
Neoplasms	0.9	0.9	-	1.9	2.0	-	1.7	1.7	-
Infectious and parasitic	0.1	0.1	-	3/	3/	-	0.1	0.1	-
Underweight, overweight and other	4.2	4.2	5.6	2.2	2.2	2.4	2.7	2.7	3.4
Nonmedical reasons	0.4	0.4	-	1.0	1.0	-	0.8	0.9	-

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Connecticut

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	64.8	Eyes	45.0
Musculoskeletal	12.4	Hernia	17.5
Hernia	7.6	Musculoskeletal	8.3
Ears	3.1	Teeth	6.0
Neurological	3.1	Neoplasms	3.1
Other	9.0	Other	20.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Delaware

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.4	8.8	3.3	9.3	9.0	10.0	8.2	8.9	6.7
Ears	1.7	3.1	-	7.3	9.7	0.7	5.2	7.6	0.3
Teeth	1.5	2.1	0.7	2.3	2.5	2.0	2.0	2.4	1.3
Mouth and gums	0.3	-	0.7	0.4	0.5	-	0.3	0.3	0.3
Nose	0.3	0.5	-	0.7	1.0	-	0.6	0.8	-
Throat	-	-	-	-	-	-	-	-	-
Lungs	1.7	3.1	-	3.3	3.5	2.7	2.7	3.4	1.3
Tuberculosis	1.5	1.0	2.0	5.4	5.7	4.7	3.9	4.2	3.3
Cardiovascular	2.0	3.7	-	7.1	7.8	5.3	5.2	6.4	2.7
Blood and blood-forming	-	-	-	-	-	-	-	-	-
Hernia	5.3	6.2	4.0	8.0	9.5	4.0	6.9	8.4	4.0
Kidney and urinary	0.3	0.5	-	0.7	1.0	-	0.6	0.8	-
Abdominal viscera	0.6	1.0	-	3.1	3.3	2.7	2.1	2.5	1.3
Genitalia	-	-	-	1.1	1.0	1.3	0.7	0.7	0.7
Syphilis	35.6	13.0	64.7	1.6	0.5	4.7	14.7	4.6	34.8
Gonorrhea and other venereal	0.9	0.5	1.3	3.3	1.5	8.0	2.4	1.2	4.7
Skin	0.3	0.5	-	0.5	0.5	0.7	0.4	0.5	0.3
Hemorrhoids	0.6	0.5	0.7	0.4	0.2	0.7	0.4	0.3	0.7
Varicose veins	1.7	2.1	1.3	0.2	-	0.7	0.8	0.7	1.0
Educational deficiency	0.6	1.0	-	4.0	1.5	10.7	2.7	1.3	5.3
Mental deficiency	3.2	5.7	-	4.2	2.5	8.6	3.8	3.6	4.3
Mental disease	5.5	7.8	2.7	24.2	26.8	17.3	17.0	20.6	10.0
Neurological	8.5	12.5	3.3	3.6	3.8	3.3	5.5	6.6	3.3
Musculoskeletal	15.7	19.2	11.3	3.1	3.0	3.3	7.9	8.3	7.3
Feet	2.3	2.6	2.0	0.5	0.2	1.3	1.2	1.0	1.7
Endocrine	0.6	1.0	-	1.1	1.2	0.7	0.9	1.2	0.3
Neoplasms	0.6	1.0	-	0.4	0.5	-	0.4	0.7	-
Infectious and parasitic	-	-	-	0.4	-	1.3	0.2	-	0.7
Underweight, overweight and other	1.7	1.6	2.0	1.6	1.8	1.3	1.7	1.7	1.7
Nonmedical reasons	0.6	1.0	-	2.2	1.5	4.0	1.6	1.3	2.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Delaware

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	63.1	Hernia	32.6
Musculoskeletal	12.5	Gonorrhea and other venereal	12.4
Hernia	3.4	Eyes	10.1
Underweight and Overweight	3.4	Teeth	8.5
Neurological	2.5	Underweight and Overweight	5.4
Other	15.1	Other	31.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters, April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

District of Columbia

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.6	5.4	1.2	10.7	10.3	11.3	7.7	9.1	6.2
Ears	0.7	1.5	0.2	2.4	3.4	0.8	1.7	2.9	0.5
Teeth	1.3	3.9	-	0.7	0.9	0.4	0.9	1.6	0.2
Mouth and gums	0.5	1.5	-	0.1	0.1	-	0.2	0.5	-
Nose	0.5	0.8	0.4	0.7	1.0	0.2	0.6	0.9	0.3
Throat	-	-	-	0.1	0.1	0.2	0.1	0.1	0.1
Lungs	0.9	1.9	0.4	2.9	3.4	2.1	2.2	3.0	1.3
Tuberculosis	2.2	4.3	1.2	6.3	6.3	6.2	4.8	5.8	3.7
Cardiovascular	2.7	6.2	1.0	16.2	14.9	18.3	11.3	12.8	9.6
Blood and blood-forming	-	-	-	-	-	-	-	-	-
Hernia	7.4	12.5	4.9	4.9	5.5	3.9	5.8	7.2	4.4
Kidney and urinary	0.1	-	0.2	2.4	2.6	1.9	1.5	2.0	1.1
Abdominal viscera	0.3	0.8	-	1.9	2.6	0.8	1.3	2.2	0.4
Genitalia	0.5	-	0.8	1.4	2.0	0.6	1.1	1.5	0.7
Syphilis	58.0	25.3	74.4	2.1	0.6	4.3	22.8	6.6	39.3
Gonorrhea and other venereal	-	-	-	1.6	0.3	3.7	1.0	0.2	1.8
Skin	0.1	-	0.2	0.3	0.1	0.6	0.2	0.1	0.4
Hemorrhoids	0.9	-	1.3	0.5	0.4	0.6	0.6	0.3	1.0
Varicose veins	2.1	2.7	1.8	0.6	0.4	1.0	1.2	0.9	1.4
Educational deficiency	0.1	0.4	-	5.0	1.0	11.3	3.2	0.6	5.6
Mental deficiency	0.5	0.8	0.4	1.2	0.5	2.3	1.0	0.9	1.4
Mental disease	2.6	5.1	1.3	24.9	30.9	15.8	16.7	24.6	8.6
Neurological	3.9	7.8	1.9	3.7	3.0	4.7	3.8	4.2	3.3
Musculoskeletal	9.1	14.8	6.2	5.2	5.0	5.5	6.6	7.4	5.8
Feet	0.4	0.8	0.2	0.4	0.4	0.4	0.4	0.5	0.3
Endocrine	1.1	1.5	0.8	0.8	1.1	0.4	0.9	1.2	0.6
Neoplasms	0.4	0.8	0.2	0.5	0.4	0.6	0.4	0.5	0.4
Infectious and parasitic	-	-	-	0.1	0.1	0.2	0.1	0.1	0.1
Underweight, overweight and other	1.1	1.2	1.0	1.4	1.1	1.9	1.3	1.1	1.5
Nonmedical reasons	-	-	-	1.0	1.6	-	0.6	1.2	-

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

District of Columbia

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	73.6	Eyes	31.2
Musculoskeletal	10.8	Hernia	22.9
Teeth	6.0	Musculoskeletal	13.2
Underweight and overweight	1.8	Gonorrhea and other venereal	7.8
Ears	1.8	Syphilis	4.4
Other	6.0	Other	20.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Florida

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.8	5.9	2.8	6.1	7.4	4.5	5.1	6.9	3.5
Ears	0.9	2.0	0.4	2.6	4.3	0.5	1.9	3.5	0.4
Teeth	1.3	2.0	0.9	0.9	1.2	0.5	1.1	1.5	0.7
Mouth and gums	0.3	0.6	0.2	0.1	0.2	0.1	0.2	0.3	0.1
Nose	0.1	0.3	-	0.6	0.7	0.3	0.3	0.6	0.1
Throat	-	-	-	3/	-	0.1	3/	-	3/
Lungs	1.6	3.5	0.6	2.9	3.2	2.5	2.3	3.4	1.5
Tuberculosis	0.8	2.2	0.1	2.9	2.6	3.3	2.0	2.5	1.5
Cardiovascular	2.3	3.3	1.7	10.4	9.9	11.2	6.7	7.7	5.9
Blood and blood-forming	3/	0.1	-	0.1	0.3	3/	0.1	0.1	3/
Hernia	8.4	13.7	5.6	7.5	9.1	5.3	7.9	10.6	5.5
Kidney and urinary	0.3	0.6	0.1	1.8	2.5	0.9	1.1	1.9	0.5
Abdominal viscera	0.6	1.2	0.2	1.1	1.8	0.2	0.9	1.6	0.2
Genitalia	1.3	1.3	1.4	1.7	1.3	2.2	1.5	1.3	1.7
Syphilis	55.0	21.1	73.0	0.9	0.5	1.4	25.4	7.5	41.1
Gonorrhea and other venereal	1.1	0.1	1.6	2.5	0.3	5.3	1.8	0.2	3.3
Skin	0.6	0.5	0.6	0.8	0.8	0.8	0.7	0.7	0.7
Hemorrhoids	0.5	0.8	0.3	0.7	0.7	0.7	0.6	0.7	0.5
Varicose veins	0.8	1.5	0.4	0.8	0.7	0.8	0.8	0.9	0.6
Educational deficiency	0.2	0.1	0.2	21.4	9.4	36.9	11.7	6.2	16.6
Mental deficiency	1.2	2.2	0.6	1.9	2.3	1.4	1.6	2.3	1.0
Mental disease	0.9	2.2	0.2	13.9	18.1	8.4	8.0	12.3	3.9
Neurological	4.0	8.7	1.4	4.2	5.0	3.2	4.1	6.3	2.2
Musculoskeletal	10.4	19.2	5.7	6.9	8.1	5.4	8.5	11.8	5.6
Feet	0.8	1.1	0.6	1.8	2.0	1.4	1.3	1.7	1.0
Endocrine	0.7	2.1	0.1	0.8	1.1	0.4	0.8	1.5	0.2
Neoplasms	0.4	0.9	0.2	0.9	1.3	0.3	0.7	1.1	0.3
Infectious and parasitic	3/	0.1	-	0.1	0.1	0.2	0.1	0.1	0.1
Underweight, overweight and other	1.6	2.5	1.1	2.3	3.3	1.0	2.0	3.0	1.0
Remediable reasons	0.1	0.2	-	1.4	1.8	0.8	0.8	1.3	0.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Florida

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	39.7	Hernia	30.3
Musculoskeletal	12.7	Eyes	13.5
Gonorrhea and other venereal	10.2	Gonorrhea and other venereal	11.0
Teeth	5.6	Musculoskeletal	7.6
Feet	4.6	Tuberculosis	5.5
Other	7.2	Other	32.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Georgia

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.3	7.6	3.3	5.2	5.8	4.5	5.2	6.5	3.8
Ears	1.4	2.6	0.4	3.5	6.1	0.3	2.5	4.7	0.4
Teeth	1.5	2.3	0.8	0.8	1.0	0.6	1.1	1.5	0.7
Mouth and gums	0.6	1.0	0.3	1.4	2.4	0.1	1.0	1.9	0.2
Nose	0.2	0.4	-	1.1	1.9	-	0.6	1.3	-
Throat	0.2	0.1	0.2	3/	-	3/	0.1	3/	0.1
Lungs	2.0	3.3	0.8	2.2	3.2	0.9	2.1	3.3	0.8
Tuberculosis	0.9	1.6	0.3	2.3	1.2	3.5	1.7	1.4	1.9
Cardiovascular	4.0	5.1	3.1	8.9	5.4	13.1	6.7	5.3	8.2
Blood and blood-forming	0.1	0.3	-	3/	3/	-	0.1	0.1	3/
Hernia	7.7	11.2	4.7	7.2	9.2	4.8	7.4	10.0	4.7
Kidney and urinary	0.4	0.7	0.2	1.1	1.1	1.0	0.8	1.0	0.6
Abdominal viscera	0.9	1.5	0.3	1.1	1.7	0.3	1.0	1.6	0.3
Genitalia	1.6	1.9	1.4	4.4	1.1	8.4	3.2	1.4	5.0
Syphilis	38.1	11.7	60.8	0.9	0.9	0.9	17.5	5.2	30.2
Gonorrhea and other venereal	0.9	0.3	1.4	2.1	0.3	4.2	1.6	0.3	2.9
Skin	0.5	0.7	0.4	0.3	0.5	0.1	0.4	0.6	0.2
Hemorrhoids	0.7	1.3	0.3	0.4	0.6	0.3	0.6	0.9	0.3
Varicose veins	1.4	2.2	0.7	0.7	1.2	0.1	1.0	1.6	0.4
Educational deficiency	5.9	4.9	6.7	27.4	11.2	47.2	17.8	8.6	27.4
Mental deficiency	2.5	4.1	1.1	0.9	1.1	0.8	1.6	2.3	0.9
Mental disease	2.1	3.3	1.0	15.9	27.1	2.4	9.8	17.5	1.7
Neurological	4.3	7.6	1.4	3.0	4.1	1.8	3.6	5.5	1.6
Musculoskeletal	12.2	17.6	7.5	4.4	5.8	2.7	7.9	10.6	5.1
Feet	1.0	0.9	1.1	0.4	0.6	0.2	0.7	0.7	0.6
Endocrine	0.9	1.7	0.2	0.9	1.5	0.1	0.9	1.6	0.2
Neoplasms	0.4	0.6	0.2	0.5	0.8	0.1	0.4	0.7	0.2
Infectious and parasitic	0.1	0.2	3/	0.2	3/	0.4	0.1	0.1	0.2
Underweight, overweight and other	2.1	3.0	1.4	1.3	1.7	0.9	1.7	2.2	1.2
Nonmedical reasons	0.1	0.3	-	1.5	2.5	0.3	0.9	1.6	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Georgia

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	52.3	Hernia	24.4
Musculoskeletal	22.4	Genitalia	14.8
Teeth	12.4	Eyes	11.8
Feet	7.0	Musculoskeletal	9.1
Neurological	2.1	Gonorrhea and other venereal	7.0
Other	3.8	Other	32.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Idaho

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	9.0	10.1	9.7
Ears	4.3	7.9	6.5
Teeth	1.3	2.5	2.1
Mouth and gums	0.9	0.4	0.6
Nose	0.3	0.2	0.2
Throat	0.1	0.1	0.1
Lungs	1.2	0.9	1.0
Tuberculosis	1.7	1.0	1.3
Cardiovascular	7.1	13.2	10.8
Blood and blood-forming	0.3	-	0.2
Hernia	6.8	15.9	12.3
Kidney and urinary	0.3	2.2	1.6
Abdominal viscera	1.7	2.1	1.9
Genitalia	0.7	1.7	1.3
Syphilis	11.1	0.9	4.9
Gonorrhea and other venereal	-	0.3	0.2
Skin	1.1	0.4	0.7
Hemorrhoids	0.5	0.3	0.4
Varicose veins	0.8	2.1	1.6
Educational deficiency	0.3	2.9	1.9
Mental deficiency	4.0	1.4	2.4
Mental disease	4.3	13.0	9.6
Neurological	13.9	4.1	7.9
Musculoskeletal	22.1	9.1	14.2
Feet	1.7	1.4	1.5
Endocrine	2.2	1.5	1.7
Neoplasms	0.4	0.6	0.5
Infectious and parasitic	0.3	-	0.1
Underweight, overweight and other	1.2	3.3	2.5
Nonmedical reasons	-	0.5	0.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Idaho

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	41.9	Hernia	37.8
Musculoskeletal	21.5	Eyes	17.4
Teeth	17.7	Musculoskeletal	8.3
Underweight and overweight	9.0	Underweight and overweight	6.0
Feet	4.5	Teeth	5.8
Other	5.4	Other	24.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Illinois

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.6	7.0	3.0	11.3	11.6	7.8	10.5	10.8	6.5
Ears	3.5	3.8	0.6	8.1	8.5	1.9	7.3	7.7	1.5
Teeth	1.1	1.2	-	1.5	1.6	0.6	1.5	1.5	0.5
Mouth and gums	0.5	0.6	-	0.3	0.3	0.1	0.3	0.3	0.1
Nose	0.4	0.4	0.3	1.0	1.0	0.4	0.9	0.9	0.4
Throat	0.1	0.1	-	0.1	0.1	-	0.1	0.1	-
Lungs	1.7	1.8	0.6	2.3	2.3	2.5	2.2	2.2	1.9
Tuberculosis	3.4	3.6	1.4	5.3	5.3	4.8	4.9	5.0	3.8
Cardiovascular	5.9	6.2	3.0	7.0	7.0	7.5	6.8	6.8	6.3
Blood and blood-forming	0.2	0.3	-	0.1	0.1	-	0.1	0.1	-
Hernia	8.6	9.1	4.2	9.3	9.4	6.8	9.2	9.4	6.1
Kidney and urinary	0.3	0.3	0.3	2.2	2.2	1.5	1.8	1.9	1.2
Abdominal viscera	0.9	1.0	0.3	2.7	2.7	0.9	2.3	2.4	0.8
Genitalia	0.8	0.7	1.1	1.4	1.4	2.3	1.3	1.3	2.0
Syphilis	14.6	9.5	63.5	1.0	0.8	6.0	3.5	2.3	21.5
Gonorrhea and other venereal	0.2	0.2	0.6	0.9	0.5	7.8	0.8	0.4	5.8
Skin	0.6	0.6	0.3	0.8	0.8	0.7	0.8	0.8	0.6
Hemorrhoids	0.6	0.6	0.3	0.4	0.4	0.6	0.4	0.4	0.5
Varicose veins	1.2	1.2	1.1	1.6	1.6	1.4	1.5	1.5	1.4
Educational deficiency	0.3	0.3	-	1.3	0.9	6.1	1.1	0.9	4.5
Mental deficiency	4.5	4.7	1.7	3.8	3.5	9.5	3.9	3.7	7.3
Mental disease	4.0	4.3	1.1	20.9	21.3	14.8	17.8	18.3	11.1
Neurological	12.8	13.8	2.	3.1	3.1	2.8	4.8	5.0	2.8
Musculoskeletal	20.7	21.5	12.	7.4	7.3	8.1	9.9	9.9	9.2
Feet	0.9	1.0	-	0.8	0.8	1.2	0.8	0.8	0.9
Endocrine	2.2	2.4	0.3	1.3	1.3	0.9	1.5	1.6	0.8
Neoplasms	0.4	0.5	0.3	1.1	1.1	0.3	1.0	1.0	0.3
Infectious and parasitic	0.1	0.1	-	0.3	0.3	0.4	0.2	0.2	0.3
Underweight, overweight and other	2.7	3.0	0.6	2.0	2.1	1.7	2.2	2.2	1.4
Nonmedical reasons	0.2	0.2	-	0.7	0.7	0.6	0.6	0.6	0.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Illinois

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	66.7	Hernia	28.1
Musculoskeletal	13.7	Eyes	27.5
Teeth	8.4	Musculoskeletal	10.3
Underweight and overweight	2.5	Teeth	5.5
Ears	2.2	Genitalia	4.2
Other	6.5	Other	24.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Indiana

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.8	6.3	2.0	8.7	8.7	8.9	7.9	8.0	5.7
Ears	3.0	3.3	0.7	6.4	6.7	2.1	5.4	5.8	1.5
Teeth	3.6	3.8	2.2	3.4	3.5	0.8	3.5	3.6	1.5
Mouth and gums	0.5	0.6	-	0.2	0.2	-	0.3	0.3	-
Nose	0.7	0.8	0.4	1.0	1.0	0.8	0.9	1.0	0.6
Throat	0.1	0.1	0.2	0.1	0.1	-	0.1	0.1	0.1
Lungs	2.3	2.5	0.9	2.4	2.4	1.3	2.4	2.5	1.1
Tuberculosis	2.7	2.9	1.5	5.5	5.6	5.3	4.8	4.9	3.5
Cardiovascular	4.1	4.4	1.8	9.6	9.5	11.8	8.1	8.1	7.1
Blood and blood-forming	0.1	0.1	-	0.1	0.1	-	0.1	0.1	-
Hernia	5.4	5.6	3.5	8.2	8.4	4.9	7.4	7.7	4.2
Kidney and urinary	0.4	0.4	0.4	1.1	1.2	0.5	0.9	0.9	0.4
Abdominal viscera	1.1	1.2	0.5	1.3	1.4	1.5	1.3	1.3	1.0
Genitalia	0.7	0.7	0.2	1.1	1.0	2.4	1.0	1.0	1.4
Syphilis	28.4	21.3	75.7	0.9	0.8	2.8	8.6	6.2	37.1
Gonorrhea and other venereal	0.1	0.1	-	0.6	0.4	3.3	0.4	0.3	1.7
Skin	0.5	0.5	0.4	0.9	1.0	0.3	0.8	0.8	0.3
Hemorrhoids	0.5	0.6	-	0.3	0.3	0.2	0.4	0.4	0.1
Varicose veins	0.8	0.9	0.7	1.2	1.2	1.1	1.1	1.1	0.9
Educational deficiency	0.3	0.3	0.2	4.9	4.4	14.1	3.6	3.3	7.5
Mental deficiency	4.1	4.8	-	2.6	2.5	3.2	3.0	3.1	1.7
Mental disease	3.3	3.5	1.8	19.1	19.3	14.7	14.7	15.2	8.7
Neurological	9.5	10.7	1.3	5.7	5.7	5.0	6.7	7.0	3.3
Musculoskeletal	16.3	18.1	4.5	7.6	7.5	8.4	10.0	10.3	6.6
Feet	1.2	1.3	0.2	1.5	1.4	3.2	1.4	1.4	1.8
Endocrine	2.3	2.6	0.2	2.1	2.1	1.1	2.1	2.3	0.7
Neoplasms	0.5	0.6	0.2	0.6	0.6	0.2	0.6	0.6	0.2
Infectious and parasitic	3/	0.1	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight and other	1.5	1.7	0.5	1.8	1.9	1.3	1.7	1.8	0.9
Nonmedical reasons	0.2	0.2	-	1.0	1.0	0.8	0.7	0.8	0.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Indiana

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	54.7	Eyes	21.0
Musculoskeletal	17.6	Teeth	19.4
Teeth	9.8	Hernia	16.9
Feet	7.4	Musculoskeletal	15.4
Underweight and overweight	3.0	Feet	4.1
Other	7.5	Other	23.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Iowa

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	8.7	10.5	9.9
Ears	4.6	6.1	5.6
Teeth	2.9	4.1	3.7
Mouth and gums	0.8	0.3	0.4
Nose	0.8	2.9	2.2
Throat	0.1	0.1	0.1
Lungs	1..	2.5	2.3
Tuberculosis	1.6	4.1	3.3
Cardiovascular	7.5	11.7	10.2
Blood and blood-forming	0.2	0.1	0.1
Hernia	8.4	10.5	9.8
Kidney and urinary	0.9	1.8	1.5
Abdominal viscera	1.3	1.9	1.7
Genitalia	0.9	1.6	1.3
Syphilis	5.5	0.6	2.3
Gonorrhea and other venereal	2/	0.4	0.3
Skin	0.8	1.0	0.9
Hemorrhoids	0.5	0.4	0.4
Varicose veins	1.1	1.4	1.3
Educational deficiency	0.6	4.1	2.9
Mental deficiency	5.4	1.3	2.7
Mental disease	4.8	9.7	8.0
Neurological	12.3	5.1	7.6
Musculoskeletal	19.1	10.1	13.2
Feet	1.5	2.0	1.8
Endocrine	3.7	1.5	2.3
Neoplasms	0.7	1.3	1.1
Infectious and parasitic	0.2	0.1	0.1
Underweight, overweight and other	3.1	2.1	2.4
Nonmedical reasons	0.1	0.7	0.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Iowa

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	33.3	Hernia	33.3
Musculoskeletal	16.5	Eyes	13.6
Teeth	7.0	Teeth	12.0
Feet	5.3	Musculoskeletal	9.0
Underweight and overweight	4.4	Underweight and overweight	4.6
Other	11.3	Other	27.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

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Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Kansas

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.8	4.9	4.1	7.5	7.2	11.6	6.7	6.6	8.1
Ears	2.3	2.4	1.2	6.4	6.5	3.7	5.1	5.3	2.5
Teeth	0.9	0.9	1.2	5.3	5.5	1.6	4.0	4.2	1.4
Mouth and gums	0.5	0.5	-	4.0	4.1	2.1	3.0	3.1	1.1
Nose	0.3	0.2	0.6	1.0	1.0	1.1	0.8	0.8	0.8
Throat	0.1	0.2	-	-	-	-	3/	3/	-
Lungs	1.7	1.8	1.2	1.9	1.9	1.1	1.8	1.9	1.1
Tuberculosis	2.0	2.0	1.8	3.0	2.9	5.8	2.7	2.6	3.9
Cardiovascular	2.5	2.7	1.2	12.5	12.4	15.3	9.5	9.6	8.7
Blood and blood-forming	0.7	0.8	-	0.1	0.1	-	0.2	0.3	-
Hernia	8.9	9.5	4.1	11.0	10.8	13.2	10.3	10.4	9.0
Kidney and urinary	0.5	0.5	0.6	1.0	1.0	-	0.8	0.9	0.3
Abdominal viscera	0.5	0.5	-	2.0	2.1	0.5	1.5	1.6	0.3
Genitalia	0.4	0.3	1.2	1.9	1.9	2.7	1.5	1.4	2.0
Syphilis	23.5	18.3	64.9	0.3	0.2	2.1	7.4	5.5	31.7
Gonorrhea and other venereal	-	-	-	0.8	0.5	6.3	0.6	0.3	3.4
Skin	0.8	0.8	6	1.0	1.1	-	1.0	1.0	0.3
Hemorrhoids	0.9	0.8	1.2	0.5	0.6	0.5	0.6	0.6	0.8
Varicose veins	0.7	0.6	1.8	1.0	1.0	0.5	0.9	0.9	1.1
Educational deficiency	0.3	0.3	-	2.7	2.5	5.8	2.0	1.9	3.1
Mental deficiency	5.7	6.4	0.6	1.2	1.1	1.6	2.5	2.7	1.1
Mental disease	3.1	3.4	0.6	12.1	12.4	6.9	9.4	9.8	3.9
Neurological	13.0	14.7	-	3.9	4.0	2.7	6.7	7.1	1.4
Musculoskeletal	19.5	20.8	8.9	11.4	11.7	7.4	13.9	14.3	8.1
Feet	1.3	1.3	1.8	1.6	1.7	0.5	1.5	1.5	1.1
Endocrine	2.3	2.5	0.6	1.6	1.6	1.1	1.8	1.9	0.8
Neoplasms	0.5	0.5	-	1.2	1.2	1.1	1.0	1.0	0.6
Infectious and parasitic	-	-	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight and other	2.0	2.1	1.8	2.3	2.3	2.1	2.2	2.2	2.0
Nonmedical reasons	0.3	0.3	-	0.7	0.6	2.7	0.5	0.5	1.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Kansas

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	68.2	Hernia	34.8
Teeth	15.8	Teeth	15.6
Musculoskeletal	6.0	Eyes	12.6
Ears	3.1	Mouth and gums	12.5
Feet	1.5	Musculoskeletal	4.5
Other	5.4	Other	20.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters, April 1942-March 1943.

Table 1.. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Kentucky

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.7	7.8	2.9	5.6	5.5	6.3	5.9	6.1	4.7
Ears	1.9	2.4	0.2	5.1	5.5	1.2	4.2	4.8	0.7
Teeth	1.3	1.2	1.8	2.3	2.3	1.8	2.0	2.0	1.8
Mouth and gums	0.6	0.6	0.7	0.3	0.3	0.1	0.4	0.4	0.4
Nose	0.2	0.3	0.1	0.7	0.7	1.0	0.6	0.6	0.6
Throat	0.1	3/	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Lungs	1.4	1.6	0.6	2.3	2.3	2.3	2.1	2.2	1.6
Tuberculosis	3.1	3.8	0.8	6.4	6.3	7.4	5.5	5.7	4.4
Cardiovascular	2.5	2.5	2.7	9.1	9.0	10.6	7.4	7.4	7.0
Blood and blood-forming	0.1	0.1	-	0.1	0.1	-	0.1	0.1	-
Hernia	6.3	7.2	3.4	5.8	5.7	6.7	5.9	6.0	5.2
Kidney and urinary	0.2	0.2	0.1	0.8	0.9	0.5	0.7	0.7	0.3
Abdominal viscera	0.6	0.7	0.4	1.1	1.1	0.7	0.9	1.0	0.6
Genitalia	0.6	0.6	0.8	1.2	1.1	1.3	1.0	1.0	1.1
Syphilis	29.3	18.2	66.1	2.4	1.7	8.5	9.6	5.6	35.0
Gonorrhea and other venereal	0.3	0.1	0.7	0.6	0.4	2.2	0.5	0.3	1.6
Skin	0.6	0.7	0.3	0.5	0.6	0.3	0.6	0.6	0.3
Hemorrhoids	0.8	0.6	1.4	0.7	0.6	1.0	0.7	0.6	1.2
Varicose veins	0.6	0.7	0.1	0.9	0.9	1.0	0.8	0.9	0.6
Educational deficiency	0.2	0.2	-	14.2	14.2	14.7	10.4	10.9	7.9
Mental deficiency	6.5	8.0	1.4	3.1	3.3	1.6	4.0	4.4	1.5
Mental disease	3.0	3.6	1.1	21.3	21.9	15.9	16.4	17.5	9.0
Neurological	9.3	11.2	3.0	4.1	4.1	3.9	5.5	5.8	3.4
Musculoskeletal	19.4	22.4	9.4	5.1	5.1	5.2	8.9	9.2	7.1
Feet	1.1	1.2	0.6	0.7	0.6	1.6	0.8	0.8	1.2
Endocrine	0.9	1.2	0.1	1.1	1.1	0.7	1.0	1.1	0.4
Neoplasms	0.4	0.5	0.2	0.6	0.6	0.5	0.6	0.6	0.3
Infectious and parasitic	-	-	-	0.1	0.1	0.1	0.1	0.1	3/
Underweight, overweight and other	1.8	2.1	1.0	2.4	2.6	1.5	2.3	2.4	1.3
Nonmedical reasons	0.2	0.3	-	1.3	1.3	1.3	1.0	1.1	0.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Kentucky

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	58.9	Hernia	19.8
Musculoskeletal	14.5	Eyes	17.4
Teeth	12.8	Teeth	13.9
Feet	3.4	Musculoskeletal	9.2
Ears	2.2	Syphilis	6.2
Other	8.2	Other	33.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Louisiana

Cause for Rejection	Local Board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.5	5.8	2.4	6.1	7.8	4.5	5.1	7.2	3.5
Ears	1.1	2.4	0.4	2.2	3.9	0.5	1.8	3.4	0.5
Teeth	2.1	2.6	1.8	1.2	2.0	0.5	1.6	2.2	1.1
Mouth and gums	0.3	0.5	0.2	0.5	0.9	0.2	0.5	0.8	0.2
Nose	0.1	0.1	0.1	0.5	0.8	0.3	0.4	0.6	0.2
Throat	3/	0.1	0.1	0.1	0.1	3/	0.1	0.1	3/
Lungs	1.3	2.4	0.7	1.3	1.8	0.9	1.3	2.0	0.8
Tuberculosis	1.4	3.2	0.4	1.8	2.3	1.3	1.6	2.6	0.9
Cardiovascular	4.4	4.8	4.3	10.2	12.0	8.5	7.9	9.7	6.6
Blood and blood-forming	3/	0.1	-	3/	0.1	-	3/	0.1	-
Hernia	6.5	10.8	4.3	5.6	7.1	4.0	5.9	8.3	4.2
Kidney and urinary	0.2	0.5	-	0.8	1.2	0.4	0.5	1.0	0.2
Abdominal viscera	0.6	1.2	0.3	1.1	1.8	0.3	0.9	1.6	0.3
Genitalia	1.4	1.2	1.6	1.8	1.5	2.0	1.6	1.4	1.8
Syphilis	50.0	18.1	66.4	0.8	0.4	1.1	20.3	6.0	31.2
Gonorrhea and other venereal	0.7	0.2	0.9	1.9	0.4	3.4	1.4	0.3	2.2
Skin	0.4	0.4	0.5	0.4	0.6	0.3	0.4	0.5	0.4
Hemorrhoids	0.7	1.0	0.5	0.6	0.7	0.4	0.6	0.8	0.5
Varicose veins	1.1	1.5	0.9	1.0	1.2	0.9	1.1	1.3	0.9
Educational deficiency	0.2	0.2	0.2	22.9	14.5	31.1	13.9	10.0	16.8
Mental deficiency	2.6	4.8	1.5	12.1	5.6	18.3	8.3	5.3	10.6
Mental disease	1.9	4.0	0.8	13.5	15.9	11.2	8.9	12.2	6.4
Neurological	4.6	10.1	1.7	2.8	3.6	2.1	3.5	5.6	1.9
Musculoskeletal	11.4	18.4	7.7	5.1	6.8	3.5	7.6	10.4	5.4
Feet	0.8	0.8	0.8	1.7	1.2	2.2	1.3	1.1	1.6
Endocrine	0.5	1.3	0.1	0.6	0.9	0.3	0.6	1.0	0.2
Neoplasms	0.4	0.6	0.2	0.4	0.5	0.3	0.4	0.5	0.2
Infectious and parasitic	3/	0.1	-	0.1	0.1	3/	0.1	0.1	3/
Underweight, overweight and other	1.7	2.6	1.2	2.3	3.4	1.1	2.0	3.2	1.2
Nonmedical reasons	0.1	0.2	-	0.6	0.9	0.4	0.4	0.7	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Louisiana

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	56.0	Hernia	31.1
Musculoskeletal	15.8	Eyes	12.5
Teeth	8.2	Gonorrhea and other venereal	11.9
Feet	5.5	Musculoskeletal	9.0
Underweight and overweight	5.1	Genitalia	6.8
Other	9.4	Other	28.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Maine

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	7.2	15.0	13.3
Ears	2.6	7.4	6.4
Teeth	1.5	6.6	5.5
Mouth and gums	1.0	0.2	0.4
Nose	0.1	0.8	0.7
Throat	0.1	0.2	0.2
Lungs	3.3	2.7	2.9
Tuberculosis	3.9	3.3	3.4
Cardiovascular	4.0	10.3	9.0
Blood and blood-forming	0.4	0.2	0.2
Hernia	8.0	6.5	6.7
Kidney and urinary	-	1.8	1.5
Abdominal viscera	0.7	2.6	2.1
Genitalia	0.7	1.3	1.2
Syphilis	9.7	0.2	2.2
Gonorrhea and other venereal	-	0.2	0.1
Skin	1.5	0.5	0.8
Hemorrhoids	0.2	0.1	0.1
Varicose veins	2.3	1.2	1.4
Educational deficiency	0.9	5.8	4.8
Mental deficiency	6.1	2.4	3.2
Mental disease	3.9	14.2	12.1
Neurological	15.6	4.3	6.3
Musculoskeletal	21.1	5.5	8.8
Feet	1.6	0.6	0.8
Endocrine	1.5	1.2	1.2
Neoplasms	0.4	1.3	1.0
Infectious and parasitic	-	0.2	0.2
Underweight, overweight and other	3.3	3.2	3.2
Nonmedical reasons	0.4	0.3	0.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Maine

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	59.4	Eyes	27.8
Hernia	12.4	Teeth	19.3
Musculoskeletal	9.1	Hernia	12.8
Teeth	8.5	Musculoskeletal	7.1
Genitalia	1.8	Educational deficiency	6.3
Other	8.8	Other	27.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations. April 1942 through March 1943 1/

Maryland

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.2	2.8	1.8	8.0	9.2	4.7	6.7	8.2	3.7
Ears	1.6	3.3	-	5.6	7.3	1.0	4.7	6.7	0.6
Teeth	0.3	0.4	0.1	1.7	2.3	0.2	1.4	2.0	0.2
Mouth and gums	0.3	0.7	-	0.1	0.2	-	0.2	0.2	-
Nose	0.1	0.3	-	0.9	1.1	0.3	0.7	1.0	0.2
Throat	-	-	-	0.1	0.1	-	3/	0.1	-
Lungs	1.0	1.7	0.3	1.6	1.7	1.3	1.5	1.7	1.0
Tuberculosis	2.2	3.6	1.0	5.8	6.2	4.6	5.0	5.8	3.3
Cardiovascular	1.0	1.7	0.3	8.8	9.1	7.9	7.0	7.9	5.2
Blood and blood-forming	-	-	-	0.1	0.1	-	0.1	0.1	-
Hernia	7.6	11.3	4.3	4.9	5.5	3.4	5.5	6.4	3.7
Kidney and urinary	0.1	-	0.3	1.1	1.0	1.3	0.9	0.9	0.9
Abdominal viscera	0.3	0.4	0.1	1.1	1.3	0.6	0.9	1.1	0.4
Genitalia	0.5	0.3	0.6	0.8	0.8	0.8	0.7	0.7	0.8
Syphilis	53.4	25.1	79.0	0.9	0.3	2.6	12.4	4.2	29.6
Gonorrhea and other venereal	0.3	-	0.5	3.0	0.7	9.1	2.4	0.6	6.1
Skin	0.8	1.1	0.5	0.5	0.5	0.5	0.5	0.6	0.5
Hemorrhoids	0.3	0.5	0.1	0.4	0.4	0.1	0.4	0.5	0.1
Varicose veins	0.5	0.8	0.3	0.5	0.6	0.2	0.5	0.6	0.2
Educational deficiency	0.1	0.1	0.1	17.0	8.7	39.4	13.3	7.4	25.5
Mental deficiency	2.6	5.0	0.5	2.5	2.1	3.9	2.6	2.5	2.7
Mental disease	2.2	3.6	0.9	22.0	26.6	9.6	17.7	23.1	6.5
Neurological	6.7	12.2	1.8	4.4	5.1	2.5	4.9	6.1	2.2
Musculoskeletal	12.4	20.2	5.4	4.4	4.6	3.6	6.1	7.0	4.2
Feet	0.6	0.8	0.3	0.6	0.6	0.7	0.6	0.6	0.6
Endocrine	1.0	1.8	0.3	0.5	0.7	0.1	0.6	0.9	0.2
Neoplasms	0.1	0.1	-	0.8	1.0	0.3	0.7	0.9	0.2
Infectious and parasitic	-	-	-	3/	3/	-	3/	3/	-
Underweight, overweight and other	1.7	1.9	1.5	1.0	1.0	1.0	1.2	1.2	1.2
Nonmedical reasons	0.1	0.3	-	0.9	1.2	0.3	0.8	1.0	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Maryland

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	57.8	Hernia	22.9
Musculoskeletal	15.3	Eyes	16.7
Teeth	8.3	Gonorrhea and other venereal	13.8
Feet	5.6	Mental deficiency	8.1
Ears	4.0	Teeth	7.8
Other	9.0	Other	30.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters, April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Massachusetts

Cause for rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.7	4.8	1.5	8.8	8.8	10.3	7.8	7.8	6.6
Ears	3.5	3.5	2.2	9.6	9.7	1.0	8.1	8.2	1.5
Teeth	2.1	2.2	-	1.7	1.7	0.5	1.8	1.8	0.3
Mouth and gums	0.4	0.4	-	0.2	0.1	0.5	0.2	0.2	0.3
Nose	0.3	0.3	-	1.3	1.3	2.6	1.1	1.0	1.5
Throat	0.1	0.1	-	3/	3/	-	3/	3/	-
Lungs	1.8	1.8	1.5	3.0	3.0	2.6	2.7	2.7	2.1
Tuberculosis	5.2	5.2	3.6	3.4	3.4	3.1	3.8	3.8	3.3
Cardiovascular	2.8	2.8	1.5	12.2	12.2	12.3	9.9	9.9	7.8
Blood and blood-forming	0.3	0.3	-	0.1	0.1	-	0.1	0.1	-
Hernia	5.3	5.4	2.9	3.7	3.8	1.6	4.1	4.2	2.1
Kidney and urinary	0.5	0.5	-	2.9	3.0	1.0	2.3	2.3	0.6
Abdominal viscera	1.9	2.0	0.7	3.6	3.6	0.5	3.1	3.2	0.6
Genitalia	0.7	0.7	0.7	0.6	0.6	0.5	0.7	0.6	0.6
Syphilis	11.0	9.2	61.6	0.4	0.3	4.6	3.0	2.5	28.3
Gonorrhea and other venereal	0.1	0.1	-	0.1	0.1	1.5	0.1	0.1	0.9
Skin	1.3	1.4	-	0.3	0.3	-	0.6	0.6	-
Hemorrhoids	0.3	0.3	-	0.2	0.2	-	0.2	0.2	-
Varicose veins	2.1	2.2	-	1.1	1.1	0.5	1.4	1.4	0.3
Educational deficiency	0.4	0.3	0.7	2.7	2.7	4.1	2.1	2.1	2.7
Mental deficiency	3.6	3.8	0.7	2.9	2.9	5.1	3.1	3.1	3.3
Mental disease	7.0	7.2	3.6	24.3	24.2	27.7	20.0	20.0	17.7
Neurological	16.0	16.4	5.1	4.9	4.9	6.2	7.7	7.7	5.7
Musculoskeletal	20.6	20.9	11.6	4.7	4.7	7.7	8.7	8.7	9.3
Feet	1.7	1.7	-	1.0	1.0	1.0	1.1	1.2	0.6
Endocrine	2.0	2.1	-	1.3	1.3	0.5	1.5	1.5	0.3
Neoplasms	0.6	0.6	-	1.0	1.0	0.5	0.9	0.9	0.3
Infectious and parasitic	0.1	0.1	0.7	0.1	0.1	-	0.1	0.1	0.3
Underweight, overweight and other	3.3	3.4	1.4	2.4	2.4	2.6	2.6	2.6	2.1
Nonmedical reasons	0.3	0.3	-	1.5	1.5	1.5	1.2	1.2	0.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Massachusetts

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	32.4	Eyes	26.3
Musculoskeletal	9.7	Hernia	15.0
Hernia	7.9	Teeth	13.1
Teeth	7.3	Musculoskeletal	11.6
Mental disease	4.3	Varicose veins	3.7
Other	18.4	Other	30.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Michigan

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	7.3	7.6	2.9	8.5	8.5	9.0	8.2	8.3	7.0
Ears	4.1	4.3	0.6	7.7	8.1	0.5	6.7	7.1	0.6
Teeth	0.9	1.0	-	1.3	1.4	1.1	1.2	1.3	0.7
Mouth and gums	0.4	0.4	-	0.2	0.3	-	0.3	0.3	-
Nose	0.6	0.6	0.6	1.2	1.4	-	1.1	1.2	0.2
Throat	3/	3/	-	3/	3/	-	3/	-	-
Lungs	2.4	2.4	1.7	1.3	1.3	0.3	1.6	1.6	0.7
Tuberculosis	3.3	3.3	4.0	3.6	3.5	5.7	3.5	3.4	5.2
Cardiovascular	5.9	6.3	0.6	9.7	9.5	13.1	8.6	8.6	9.1
Blood and blood-forming	0.1	0.1	-	0.1	0.1	-	0.1	0.1	-
Hernia	11.4	11.8	5.2	7.7	7.9	5.5	8.8	8.9	5.4
Kidney and urinary	0.3	0.3	0.6	1.5	1.5	0.8	1.2	1.2	0.7
Abdominal viscera	0.8	0.8	-	2.6	2.6	1.6	2.1	2.1	1.1
Genitalia	0.4	0.4	1.1	1.4	1.4	2.7	1.2	1.1	2.2
Syphilis	12.4	9.4	57.5	0.8	0.7	3.8	4.1	3.1	21.1
Gonorrhea and other venereal	0.2	0.2	0.6	0.8	0.3	3.8	0.4	0.3	2.8
Skin	1.1	1.1	1.1	0.4	0.5	0.3	0.6	0.6	0.6
Hemorrhoids	0.4	0.4	1.1	0.2	0.2	-	0.3	0.3	0.4
Varicose veins	1.0	1.1	-	1.1	1.1	0.3	1.1	1.1	0.2
Educational deficiency	0.1	0.2	-	2.5	2.2	10.7	1.8	1.7	5.0
Mental deficiency	2.9	3.0	0.6	6.9	6.7	7.4	5.8	5.7	7.4
Mental disease	3.7	3.9	0.6	25.1	25.4	19.1	19.2	19.5	13.1
Neurological	11.3	11.8	2.3	3.4	3.4	3.3	5.6	5.7	3.0
Musculoskeletal	21.8	22.4	12.6	6.5	6.6	4.9	10.8	10.9	7.4
Feet	1.3	1.4	-	0.8	0.7	1.4	0.9	0.9	0.9
Endocrine	2.4	2.4	2.3	1.6	1.7	1.1	1.9	1.9	1.5
Neoplasms	0.5	0.5	0.6	0.5	0.5	0.6	0.4	0.5	0.6
Infectious and parasitic	-	-	-	0.1	0.1	-	3/	-	2.2
Underweight, overweight and other	2.7	2.6	3.4	1.9	1.9	1.6	2.1	2.1	0.9
Nonmedical reasons	0.3	0.3	-	0.6	0.5	1.4	0.4	0.5	-

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Michigan

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	65.3	Hernia	33.0
Teeth	12.5	Eyes	21.6
Musculoskeletal	10.4	Musculoskeletal	9.8
Underweight and overweight	3.4	Teeth	6.0
Feet	2.4	Genitalia	5.6
Other	6.0	Other	24.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Minnesota

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	7.7	10.6	9.7
Ears	4.2	6.5	5.8
Teeth	0.9	3.3	2.5
Mouth and gums	0.6	0.2	0.4
Nose	0.7	1.5	1.2
Throat	0.1	2/	2/
Lungs	1.9	2.0	2.0
Tuberculosis	3.8	2.0	2.6
Cardiovascular	4.4	8.0	6.9
Blood and blood-forming	0.2	0.1	0.2
Hernia	8.0	11.7	9.9
Kidney and urinary	0.2	2.0	1.4
Abdominal viscera	0.6	5.1	3.6
Genitalia	0.5	1.6	1.3
Syphilis	4.0	0.3	1.5
Gonorrhea and other venereal	0.1	0.2	0.1
Skin	0.9	0.9	0.9
Hemorrhoids	0.4	0.4	0.4
Varicose veins	1.1	1.3	1.2
Educational deficiency	0.1	2.4	1.7
Mental deficiency	7.3	2.8	4.2
Mental disease	4.7	19.6	14.8
Neurological	19.0	5.1	9.3
Musculoskeletal	24.3	7.3	12.8
Feet	1.7	0.9	1.1
Endocrine	1.9	1.8	1.8
Neoplasms	0.3	0.7	0.6
Infectious and parasitic	-	2/	2/
Underweight, overweight and other	2.4	1.5	1.8
Nonmedical reasons	-	0.2	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Minnesota

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	62.9	Hernia	33.8
Musculoskeletal	12.1	Eyes	22.1
Teeth	9.0	Musculoskeletal	11.0
Feet	3.9	Teeth	10.7
Ears	2.8	Genitalia	4.2
Other	9.3	Other	18.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Mississippi

Cause for Rejection	Local boards			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.5	5.0	1.9	7.6	10.8	5.7	5.4	9.1	3.8
Ears	0.8	2.1	0.5	1.4	3.1	0.3	1.1	2.8	0.4
Teeth	0.4	0.9	0.2	0.7	1.2	0.5	0.6	1.1	0.4
Mouth and gums	0.2	0.4	0.2	0.3	0.6	0.1	0.3	0.6	0.1
Nose	3/	-	3/	3/	0.1	3/	3/	3/	3/
Throat	3/	0.1	3/	3/	-	3/	3/	3/	3/
Lungs	0.5	1.1	0.3	1.1	1.4	0.8	0.8	1.3	0.6
Tuberculosis	0.9	2.4	0.5	1.5	2.3	1.0	1.3	2.4	0.8
Cardiovascular	1.3	2.4	1.0	5.9	6.0	5.8	3.9	5.0	3.4
Blood and blood-forming	3/	0.2	-	3/	0.1	-	3/	0.1	-
Hernia	2.8	5.5	2.2	9.0	11.7	7.5	6.3	9.8	4.9
Kidney and urinary	3/	0.1	-	0.5	1.1	0.2	0.3	0.8	0.1
Abdominal viscera	0.2	0.6	0.1	0.7	1.7	0.1	0.5	1.3	0.1
Genitalia	0.4	0.5	0.4	1.7	1.6	1.7	1.1	1.2	1.1
Syphilis	69.1	23.8	80.5	1.1	0.5	1.5	30.7	7.4	40.5
Gonorrhea and other venereal	0.2	0.1	0.2	3.0	0.9	4.2	1.8	0.7	2.2
Skin	0.3	0.6	0.2	0.7	0.8	0.7	0.5	0.8	0.4
Hemorrhoids	0.2	0.4	0.1	0.6	1.0	0.3	0.4	0.8	0.2
Varicose veins	0.5	1.0	0.3	0.9	1.3	0.6	0.7	1.2	0.5
Educational deficiency	3/	-	3/	38.7	14.9	52.5	21.9	10.5	26.6
Mental deficiency	3.0	8.1	1.8	1.7	1.9	1.7	2.3	3.7	1.7
Mental disease	1.5	4.4	0.8	9.6	17.4	5.2	6.1	13.4	3.1
Neurological	4.6	14.4	2.1	2.2	3.1	1.6	3.2	6.6	1.9
Musculoskeletal	8.4	20.3	5.4	5.7	8.2	4.2	6.8	11.8	4.8
Feet	0.5	1.1	0.4	1.0	1.0	1.1	0.8	1.0	0.7
Endocrine	0.4	1.3	0.2	0.6	1.2	0.3	0.5	1.2	0.2
Neoplasms	0.3	0.6	0.2	0.9	2.0	0.3	0.6	1.6	0.2
Infectious and parasitic	-	-	-	0.3	0.3	0.3	0.2	0.2	0.1
Underweight, overweight and other	0.9	2.4	0.5	1.6	2.7	0.9	1.3	2.6	0.7
Nonmedical reasons	0.1	0.2	3/	1.0	1.3	0.9	0.6	1.0	0.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Mississippi

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	47.9	Hernia	39.1
Teeth	19.8	Gonorrhea and other venereal	11.8
Musculoskeletal	19.8	Eyes	8.6
Feet	3.8	Musculoskeletal	8.3
Ears	2.2	Genitalia	7.1
Other	6.5	Other	25.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Missouri

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.1	6.6	4.2	8.3	8.5	7.3	7.7	8.0	6.0
Ears	3.0	3.5	0.8	7.1	7.8	1.6	5.9	6.6	1.3
Teeth	2.5	2.5	2.4	3.9	4.3	0.7	3.5	3.8	1.3
Mouth and gums	0.6	0.7	0.4	1.2	1.2	1.2	1.0	1.0	0.9
Nose	0.4	0.4	0.3	2.6	2.8	1.3	2.0	2.1	0.9
Throat	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Lungs	1.5	1.6	1.1	1.7	1.7	1.6	1.7	1.7	1.4
Tuberculosis	2.1	2.3	0.7	5.2	5.3	4.5	4.3	4.4	3.0
Cardiovascular	4.9	5.5	2.0	9.8	9.7	10.8	8.4	8.6	7.3
Blood and blood-forming	0.2	0.2	-	0.1	0.1	-	0.1	0.1	-
Hernia	15.0	16.1	9.8	7.7	7.9	5.9	9.8	10.2	7.5
Kidney and urinary	0.8	0.9	0.3	1.5	1.6	1.2	1.3	1.4	0.8
Abdominal viscera	0.6	0.7	0.4	1.3	1.5	0.5	1.1	1.2	0.5
Genitalia	1.3	1.3	0.9	1.3	1.3	1.0	1.3	1.3	1.0
Syphilis	21.9	14.6	56.3	1.0	0.6	3.9	7.0	4.5	24.5
Gonorrhea and other venereal	0.2	0.1	0.7	1.3	0.6	7.1	1.0	0.4	4.6
Skin	0.7	0.8	0.4	0.4	0.4	0.1	0.5	0.5	0.2
Hemorrhoids	0.8	0.8	0.9	0.8	0.5	1.1	0.6	0.6	1.0
Varicose veins	1.6	1.6	1.5	1.0	0.9	1.6	1.2	1.1	1.6
Educational deficiency	0.5	0.5	0.3	4.9	4.5	7.9	3.6	3.4	4.9
Mental deficiency	0.1	-	0.3	1.0	-	9.0	0.7	-	5.5
Mental disease	4.0	4.5	1.5	19.7	20.2	15.5	15.1	15.9	10.0
Neurological	7.4	8.6	2.0	4.6	4.5	5.4	5.5	5.7	4.1
Musculoskeletal	16.8	18.5	8.8	7.3	7.5	6.1	10.1	10.6	7.2
Feet	0.9	0.9	1.1	1.0	1.0	0.9	1.0	1.0	1.0
Endocrine	2.2	2.6	0.2	1.0	1.0	0.7	1.3	1.4	0.5
Neoplasms	0.7	0.8	0.2	0.6	0.7	0.1	0.6	0.7	0.2
Infectious and parasitic	0.1	0.1	-	0.2	0.2	0.3	0.2	0.2	0.2
Underweight, overweight and other	2.8	3.0	2.2	2.9	3.0	1.5	2.9	3.0	1.8
Nonmedical reasons	0.2	0.2	0.2	0.7	0.6	1.1	0.5	0.5	0.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Missouri

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	59.9	Hernia	22.5
Musculoskeletal	11.7	Eyes	13.0
Teeth	9.0	Teeth	12.7
Nose	3.1	Educational deficiency	7.9
Genitalia	2.9	Musculoskeletal	6.1
Other	13.4	Other	37.8

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Montana

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	8.1	18.5	15.7
Ears	2.3	6.1	5.0
Teeth	2.6	8.9	7.2
Mouth and gums	0.2	1.1	0.8
Nose	-	1.0	0.7
Throat	-	-	-
Lungs	1.7	1.8	1.7
Tuberculosis	2.2	1.3	1.5
Cardiovascular	4.6	8.1	7.2
Blood and blood-forming	0.2	0.1	0.1
Hernia	10.6	9.4	10.0
Kidney and urinary	0.3	1.3	1.1
Abdominal viscera	1.4	4.3	3.6
Genitalia	0.2	1.0	0.8
Syphilis	3.8	1.2	3.3
Gonorrhea and other venereal	-	0.1	0.1
Skin	1.0	0.6	0.7
Hemorrhoids	0.2	0.8	0.6
Varicose veins	1.0	1.8	1.6
Educational deficiency	-	1.9	1.4
Mental deficiency	2.6	1.9	2.1
Mental disease	3.4	5.7	5.0
Neurological	14.6	4.9	7.8
Musculoskeletal	27.0	10.3	14.8
Feet	1.7	2.7	2.5
Endocrine	2.9	3.0	3.0
Neoplasms	0.6	0.3	0.4
Infectious and parasitic	-	-	-
Underweight, overweight and other	1.6	1.5	1.4
Nonmedical reasons	0.2	0.2	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Montana

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	46.7	Eyes	23.9
Musculoskeletal	23.0	Teeth	22.7
Teeth	11.4	Hernia	21.2
Feet	7.0	Musculoskeletal	10.8
Ears	4.1	Feet	4.7
Other	7.8	Other	16.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Nebraska

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.7	6.5	6.6
Ears	3.3	5.0	4.6
Teeth	1.1	6.3	4.8
Mouth and gums	0.6	0.4	0.5
Nose	0.8	1.5	1.3
Throat	0.1	-	2/
Lungs	1.6	1.7	1.6
Tuberculosis	0.7	4.1	3.1
Cardiovascular	5.2	19.5	15.5
Blood and blood-forming	0.2	0.1	0.1
Hernia	6.6	9.8	8.9
Kidney and urinary	0.2	1.3	1.0
Abdominal viscera	0.8	2.0	1.7
Genitalia	0.1	1.6	1.2
Syphilis	11.5	0.6	3.7
Gonorrhea and other venereal	0.1	0.3	0.2
Skin	1.0	0.4	0.6
Hemorrhoids	0.5	0.6	0.5
Varicose veins	1.5	0.9	1.1
Educational deficiency	0.2	2.3	1.7
Mental deficiency	5.7	1.7	2.8
Mental disease	4.1	17.8	13.9
Neurological	14.9	4.5	7.4
Musculoskeletal	25.8	6.5	11.9
Feet	1.6	1.0	1.2
Endocrine	3.5	1.5	2.1
Neoplasms	0.6	0.5	0.5
Infectious and parasitic	0.1	0.3	0.3
Underweight, overweight and other	0.9	1.0	1.0
Nonmedical reasons	-	0.3	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Nebraska

1

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	54.2	Hernia	36.7
Teeth	15.1	Teeth	15.3
Musculoskeletal	12.6	Eyes	13.8
Feet	3.8	Musculoskeletal	7.6
Underweight and overweight	3.3	Genitalia	5.6
Other	11.0	Other	21.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Nevada

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.7	9.5	8.5
Ears	1.5	6.9	4.9
Teeth	0.5	2.4	1.7
Mouth and gums	-	-	-
Nose	-	1.5	0.9
Throat	-	-	-
Lungs	1.5	3.0	2.5
Tuberculosis	0.5	4.5	3.0
Cardiovascular	4.1	14.0	10.4
Blood and blood-forming	-	0.3	0.2
Hernia	10.3	11.9	11.3
Kidney and urinary	-	2.7	1.7
Abdominal viscera	1.5	4.2	3.2
Genitalia	1.0	2.7	2.1
Syphilis	30.3	1.5	12.1
Gonorrhea and other venereal	-	0.6	0.4
Skin	-	1.5	0.9
Hemorrhoids	1.0	1.2	1.2
Varicose veins	1.0	1.5	1.3
Educational deficiency	-	2.4	1.5
Mental deficiency	1.0	1.5	1.3
Mental disease	1.5	7.7	5.5
Neurological	4.7	2.1	3.0
Musculoskeletal	27.7	9.5	16.2
Feet	2.1	0.3	0.9
Endocrine	1.0	1.8	1.5
Neoplasms	-	0.9	0.6
Infectious and parasitic	-	-	-
Underweight, overweight and other	2.1	1.8	1.9
Nonmedical reasons	-	2.1	1.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1940-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Nevada

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	53.8	Hernia	31.2
Neurological	19.2	Eyes	12.8
Teeth	11.5	Cardiovascular	7.2
Feet	4.8	Musculoskeletal	7.2
Ears	2.9	Genitalia	6.4
Other	7.8	Other	35.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

New Hampshire

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	5.2	8.4	7.9
Ears	2.4	4.6	4.3
Teeth	2.4	3.5	3.3
Mouth and gums	-	0.1	0.1
Nose	0.5	0.3	0.3
Throat	-	-	-
Lungs	0.5	1.9	1.7
Tuberculosis	2.4	2.1	2.2
Cardiovascular	2.4	14.2	12.4
Blood and blood-forming	0.5	-	0.1
Hernia	8.1	5.0	5.5
Kidney and urinary	0.9	1.4	1.4
Abdominal viscera	0.9	2.9	2.6
Genitalia	0.5	1.3	1.1
Syphilis	11.9	0.5	2.2
Gonorrhea and other venereal	-	0.3	0.2
Skin	1.4	0.6	0.7
Hemorrhoids	0.5	0.5	0.5
Varicose veins	1.4	1.5	1.5
Educational deficiency	-	6.1	5.2
Mental deficiency	5.2	2.7	3.1
Mental disease	4.7	24.9	21.8
Neurological	18.0	3.9	6.1
Musculoskeletal	22.7	5.9	8.4
Feet	2.4	1.4	1.5
Endocrine	0.9	1.4	1.3
Neoplasms	1.4	1.2	1.2
Infectious and parasitic	-	0.1	0.1
Underweight, overweight and other	2.8	3.2	3.2
Nonmedical reasons	-	0.1	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

New Hampshire

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	41.4	Eyes	18.1
Hernia	15.2	Teeth	17.2
Musculoskeletal	13.0	Hernia	14.2
Teeth	8.2	Musculoskeletal	11.1
Feet	5.6	Feet	5.3
Other	16.6	Other	34.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

New Jersey

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.0	6.8	2.2	9.2	9.3	8.5	8.7	8.9	6.6
Ears	3.0	3.6	0.3	8.3	9.0	1.4	7.4	8.1	1.1
Teeth	1.0	1.1	0.5	0.8	0.8	0.9	0.9	0.9	0.8
Mouth and gums	0.6	0.6	0.3	0.5	0.5	0.1	0.5	0.6	0.1
Nose	-	-	-	0.7	0.8	0.1	0.6	0.7	0.1
Throat	0.2	0.2	0.3	3/	3/	-	0.1	0.1	0.1
Lungs	1.6	1.9	0.5	2.1	2.1	1.8	2.0	2.1	1.4
Tuberculosis	3.8	4.1	2.2	4.1	4.2	3.5	4.1	4.2	3.1
Cardiovascular	3.8	4.2	2.2	10.6	10.7	9.4	9.5	9.7	7.4
Blood and blood-forming	0.3	0.3	-	0.1	0.1	-	0.1	0.1	-
Hernia	5.5	5.7	4.5	9.3	9.6	5.6	8.6	9.0	5.3
Kidney and urinary	0.4	0.5	-	2.4	2.4	2.6	2.1	2.1	1.9
Abdominal viscera	1.0	1.3	-	2.9	3.2	0.4	2.6	2.9	0.3
Genitalia	0.7	0.6	1.0	1.5	1.5	1.6	1.3	1.3	1.4
Syphilis	20.5	11.0	65.0	1.1	0.7	5.5	4.3	2.2	22.5
Gonorrhea and other venereal	-	-	-	0.8	0.3	6.0	0.6	0.2	4.3
Skin	0.6	0.7	0.3	0.4	0.4	0.3	0.5	0.5	0.3
Hemorrhoids	0.7	0.7	0.3	0.4	0.4	0.5	0.5	0.5	0.4
Varicose veins	1.1	1.3	0.5	1.1	1.1	0.7	1.1	1.2	0.6
Educational deficiency	3/	3/	-	4.0	3.1	13.9	3.3	2.6	9.9
Mental deficiency	3.1	3.5	1.2	1.2	1.1	3.1	1.6	1.4	2.6
Mental disease	3.2	3.6	1.2	18.6	18.7	16.9	16.0	16.4	12.4
Neurological	14.0	16.3	3.2	6.3	6.5	4.4	7.6	8.0	4.1
Musculoskeletal	21.3	23.7	10.2	6.7	6.7	6.5	9.1	9.3	7.6
Feet	1.4	1.4	1.2	1.7	1.5	3.0	1.6	1.5	2.5
Endocrine	2.8	3.2	0.8	2.0	2.1	0.8	2.1	2.2	0.8
Neoplasms	0.3	0.4	0.3	1.0	1.1	0.3	0.9	1.0	0.3
Infectious and parasitic	-	-	-	0.1	0.1	0.2	0.1	0.1	0.1
Underweight, overweight and other	2.9	3.1	1.8	1.5	1.5	0.8	1.7	1.8	1.1
Nonmedical reasons	0.2	0.2	-	0.6	0.5	1.2	0.5	0.4	0.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

New Jersey

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	72.6	Hernia	35.0
Musculoskeletal	10.6	Eyes	17.8
Feet	3.4	Musculoskeletal	9.4
Ears	2.5	Genitalia	4.5
Teeth	1.9	Neoplasms	3.2
Other	9.0	Other	30.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

New Mexico

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.8	8.8	8.1
Ears	2.2	14.1	9.9
Teeth	3.9	0.7	1.8
Mouth and gums	-	0.4	0.2
Nose	0.1	0.1	0.1
Throat	-	0.1	0.1
Lungs	1.7	1.5	1.5
Tuberculosis	8.8	4.2	5.8
Cardiovascular	2.8	10.8	8.0
Blood and blood-forming	-	0.1	0.1
Hernia	7.1	7.2	7.2
Kidney and urinary	0.3	1.3	1.0
Abdominal viscera	0.6	1.0	0.9
Genitalia	1.0	1.8	1.5
Syphilis	28.2	0.8	10.4
Gonorrhea and other venereal	0.4	0.6	0.6
Skin	0.5	0.3	0.4
Hemorrhoids	0.3	0.3	0.3
Varicose veins	1.3	1.3	1.3
Educational deficiency	0.1	13.8	9.0
Mental deficiency	3.4	1.4	2.1
Mental disease	2.1	9.5	6.9
Neurological	7.2	7.3	7.3
Musculoskeletal	17.4	5.1	9.4
Feet	1.0	1.2	1.2
Endocrine	1.4	0.9	1.1
Neoplasms	0.6	0.3	0.5
Infectious and parasitic	-	0.1	0.1
Underweight, overweight and other	0.8	4.1	2.9
Nonmedical reasons	-	0.9	0.6

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

New Mexico

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	55.1	Hernia	20.6
Musculoskeletal	11.8	Educational deficiency	18.0
Teeth	9.2	Eyes	14.9
Education deficiency	8.7	Underweight and overweight	10.2
Ears	6.1	Ears	6.8
Other	9.1	Other	29.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

New York (Excluding N. Y. City)

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.4	5.7	1.6	7.5	7.4	8.7	6.9	7.0	5.8
Ears	2.9	2.9	2.0	9.0	9.3	1.7	7.4	7.7	1.8
Teeth	1.7	1.7	0.8	0.4	0.4	-	0.8	0.8	0.3
Mouth and gums	0.6	0.6	-	0.4	0.4	0.3	0.4	0.4	0.2
Nose	0.2	0.3	-	1.4	1.4	1.4	1.1	1.1	0.8
Throat	0.1	0.1	0.4	0.1	0.1	-	0.1	0.1	0.2
Lungs	2.3	2.4	1.6	2.9	2.9	1.4	2.7	2.8	1.5
Tuberculosis	4.6	4.7	3.7	4.9	4.8	6.7	4.8	4.8	5.5
Cardiovascular	9.0	9.3	4.1	9.8	9.9	7.6	9.6	9.7	6.1
Blood and blood-forming	0.3	0.3	-	0.1	0.1	0.3	0.2	0.2	0.2
Hernia	10.6	11.0	4.5	9.1	9.2	5.9	9.5	9.7	5.3
Kidney and urinary	0.5	0.5	-	2.3	2.3	2.5	1.8	1.8	1.5
Abdominal viscera	1.7	1.8	0.4	3.0	3.1	1.1	2.7	2.8	0.8
Genitalia	1.0	1.0	1.2	1.3	1.2	2.2	1.2	1.2	1.8
Syphilis	10.4	7.1	61.1	0.7	0.6	4.2	3.2	2.2	27.3
Gonorrhea and other venereal	0.1	0.1	0.8	0.3	0.3	1.7	0.3	0.2	1.3
Skin	0.7	0.7	-	0.8	0.8	0.8	0.8	0.8	0.5
Hemorrhoids	0.4	0.4	-	0.4	0.4	0.8	0.4	0.4	0.5
Varicose veins	1.3	1.4	-	1.3	1.3	0.8	1.3	1.3	0.5
Educational deficiency	0.3	0.3	-	2.0	1.8	9.8	2.8	2.8	3.3
Mental deficiency	3.4	3.6	1.2	2.6	2.6	4.8	1.6	1.4	5.8
Mental disease	5.7	5.8	3.3	21.8	21.8	22.1	17.6	17.7	14.4
Neurological	12.4	13.0	2.8	5.0	5.0	3.9	6.9	7.1	3.5
Musculoskeletal	16.8	17.3	8.9	5.5	5.5	5.9	8.4	8.5	7.1
Feet	1.8	1.9	0.4	0.8	0.8	0.6	1.1	1.1	0.5
Endocrine	2.6	2.8	-	1.9	1.9	1.1	2.1	2.1	0.6
Neoplasms	0.7	0.7	0.4	1.1	1.1	0.3	1.0	1.0	0.3
Infectious and parasitic	0.1	0.1	-	0.2	0.2	-	0.1	0.1	-
Underweight, overweight and other	2.1	2.2	0.8	1.8	1.8	1.4	1.9	1.9	1.2
Nonmedical reasons	0.3	0.3	-	1.6	1.6	2.0	1.3	1.3	1.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

New York (Excluding N. Y. City)

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	64.5	Hernia	37.9
Musculoskeletal	11.7	Eyes	11.3
Underweight and overweight	5.1	Musculoskeletal	7.6
Feet	4.2	Tuberculosis	5.5
Teeth	2.9	Genitalia	4.8
Other	11.6	Other	32.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

New York City

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.8	3.7	5.5	13.8	13.8	14.0	12.3	12.2	12.6
Ears	2.6	2.7	0.6	9.2	9.7	2.7	8.2	8.6	2.4
Teeth	0.6	0.5	1.8	0.9	1.0	0.2	0.9	0.9	0.5
Mouth and gums	0.3	0.3	-	0.1	0.1	-	0.1	0.2	-
Nose	0.2	0.2	0.6	0.6	0.7	0.3	0.6	0.6	0.4
Throat	0.1	0.1	-	3/	3/	-	3/	0.1	-
Lungs	1.7	1.7	1.8	1.8	1.8	1.8	1.8	1.8	1.8
Tuberculosis	5.8	5.9	4.9	6.8	6.7	7.6	6.6	6.6	7.2
Cardiovascular	5.2	5.3	4.3	11.6	11.5	12.3	10.6	10.5	11.0
Blood and blood-forming	0.4	0.4	-	0.1	0.1	-	0.2	0.2	-
Hernia	12.3	12.7	7.9	9.2	9.4	7.4	9.7	9.9	7.5
Kidney and urinary	0.3	0.3	-	2.1	2.1	1.1	1.8	1.9	1.0
Abdominal viscera	1.1	1.2	-	2.8	2.9	1.5	2.5	2.7	1.2
Genitalia	0.3	0.2	0.6	0.8	0.9	0.6	0.7	0.8	0.6
Syphilis	9.0	6.2	45.7	0.7	0.4	3.5	2.0	1.3	10.1
Gonorrhea and other venereal	0.2	3/	1.8	0.3	0.1	1.9	0.2	0.1	1.9
Skin	0.8	0.9	-	0.6	0.6	0.1	0.6	0.6	0.1
Hemorrhoids	0.9	0.9	0.6	0.5	0.5	0.9	0.6	0.5	0.9
Varicose veins	2.5	2.5	1.8	1.9	2.0	1.1	2.0	2.1	1.2
Educational deficiency	0.1	0.1	-	2.2	1.8	7.4	1.9	1.5	6.2
Mental deficiency	2.2	2.3	1.2	1.4	1.1	4.5	1.5	1.3	4.0
Mental disease	7.0	7.2	3.7	19.3	19.5	16.8	17.3	17.5	14.7
Neurological	16.7	17.7	4.3	3.8	3.8	4.5	5.9	6.0	4.3
Musculoskeletal	17.9	18.7	8.6	4.5	4.4	5.5	6.6	6.6	5.9
Feet	1.0	1.1	-	1.0	0.9	2.4	1.0	0.9	2.0
Endocrine	2.7	2.9	0.6	1.3	1.3	1.0	1.5	1.5	1.0
Neoplasms	0.3	0.3	-	0.8	0.9	0.2	0.7	0.8	0.2
Infectious and parasitic	-	-	-	3/	3/	-	3/	3/	-
Underweight, overweight and other	3.9	4.0	3.1	1.8	1.9	0.7	2.1	2.2	1.0
Nonmedical reasons	0.1	3/	0.6	0.1	0.1	-	0.1	0.1	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

New York City

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	76.4	Eyes	39.0
Underweight and overweight	6.0	Hernia	29.0
Musculoskeletal	5.5	Musculoskeletal	5.9
Ears	2.3	Teeth	4.3
Feet	2.3	Genitalia	3.0
Other	7.5	Other	18.8

1/ Based on a sample of DSS Forms 221 received at National Headquarters, April 1942 - March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

North Carolina

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.0	6.5	3.4	5.7	6.4	4.9	5.5	6.4	4.3
Ears	2.1	3.5	0.5	3.6	5.8	0.9	3.1	5.0	0.8
Teeth	1.3	2.0	0.5	0.6	0.8	0.4	0.8	1.2	0.4
Mouth and gums	0.3	0.4	0.1	0.4	0.6	0.3	0.4	0.5	0.2
Nose	0.2	0.4	0.1	0.3	0.4	0.2	0.3	0.4	0.2
Throat	3/	-	3/	0.1	0.1	3/	3/	3/	3/
Lungs	2.6	3.6	1.5	2.5	3.3	1.6	2.6	3.4	1.6
Tuberculosis	2.2	3.6	0.6	1.1	1.3	0.8	1.5	2.1	0.7
Cardiovascular	5.9	8.0	3.8	13.0	12.0	14.3	10.6	10.7	10.5
Blood and blood-forming	0.1	0.3	-	0.1	0.1	-	0.1	0.2	-
Hernia	6.5	8.4	4.6	5.7	6.5	4.7	6.0	7.1	4.7
Kidney and urinary	0.5	0.7	0.2	1.1	1.3	0.8	0.9	1.1	0.6
Abdominal viscera	1.4	2.5	0.3	0.7	1.2	0.1	0.9	1.6	0.2
Genitalia	1.1	1.2	0.9	0.8	0.9	0.9	0.9	1.0	0.9
Syphilis	34.6	9.9	60.8	0.8	0.3	1.5	12.4	3.4	22.9
Gonorrhea and other venereal	0.5	0.1	1.0	3.1	0.7	6.1	2.2	0.5	4.2
Skin	0.7	0.8	0.7	0.9	0.8	0.9	0.8	0.8	0.8
Hemorrhoids	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6
Varicose veins	2.1	2.7	1.4	2.4	2.6	2.2	2.3	2.6	1.9
Educational deficiency	0.4	0.5	0.4	18.7	12.8	26.1	12.5	8.8	16.8
Mental deficiency	3.6	5.1	1.9	5.8	5.9	5.6	5.0	5.6	4.3
Mental disease	2.4	3.7	1.0	13.5	15.3	11.3	9.7	11.6	7.5
Neurological	5.7	8.8	2.5	4.0	4.2	3.7	4.6	5.7	3.3
Musculoskeletal	14.8	19.1	10.2	4.8	5.8	3.5	8.2	10.2	5.9
Feet	1.3	1.6	1.0	3.6	1.9	5.7	2.8	1.8	4.0
Endocrine	1.4	2.3	0.4	0.9	1.4	0.3	1.0	1.7	0.3
Neoplasms	0.4	0.6	0.2	0.7	1.0	0.3	0.6	0.9	0.3
Infectious and parasitic	-	-	-	0.2	0.3	3/	0.1	0.2	3/
Underweight, overweight and other	2.2	3.0	1.4	3.4	4.4	2.1	3.0	4.0	1.9
Nonmedical reasons	0.1	0.1	3/	0.9	1.3	0.2	0.6	0.9	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

North Carolina

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	43.9	Hernia	24.4
Underweight and overweight	21.8	Gonorrhea and other venereal	13.8
Musculoskeletal	12.4	Eyes	12.4
Feet	5.6	Musculoskeletal	8.4
Endocrine	5.5	Underweight and overweight	8.1
Other	10.8	Other	32.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

North Dakota

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	7.2	10.8	10.0
Ears	3.0	6.6	5.7
Teeth	0.2	1.4	1.1
Mouth and gums	0.7	0.2	0.3
Nose	0.2	0.9	0.8
Throat	-	-	-
Lungs	2.5	2.1	2.2
Tuberculosis	3.4	0.9	1.5
Cardiovascular	7.4	8.5	8.2
Blood and blood-forming	1.0	0.3	0.5
Hernia	15.5	11.1	12.2
Kidney and urinary	0.5	1.7	1.4
Abdominal viscera	1.0	5.6	4.5
Genitalia	1.0	1.3	1.2
Syphilis	3.7	0.2	1.1
Gonorrhea and other venereal	-	0.3	0.2
Skin	1.2	1.1	1.1
Hemorrhoids	-	0.3	0.2
Varicose veins	1.5	1.3	1.3
Educational deficiency	0.2	6.4	4.9
Mental deficiency	6.7	3.4	4.2
Mental disease	4.9	19.1	15.7
Neurological	12.8	4.5	6.5
Musculoskeletal	18.3	7.6	10.2
Feet	1.2	1.2	1.2
Endocrine	3.2	1.2	1.7
Neoplasms	1.0	0.9	0.9
Infectious and parasitic	-	-	-
Underweight, overweight and other	1.7	0.9	1.1
Nonmedical reasons	-	0.2	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

North Dakota

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	68.4	Hernia	37.2
Musculoskeletal	14.0	Eyes	24.2
Teeth	5.8	Musculoskeletal	11.5
Feet	4.7	Teeth	4.8
Ears	3.1	Genitalia	3.6
Other	4.0	Other	18.7

1/ Based on a sample of DSS Forms 211 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Ohio

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.6	5.5	6.4	10.8	11.0	8.6	9.8	9.9	8.1
Ears	4.2	4.5	0.7	6.7	7.0	1.7	6.1	6.5	1.5
Teeth	5.1	5.1	5.0	5.0	5.2	2.3	5.0	5.2	2.9
Mouth and gums	0.6	0.6	1.2	0.3	0.3	0.1	0.3	0.3	0.4
Nose	1.1	1.1	0.7	1.2	1.3	0.6	1.2	1.2	0.6
Throat	0.1	0.1	0.2	3/	3/	0.1	0.1	3/	0.1
Lungs	2.5	2.6	1.2	2.8	2.8	2.2	2.7	2.8	2.0
Tuberculosis	2.4	2.3	2.9	6.3	6.4	6.1	5.5	5.5	5.3
Cardiovascular	7.5	7.7	5.0	10.2	10.1	12.0	9.7	9.7	10.3
Blood and blood-forming	0.2	0.2	-	0.1	0.1	-	0.1	0.1	-
Hernia	13.1	13.4	9.5	8.8	8.9	7.3	9.7	9.8	7.8
Kidney and urinary	0.7	0.8	-	1.4	1.4	1.3	1.3	1.3	1.0
Abdominal viscera	1.2	1.2	1.2	1.8	1.8	1.0	1.6	1.7	1.1
Genitalia	1.5	1.5	1.2	1.3	1.3	1.5	1.4	1.4	1.5
Syphilis	11.3	9.4	32.5	1.4	1.3	4.1	3.4	2.9	10.8
Gonorrhea and other venereal	0.2	0.1	1.2	0.9	0.6	5.3	0.8	0.5	4.3
Skin	0.8	0.7	1.2	0.8	0.7	1.1	0.8	0.7	1.1
Hemorrhoids	0.7	0.7	1.4	0.7	0.7	1.2	0.7	0.7	1.2
Varicose veins	1.7	1.7	2.4	1.5	1.5	1.0	1.5	1.5	1.3
Educational deficiency	0.4	0.4	1.0	3.1	0.9	1.3	2.5	2.1	8.9
Mental deficiency	3.2	3.4	1.4	1.0	2.5	11.3	1.4	1.4	1.3
Mental disease	3.2	3.4	1.9	14.7	14.8	13.1	12.4	12.5	10.5
Neurological	8.9	9.3	4.3	3.9	4.0	3.1	4.9	5.1	3.4
Musculoskeletal	17.5	17.9	12.8	7.4	7.5	5.8	9.4	9.6	7.4
Feet	1.2	1.1	1.7	1.7	1.6	3.4	1.6	1.5	3.0
Endocrine	2.0	2.2	-	1.2	1.3	0.7	1.4	1.5	0.6
Neoplasms	0.6	0.6	0.7	0.8	0.8	0.3	0.7	0.7	0.4
Infectious and parasitic	0.1	0.1	-	3/	3/	0.1	0.1	3/	0.1
Underweight, overweight and other	2.3	2.3	2.1	2.9	2.9	2.3	2.8	2.8	2.2
Nonmedical reasons	0.1	0.1	0.2	1.3	1.3	1.1	1.1	1.1	0.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Ohio

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	59.6	Eyes	24.1
Musculoskeletal	14.3	Teeth	18.3
Teeth	11.1	Hernia	17.2
Underweight and overweight	5.5	Musculoskeletal	10.2
Feet	4.0	Tuberculosis	3.9
Other	5.5	Other	26.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Oklahoma

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.9	7.6	4.0	7.7	7.7	7.7	7.4	7.7	6.1
Ears	2.5	3.0	0.4	5.4	5.8	1.3	4.5	5.0	0.9
Teeth	1.6	2.0	0.2	1.8	2.0	0.3	1.8	2.0	0.3
Mouth and gums	0.5	0.6	-	0.2	0.2	-	0.3	0.3	-
Nose	0.2	0.1	0.2	1.2	1.2	0.8	0.9	0.9	0.6
Throat	0.1	0.1	-	0.1	3/	0.3	0.1	0.1	0.2
Lungs	1.5	1.6	1.1	3.6	3.5	4.2	2.9	2.9	2.8
Tuberculosis	1.7	2.0	0.4	1.6	1.7	0.8	1.6	1.8	0.7
Cardiovascular	4.3	4.9	1.8	7.8	7.5	10.5	6.7	6.7	6.7
Blood and blood-forming	3/	3/	-	0.1	0.1	-	0.1	0.1	-
Hernia	6.5	7.0	4.0	9.6	9.6	10.0	8.6	8.8	7.4
Kidney and urinary	0.4	0.4	0.2	1.6	1.7	1.0	1.2	1.3	0.6
Abdominal viscera	0.4	0.4	0.2	1.5	1.5	0.8	1.1	1.2	0.6
Genitalia	1.1	1.0	1.5	1.6	1.6	2.0	1.5	1.4	1.8
Syphilis	13.8	16.1	58.2	1.3	1.1	2.5	8.2	5.5	26.4
Gonorrhea and other venereal	0.2	3/	0.9	1.1	0.3	7.3	0.8	0.3	4.5
Skin	0.9	1.0	0.7	0.8	0.9	0.2	0.8	0.9	0.4
Hemorrhoids	0.8	0.8	1.1	0.8	0.9	0.5	0.8	0.8	0.8
Varicose veins	1.2	1.3	0.7	1.3	1.3	0.8	1.3	1.3	0.8
Educational deficiency	0.5	0.5	0.2	10.4	9.5	18.0	7.4	6.9	10.3
Mental deficiency	5.2	5.8	2.6	0.6	0.7	0.3	2.0	2.1	1.3
Mental disease	4.9	4.8	5.3	21.9	22.3	18.6	16.7	17.2	12.9
Neurological	9.9	11.5	2.6	4.7	4.9	4.0	6.3	6.8	3.4
Musculoskeletal	19.6	21.4	11.9	7.1	7.4	4.5	11.0	11.5	7.7
Feet	1.0	1.0	1.1	1.3	1.3	0.7	1.2	1.2	0.9
Endocrine	1.1	1.3	-	1.1	1.2	0.5	1.1	1.2	0.3
Neoplasms	0.4	0.5	-	0.5	0.6	0.2	0.5	0.6	0.1
Infectious and parasitic	-	-	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight and other	2.6	3.0	0.7	1.9	2.0	1.5	2.1	2.3	1.1
Nonmedical reasons	0.2	0.3	-	1.3	1.4	0.7	1.0	1.1	0.4

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Oklahoma

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	57.8	Hernia	38.1
Musculoskeletal	18.7	Eyes	14.5
Teeth	7.5	Musculoskeletal	9.8
Underweight and overweight	5.0	Genitalia	5.3
Feet	3.1	Gonorrhea and other venereal	4.5
Other	7.9	Other	31.8

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Oregon

Cause for Rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	8.6	10.1	9.4
Ears	3.5	6.2	5.0
Teeth	3.7	4.2	4.0
Mouth and gums	0.9	0.7	0.8
Nose	0.5	1.0	0.8
Throat	-	0.1	2/
Lungs	1.8	2.4	2.2
Tuberculosis	3.1	2.9	3.0
Cardiovascular	2.9	16.3	10.7
Blood and blood-forming	0.2	0.5	0.3
Hernia	7.0	9.2	8.3
Kidney and urinary	0.7	2.2	1.6
Abdominal viscera	1.8	4.3	3.4
Genitalia	2.1	1.8	1.9
Syphilis	10.5	0.6	4.8
Gonorrhea and other venereal	-	0.2	0.1
Skin	1.5	0.6	1.0
Hemorrhoids	0.9	0.4	0.6
Varicose veins	2.5	1.5	1.9
Educational deficiency	0.1	1.0	0.7
Mental deficiency	2.0	1.2	1.5
Mental disease	1.6	7.8	5.2
Neurological	12.4	4.7	8.0
Musculoskeletal	25.2	10.4	16.6
Feet	2.0	0.8	1.3
Endocrine	2.9	2.4	2.6
Neoplasms	0.3	0.5	0.4
Infectious and parasitic	-	0.1	0.1
Underweight, overweight and other	1.2	3.9	2.7
Nonmedical reasons	0.1	1.8	1.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Oregon

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	57.6	Hernia	28.6
Musculoskeletal	22.6	Musculoskeletal	15.8
Underweight and overweight	9.5	Eyes	14.3
Teeth	2.9	Teeth	12.9
Feet	2.9	Underweight and overweight	6.5
Other	4.5	Other	21.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Pennsylvania

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.9	7.5	3.4	11.8	11.9	10.3	10.5	10.8	7.4
Ears	3.1	3.5	0.3	8.4	8.8	1.6	6.9	7.5	1.1
Teeth	4.6	5.0	2.4	2.6	2.8	0.7	3.2	3.3	1.4
Mouth and gums	0.6	0.6	0.4	0.4	0.5	-	0.5	0.5	0.2
Nose	0.2	0.3	0.1	0.8	0.8	0.3	0.6	0.7	0.2
Throat	0.1	0.1	-	0.1	0.1	0.2	0.1	0.1	0.1
Lungs	1.9	2.0	1.0	2.4	2.4	1.9	2.3	2.3	1.5
Tuberculosis	2.0	2.0	1.9	4.2	4.2	3.7	3.6	3.6	2.9
Cardiovascular	7.5	7.8	5.5	14.0	13.8	16.7	12.3	12.3	12.0
Blood and blood-forming	0.1	0.1	-	0.1	0.1	0.1	0.1	0.1	3/
Hernia	12.4	13.3	6.4	7.9	8.0	5.7	9.1	9.4	6.0
Kidney and urinary	0.7	0.8	0.1	3.1	3.1	2.6	2.4	2.5	1.5
Abdominal viscera	1.1	1.2	0.8	2.0	2.0	1.3	1.7	1.8	1.1
Genitalia	1.0	1.1	0.9	1.5	1.4	3.3	1.4	1.3	2.3
Syphilis	15.5	8.6	59.4	0.7	0.5	4.5	4.7	2.6	27.8
Gonorrhea and other venereal	0.2	3/	0.9	0.5	0.3	4.4	0.4	0.2	2.9
Skin	0.9	1.0	0.4	0.7	0.7	0.6	0.8	0.8	0.5
Hemorrhoids	0.5	0.5	0.5	0.4	0.4	0.5	0.4	0.4	0.5
Varicose veins	1.1	1.2	0.7	1.4	1.4	1.6	1.3	1.3	1.3
Educational deficiency	0.3	0.3	-	2.7	2.3	8.9	2.1	1.8	5.1
Mental deficiency	3.5	3.9	0.7	1.2	1.2	1.8	1.9	1.9	1.3
Mental disease	3.8	4.2	1.5	13.9	14.1	11.3	11.1	11.5	7.1
Neurological	8.3	9.3	1.7	4.5	4.5	4.6	5.5	5.7	3.4
Musculoskeletal	16.8	18.2	7.9	6.1	6.1	6.0	9.0	9.2	6.8
Feet	1.4	1.5	0.7	1.2	1.1	2.0	1.2	1.2	1.4
Endocrine	1.8	2.1	0.2	1.6	1.7	0.8	1.7	1.8	0.5
Neoplasms	0.5	0.5	0.4	0.6	0.6	0.2	0.6	0.6	0.3
Infectious and parasitic	3/	3/	-	0.2	0.2	0.1	0.1	0.1	0.1
Underweight, overweight and other	3.1	3.3	1.7	3.9	3.9	3.4	3.7	3.8	2.7
Nonmedical reasons	0.1	0.1	0.1	1.1	1.1	0.9	0.8	0.9	0.6

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Pennsylvania

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	65.5	Eyes	20.7
Musculoskeletal	11.1	Hernia	20.1
Teeth	6.9	Teeth	8.1
Underweight and overweight	5.5	Musculoskeletal	7.2
Feet	3.1	Underweight and overweight	6.0
Other	7.9	Other	37.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

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Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Rhode Island

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	4.7	7.2	6.8
Ears	3.9	8.6	7.7
Teeth	1.0	0.3	0.5
Mouth and gums	0.7	-	0.1
Nose	-	1.7	1.4
Throat	-	0.1	2/
Lungs	0.7	2.8	2.5
Tuberculosis	12.0	4.7	6.1
Cardiovascular	8.6	15.0	13.8
Blood and blood-forming	-	0.1	0.1
Hernia	3.2	7.2	6.5
Kidney and urinary	1.0	1.2	1.1
Abdominal viscera	3.9	3.1	3.3
Genitalia	0.7	1.0	1.0
Syphilis	5.2	1.4	2.1
Gonorrhea and other venereal	0.3	0.1	0.1
Skin	1.0	0.6	0.7
Hemorrhoids	0.2	0.9	0.7
Varicose veins	2.5	0.5	0.9
Educational deficiency	-	4.2	3.4
Mental deficiency	4.7	1.7	2.3
Mental disease	5.7	22.5	19.3
Neurological	15.0	4.3	6.3
Musculoskeletal	17.9	4.2	6.8
Feet	0.7	0.8	0.7
Endocrine	1.5	1.2	1.2
Neoplasms	-	1.0	0.8
Infectious and parasitic	-	0.2	0.1
Underweight, overweight and other	4.7	3.1	3.4
Nonmedical reasons	0.2	0.3	0.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Rhode Island

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	46.0	Hernia	32.4
Musculoskeletal	14.0	Eyes	12.9
Hernia	8.9	Tuberculosis	9.7
Feet	7.0	Musculoskeletal	7.2
Teeth	5.2	Syphilis	6.1
Other	18.9	Other	31.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

South Carolina

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.1	7.2	3.5	5.9	7.7	4.3	5.6	7.6	4.0
Ears	1.7	3.6	0.2	2.2	4.3	0.4	2.0	4.0	0.4
Teeth	2.3	3.1	1.6	0.7	1.4	0.2	1.3	2.0	0.7
Mouth and gums	0.5	1.0	0.1	0.1	0.3	-	0.3	0.5	0.1
Nose	0.3	0.5	0.1	0.3	0.4	0.3	0.3	0.4	0.2
Throat	0.2	0.1	0.3	-	-	-	0.1	3/	0.1
Lungs	2.4	3.9	1.2	3.0	4.3	1.9	2.8	4.1	1.6
Tuberculosis	1.0	1.7	0.4	0.9	1.1	0.7	0.9	1.4	0.6
Cardiovascular	5.8	7.9	4.2	7.5	6.9	8.0	6.9	7.2	6.6
Blood and blood-forming	0.1	0.2	0.1	0.1	0.1	0.1	0.1	0.2	0.1
Hernia	7.1	9.8	4.9	5.3	7.0	3.7	5.9	8.0	4.2
Kidney and urinary	0.4	0.8	0.1	1.8	2.2	1.4	1.3	1.7	0.9
Abdominal viscera	0.6	1.2	0.1	0.8	1.4	0.2	0.7	1.3	0.1
Genitalia	1.2	1.4	1.1	1.3	0.8	1.8	1.3	1.0	1.5
Syphilis	42.1	12.0	65.7	0.9	0.4	1.4	15.7	4.4	25.3
Gonorrhea and other venereal	0.8	0.1	1.3	1.3	0.3	2.2	1.1	0.2	1.9
Skin	0.7	1.2	0.2	0.8	0.9	0.7	0.7	1.0	0.5
Hemorrhoids	0.7	1.0	0.5	0.5	0.4	0.5	0.5	0.6	0.5
Varicose veins	1.5	2.6	0.7	1.2	2.7	1.0	1.7	2.6	0.9
Educational deficiency	0.4	0.5	0.3	26.7	9.3	42.1	17.3	6.3	26.6
Mental deficiency	3.6	6.0	1.6	7.0	6.1	7.8	5.8	6.1	5.5
Mental disease	1.7	2.8	0.9	16.4	23.0	10.6	11.2	16.1	7.0
Neurological	4.5	7.2	2.3	4.0	4.9	3.2	4.2	5.7	2.9
Musculoskeletal	11.1	17.1	6.4	5.6	6.7	4.5	7.5	10.3	5.2
Feet	0.7	1.0	0.5	1.5	1.7	1.2	1.2	1.5	1.0
Endocrine	1.1	2.1	0.3	0.3	0.4	0.2	0.6	1.0	0.2
Neoplasms	0.5	0.7	0.3	0.7	1.3	0.1	0.6	1.1	0.2
Infectious and parasitic	-	-	-	0.1	0.2	0.1	0.1	0.1	3/
Underweight, overweight and other	1.9	3.0	1.1	1.8	2.7	1.0	1.8	2.8	1.0
Nonmedical reasons	3/	0.1	-	0.7	1.1	0.4	0.5	0.8	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

South Carolina

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	55.4	Hernia	18.1
Musculoskeletal	16.9	Eyes	13.7
Underweight and overweight	9.1	Musculoskeletal	13.3
Feet	7.6	Kidney and urinary	7.3
Teeth	5.3	Gonorrhea and other venereal	6.4
Other	5.7	Other	41.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

South Dakota

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	8.7	9.9	9.5
Ears	3.9	5.4	4.9
Teeth	1.2	7.0	5.2
Mouth and gums	0.8	0.6	0.7
Nose	0.4	1.3	1.0
Throat	-	0.1	0.1
Lungs	1.9	2.0	2.0
Tuberculosis	3.6	2.4	2.8
Cardiovascular	6.2	13.9	11.4
Blood and blood-forming	-	0.1	2/
Hernia	6.5	13.7	11.4
Kidney and urinary	0.5	1.3	1.1
Abdominal viscera	1.9	3.4	2.9
Genitalia	0.4	1.0	0.8
Syphilis	2.2	0.4	2.6
Gonorrhea and other venereal	0.1	0.5	0.4
Skin	0.6	0.3	0.4
Hemorrhoids	0.1	0.2	0.2
Varicose veins	1.2	0.8	1.0
Educational deficiency	0.4	1.7	1.3
Mental deficiency	2.1	3.0	5.0
Mental disease	3.8	15.8	12.0
Neurological	1.1	4.0	6.9
Musculoskeletal	22.1	7.0	11.8
Feet	1.2	0.6	0.9
Endocrine	1.2	1.3	1.4
Neoplasms	0.3	0.4	0.3
Infectious and parasitic	-	0.1	2/
Underweight, overweight and other	2.8	1.6	1.9
Nonmedical reasons	-	2.2	2.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

South Dakota

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	58.3	Hernia	22.0
Musculoskeletal	12.9	Eyes	10.1
Teeth	12.5	Teeth	14.9
Ears	4.6	Musculoskeletal	8.7
Feet	2.3	Genitalia	7.2
Other	9.4	Other	16.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Tennessee

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.9	6.1	2.9	8.4	7.4	11.1	7.2	7.0	7.7
Ears	1.8	2.7	.3	4.0	5.3	1.0	3.3	4.4	0.7
Teeth	0.3	0.4	0.2	1.7	2.0	0.9	1.2	1.4	0.6
Mouth and gums	0.3	0.4	0.1	0.2	0.1	0.4	0.3	0.2	0.3
Nose	0.2	0.2	0.2	0.3	0.4	3/	0.3	0.4	0.1
Throat	3/	-	0.1	3/	3/	-	3/	3/	3/
Lungs	1.7	2.1	0.9	1.8	1.8	1.8	1.8	1.9	1.5
Tuberculosis	3.2	4.2	1.3	4.5	5.0	3.3	4.0	4.7	2.5
Cardiovascular	3.0	4.1	1.2	8.5	6.2	14.1	6.6	5.6	8.9
Blood and blood-forming	0.1	0.1	-	3/	3/	-	3/	0.1	-
Hernia	9.4	11.2	6.5	6.5	6.7	6.0	7.5	8.1	6.2
Kidney and urinary	0.2	0.2	0.1	1.0	0.7	1.8	0.7	0.5	1.1
Abdominal viscera	0.6	0.8	0.2	0.8	1.1	0.3	0.8	0.9	0.3
Genitalia	1.1	1.1	1.1	2.2	1.5	3.9	1.8	1.4	2.7
Syphilis	36.0	18.0	67.8	3.7	0.8	11.0	14.8	6.3	36.0
Gonorrhea and other venereal	0.3	0.2	0.4	2.3	1.1	5.4	1.0	0.8	1.4
Skin	0.6	0.7	0.4	0.6	0.7	0.7	0.6	0.6	0.6
Hemorrhoids	0.2	-	0.4	0.2	-	0.6	0.2	-	0.5
Varicose veins	1.2	1.5	0.5	1.0	1.0	0.8	1.0	1.2	0.7
Educational deficiency	0.3	0.4	0.2	26.1	28.0	21.0	17.2	19.2	12.6
Mental deficiency	4.9	7.0	1.2	3.0	3.1	2.8	3.7	4.4	2.2
Mental disease	3.0	4.3	0.6	9.9	12.5	3.3	7.5	9.6	2.2
Neurological	7.1	9.5	2.7	2.7	3.1	1.7	4.2	5.1	2.1
Musculoskeletal	15.4	19.1	9.0	5.6	5.8	4.9	8.9	10.1	6.8
Feet	1.0	1.3	0.5	0.7	0.6	1.0	0.8	0.8	0.8
Endocrine	0.9	1.4	0.1	0.7	0.9	0.3	0.8	1.1	0.2
Neoplasms	0.3	0.4	0.2	0.7	0.7	0.6	0.5	0.6	0.4
Infectious and parasitic	3/	3/	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight and other	1.8	2.4	0.9	1.5	1.9	0.7	1.7	2.1	0.8
Nonmedical reasons	0.2	0.2	-	1.3	1.6	0.6	0.9	1.2	0.3

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1

Tennessee

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	52.1	Hernia	26.1
Musculoskeletal	10.8	Eyes	19.2
Teeth	7.5	Gonorrhea and other venereal	9.3
Gonorrhea and other venereal	6.8	Genitalia	8.1
Underweight and overweight	6.2	Teeth	6.7
Other	13.6	Other	30.6

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Texas

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.2	5.7	2.5	9.8	10.0	9.3	8.0	8.9	5.8
Ears	1.1	1.8	0.3	3.9	4.6	1.0	3.0	3.9	0.6
Teeth	0.9	1.1	0.8	1.5	1.7	0.9	1.3	1.5	0.8
Mouth and gums	0.6	0.8	0.3	1.2	1.4	0.8	1.0	1.2	0.6
Nose	0.2	0.3	3/	0.4	0.4	0.1	0.3	0.4	0.1
Throat	0.1	0.1	0.1	3/	3/	-	0.1	0.1	3/
Lungs	1.3	2.0	0.5	3.0	3.0	3.2	2.5	2.7	1.8
Tuberculosis	2.0	3.3	0.5	3.6	3.8	2.9	3.1	3.7	1.7
Cardiovascular	2.0	3.0	0.8	12.3	11.6	14.9	9.0	9.5	7.6
Blood and blood-forming	0.1	0.1	3/	0.1	0.1	3/	0.1	0.1	3/
Hernia	5.3	7.2	3.1	6.0	6.2	5.0	5.8	6.4	4.1
Kidney and urinary	0.1	0.2	-	1.4	1.4	1.4	1.0	1.1	0.7
Abdominal viscera	0.5	0.8	0.1	1.3	1.5	0.5	1.0	1.3	0.3
Genitalia	0.6	0.5	0.8	1.5	1.5	1.6	1.2	1.3	1.2
Syphilis	52.6	30.8	77.9	0.7	0.4	1.7	17.4	7.8	41.2
Gonorrhea and other venereal	0.3	0.2	0.4	1.6	0.3	6.7	1.2	0.3	3.4
Skin	0.4	0.4	0.4	0.9	0.9	0.9	0.8	0.8	0.6
Hemorrhoids	0.5	0.6	0.3	0.7	0.6	0.9	0.6	0.6	0.6
Varicose veins	0.7	0.9	0.5	1.2	1.2	1.3	1.0	1.1	0.8
Educational deficiency	0.2	0.3	0.1	20.0	19.4	22.3	13.6	14.8	10.8
Mental deficiency	3.1	4.3	1.7	2.4	2.3	2.8	2.6	2.8	2.2
Mental disease	1.2	1.8	0.5	9.7	10.1	8.4	7.0	8.1	4.3
Neurological	6.4	10.5	1.6	3.7	3.7	3.5	4.5	5.4	2.5
Musculoskeletal	12.5	18.6	5.4	7.2	7.4	6.1	8.9	10.2	5.7
Feet	0.8	0.9	0.7	1.4	1.4	1.3	1.2	1.3	1.0
Endocrine	0.8	1.4	0.1	1.0	1.2	0.3	0.9	1.3	0.2
Neoplasms	0.4	0.6	0.2	0.7	0.8	0.5	0.6	0.7	0.4
Infectious and parasitic	3/	3/	-	3/	3/	3/	3/	3/	3/
Underweight, overweight and other	1.1	1.7	0.4	1.7	1.9	1.2	1.5	1.8	0.8
Nonmedical reasons	3/	0.1	-	1.1	1.2	0.5	0.7	0.9	0.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Texas

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	65.2	Hernia	29.1
Musculoskeletal	13.6	Eyes	17.0
Teeth	8.9	Gonorrhea and other venereal	9.3
Feet	3.3	Musculoskeletal	7.2
Ears	2.5	Teeth	5.5
Other	6.5	Other	31.9

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Utah

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	4.2	12.2	9.1
Ears	5.4	4.7	5.0
Teeth	3.0	2.5	2.7
Mouth and gums	0.2	-	0.1
Nose	-	0.7	0.5
Throat	0.6	-	0.2
Lungs	1.8	1.1	1.3
Tuberculosis	0.4	2.2	1.5
Cardiovascular	14.2	19.5	17.5
Blood and blood-forming	0.2	0.1	0.2
Hernia	16.0	12.3	13.7
Kidney and urinary	0.6	1.1	0.9
Abdominal viscera	2.0	3.1	2.7
Genitalia	0.8	2.0	1.5
Syphilis	4.8	0.2	2.0
Gonorrhea and other venereal	-	0.1	0.1
Skin	1.0	1.0	1.0
Hemorrhoids	0.6	1.2	1.0
Varicose veins	0.4	1.1	0.8
Educational deficiency	0.8	1.4	1.1
Mental deficiency	2.6	0.6	1.4
Mental disease	4.2	9.5	7.4
Neurological	12.2	4.1	7.2
Musculoskeletal	16.8	10.5	12.9
Feet	1.4	1.4	1.4
Endocrine	3.2	2.0	2.4
Neoplasms	0.6	0.4	0.5
Infectious and parasitic	-	-	-
Underweight, overweight and other	1.8	3.4	2.8
Nonmedical reasons	0.2	1.6	1.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Utah

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	60.4	Hernia	27.6
Musculoskeletal	15.7	Eyes	19.4
Teeth	11.7	Musculoskeletal	10.5
Neurological	3.1	Cardiovascular	10.3
Feet	3.1	Underweight and overweight	5.7
Other	6.0	Other	26.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Vermont

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.6	6.4	6.5
Ears	2.6	2.7	2.7
Teeth	5.2	2.0	3.1
Mouth and gums	0.4	0.2	0.3
Nose	0.4	0.2	0.3
Throat	-	-	-
Lungs	3.3	1.4	2.1
Tuberculosis	1.9	2.3	2.1
Cardiovascular	6.8	9.6	8.6
Blood and blood-forming	-	-	-
Hernia	10.1	7.3	8.3
Kidney and urinary	0.9	0.8	0.8
Abdominal viscera	2.3	1.3	1.6
Genitalia	1.4	1.1	1.2
Syphilis	2.6	1.1	1.6
Gonorrhea and other venereal	0.5	-	0.2
Skin	1.2	0.9	1.0
Hemorrhoids	0.7	-	0.2
Varicose veins	1.1	1.4	1.3
Educational deficiency	1.0	2.3	1.9
Mental deficiency	6.3	2.2	4.0
Mental disease	6.5	38.5	27.3
Neurological	10.1	5.4	7.1
Musculoskeletal	19.4	3.8	9.3
Feet	3.1	0.5	1.4
Endocrine	2.1	1.7	1.8
Neoplasms	-	0.7	0.4
Infectious and parasitic	0.2	-	0.1
Underweight, overweight and other	3.1	5.0	4.3
Nonmedical reasons	0.2	0.7	0.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Vermont

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	28.8	Eyes	19.6
Underweight and overweight	21.2	Hernia	19.0
Musculoskeletal	19.1	Underweight and overweight	17.4
Feet	14.4	Teeth	9.8
Teeth	6.8	Musculoskeletal	8.7
Other	9.7	Other	25.5

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Virginia

Cause for rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.0	7.0	2.7	7.3	8.3	4.9	6.7	8.1	4.2
Ears	2.1	3.4	0.6	3.1	4.0	1.2	2.9	3.9	1.9
Teeth	1.6	2.4	0.8	1.5	2.0	0.4	1.5	2.1	0.5
Mouth and gums	0.2	0.3	0.1	0.2	0.3	0.1	0.3	0.4	0.1
Nose	3/	3/	-	0.7	0.9	0.4	0.6	0.7	0.3
Throat	0.1	0.1	-	3/	3/	-	3/	3/	-
Lungs	1.7	2.6	0.8	2.3	2.7	1.5	2.2	2.6	1.3
Tuberculosis	2.1	3.2	0.9	3.8	4.0	3.4	3.4	3.9	2.6
Cardiovascular	3.5	5.3	1.5	10.4	10.4	10.2	8.6	9.4	7.3
Blood and blood-forming	3/	3/	-	0.1	0.1	-	0.1	0.1	-
Hernia	5.4	6.5	4.1	5.2	6.0	3.5	5.2	6.1	3.7
Kidney and urinary	0.3	0.5	3/	2.7	3.0	2.1	2.1	2.5	1.4
Abdominal viscera	1.4	2.2	0.5	1.7	2.1	0.7	1.6	2.1	0.6
Genitalia	0.7	0.7	0.7	0.9	0.9	1.0	0.8	0.8	0.9
Syphilis	38.7	12.8	68.0	1.3	0.6	2.8	10.7	3.1	24.6
Gonorrhea and other venereal	0.5	0.1	0.9	2.9	0.8	7.7	2.3	0.6	5.4
Skin	0.5	0.6	0.4	0.4	0.5	0.2	0.4	0.5	0.3
Hemorrhoids	0.5	0.4	0.6	0.2	0.2	0.2	0.3	0.2	0.3
Varicose veins	1.7	2.4	0.8	0.7	0.7	0.6	0.9	1.1	0.7
Educational deficiency	0.4	0.6	0.1	20.1	15.3	30.7	15.2	12.3	20.5
Mental deficiency	4.8	7.3	2.0	5.7	4.7	7.9	5.5	5.2	5.9
Mental disease	2.8	4.0	1.5	13.8	15.9	9.1	11.0	13.5	6.5
Neurological	6.1	9.4	2.4	4.9	4.9	4.8	5.2	5.8	4.0
Musculoskeletal	14.8	20.9	7.9	4.9	5.5	3.6	7.4	8.7	5.0
Feet	1.1	1.3	0.9	2.7	0.7	0.8	0.8	0.8	0.8
Endocrine	1.4	2.3	0.3	1.0	1.1	0.7	1.1	1.3	0.6
Neoplasms	0.5	0.6	0.3	0.6	0.7	0.2	0.5	0.8	0.2
Infectious and parasitic	-	-	-	0.1	0.2	0.1	0.1	0.1	0.1
Underweight, overweight, and other	2.0	2.7	1.2	2.4	3.0	1.0	2.3	2.9	1.1
Nonmedical reasons	3/	3/	-	0.4	0.5	0.2	0.3	0.4	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Includes all races other than Negro.
3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Virginia

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	52.4	Hernia	21.0
Musculoskeletal	17.8	Eyes	15.8
Underweight and overweight	10.7	Gonorrhea and other venereal	12.6
Feet	4.6	Musculoskeletal	8.4
Teeth	4.4	Teeth	6.2
Other	10.1	Other	36.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters, April 1942-March 1943.

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Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Washington

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	6.3	8.4	7.6
Ears	3.6	8.7	6.7
Teeth	0.9	0.9	0.9
Mouth and gums	0.3	0.5	0.4
Nose	0.3	0.5	0.4
Throat	0.1	2/	0.1
Lungs	2.0	1.7	1.8
Tuberculosis	3.6	3.3	3.4
Cardiovascular	6.3	8.0	7.3
Blood and blood-forming	0.1	0.1	0.1
Hernia	10.8	10.7	10.7
Kidney and urinary	0.7	2.1	1.5
Abdominal viscera	1.4	3.5	2.7
Genitalia	1.0	2.1	1.7
Syphilis	11.7	0.9	5.3
Gonorrhea and other venereal	0.1	0.3	0.2
Skin	0.9	1.5	1.3
Hemorrhoids	0.3	0.5	0.5
Varicose veins	1.7	2.3	2.1
Educational deficiency	0.3	2.5	1.6
Mental deficiency	2.7	1.0	1.7
Mental disease	3.3	10.1	7.4
Neurological	12.0	8.4	9.8
Musculoskeletal	24.3	12.5	17.2
Feet	1.0	1.4	1.2
Endocrine	1.8	2	2.1
Neoplasms	0.3	0.	0.5
Infectious and parasitic	-	-	-
Underweight, overweight and other	1.6	3.4	2.7
Nonmedical reasons	0.2	1.7	1.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Washington

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	60.2	Hernia	45.6
Musculoskeletal	12.0	Eyes	11.8
Teeth	10.2	Musculoskeletal	9.0
Underweight and overweight	9.4	Underweight and overweight	8.8
Ears	2.8	Genitalia	6.1
Other	5.4	Other	18.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

West Virginia

Cause for Rejection	Local board			Induction station			Local board and induction station		
	Total	White 2/	Negro	Total	White 2/	Negro	Total	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.9	6.1	4.3	7.1	7.2	5.7	6.7	6.9	5.2
Ears	1.4	1.6	0.3	6.0	6.4	2.1	4.8	5.2	1.4
Teeth	1.2	1.4	0.3	1.6	1.7	1.0	1.5	1.6	0.8
Mouth and gums	0.9	0.9	0.6	0.4	0.4	0.3	0.5	0.5	0.4
Nose	0.5	0.5	-	0.7	0.7	0.3	0.6	0.7	0.2
Throat	3/	-	0.3	0.1	0.1	-	0.1	3/	0.1
Lungs	2.8	2.9	2.1	2.7	2.8	2.4	2.7	2.8	2.3
Tuberculosis	2.7	2.9	1.2	7.4	7.5	6.4	6.1	6.3	4.5
Cardiovascular	4.2	4.4	3.3	14.1	12.7	28.0	11.4	10.5	19.0
Blood and blood-forming	0.2	0.2	-	3/	3/	-	0.1	0.2	-
Hernia	6.7	7.1	4.3	4.7	4.9	2.7	5.3	5.5	3.3
Kidney and urinary	0.5	0.5	0.3	1.3	1.3	1.5	1.1	1.1	1.1
Abdominal viscera	0.3	0.4	-	1.7	1.6	2.6	1.3	1.3	1.6
Genitalia	0.5	0.5	0.6	1.6	1.5	2.4	1.3	1.2	1.8
Syphilis	26.3	21.9	53.5	2.1	1.7	6.0	8.7	7.0	21.2
Gonorrhea and other venereal	0.1	0.2	-	0.7	0.5	2.1	0.5	0.4	1.3
Skin	0.4	0.4	0.3	0.8	0.9	-	0.7	0.8	0.1
Hemorrhoids	0.3	0.2	0.6	0.3	0.3	-	0.3	0.3	0.2
Varicose veins	1.1	1.0	1.8	1.3	1.3	0.7	1.2	1.2	1.1
Educational deficiency	0.2	0.2	-	11.0	11.0	10.6	8.0	8.2	6.8
Mental deficiency	5.8	6.6	1.2	2.8	3.0	1.0	3.7	4.0	1.2
Mental disease	2.2	2.4	1.2	14.8	15.4	9.6	11.4	11.9	5.0
Neurological	10.4	11.4	4.5	4.5	4.6	2.9	6.1	6.4	3.5
Musculoskeletal	20.6	21.2	16.3	7.4	7.3	8.9	11.0	10.9	12.0
Feet	1.1	1.1	1.2	0.6	0.6	0.9	0.7	0.7	1.0
Endocrine	1.8	2.0	0.3	0.7	0.8	0.3	1.0	1.1	0.3
Neoplasms	0.4	0.3	0.9	0.5	0.5	0.2	0.5	0.5	0.4
Infectious and parasitic	-	-	-	0.1	0.1	-	0.1	0.1	-
Underweight, overweight, and other	1.4	1.5	0.6	2.0	2.1	0.9	1.8	2.0	0.8
Nonmedical reasons	0.1	0.2	-	1.0	1.1	0.5	0.8	0.8	0.1

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942 through March 1943.

2/ Includes all races other than Negro.

3/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

West Virginia

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	53.0	Eyes	19.0
Musculoskeletal	19.1	Hernia	16.6
Teeth	15.5	Musculoskeletal	15.0
Underweight and overweight	4.3	Teeth	11.1
Ears	2.5	Syphilis	5.5
Other	5.6	Other	32.8

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942 through March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Wisconsin

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	5.6	5.8	5.8
Ears	3.2	7.9	6.7
Teeth	1.0	1.2	1.2
Mouth and gums	0.2	0.2	0.2
Nose	0.2	1.3	1.0
Throat	-	2/	2/
Lungs	3.0	3.5	3.4
Tuberculosis	3.4	4.0	3.9
Cardiovascular	5.4	8.6	7.8
Blood and blood-forming	0.2	0.1	0.1
Hernia	13.6	10.8	11.5
Kidney and urinary	0.6	1.4	1.2
Abdominal viscera	0.9	2.8	2.3
Genitalia	0.6	2.0	1.7
Syphilis	6.8	0.5	2.1
Gonorrhea and other venereal	0.1	0.2	0.2
Skin	0.7	0.9	0.8
Hemorrhoids	0.4	0.4	0.4
Varicose veins	1.0	1.5	1.3
Educational deficiency	0.4	2.3	1.8
Mental deficiency	5.2	5.4	5.4
Mental disease	5.0	19.3	15.6
Neurological	13.0	4.7	6.8
Musculoskeletal	21.9	9.1	12.3
Feet	1.3	0.7	0.8
Endocrine	3.0	2.2	2.4
Neoplasms	0.6	1.1	1.0
Infectious and parasitic	2/	2/	2/
Underweight, overweight and other	2.3	1.4	1.6
Nonmedical reasons	0.4	0.8	0.7

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.
2/ Less than 0.1 percent.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Wisconsin

Inducted for limited service		Rejected for limited service or remediable	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	69.1	Hernia	40.7
Musculoskeletal	15.3	Musculoskeletal	13.4
Teeth	6.4	Eyes	11.2
Underweight and overweight	2.6	Genitalia	7.1
Feet	1.5	Teeth	4.4
Other	5.1	Other	23.2

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 1. Percent distribution of principal causes for rejection at local boards and induction stations, April 1942 through March 1943 1/

Wyoming

Cause for rejection	Local board	Induction station	Local board and induction station
Total	100.0	100.0	100.0
Eyes	9.8	12.1	11.0
Ears	4.4	4.6	4.5
Teeth	4.4	7.9	6.2
Mouth and gums	1.0	1.2	1.1
Nose	0.3	-	0.2
Throat	0.3	-	0.2
Lungs	1.6	0.6	1.1
Tuberculosis	1.6	2.4	2.0
Cardiovascular	7.0	12.1	9.6
Blood and blood-forming	-	-	-
Hernia	7.0	15.5	11.3
Kidney and urinary	1.0	1.5	1.2
Abdominal viscera	0.3	4.3	2.3
Genitalia	1.3	0.9	1.1
Syphilis	15.6	1.8	8.5
Gonorrhea and other venereal	-	0.3	0.2
Skin	1.3	1.8	1.6
Hemorrhoids	1.6	-	0.8
Varicose veins	0.6	1.8	1.2
Educational deficiency	0.3	3.9	2.2
Mental deficiency	3.5	1.8	2.7
Mental disease	2.9	4.6	3.7
Neurological	5.7	1.2	3.4
Musculoskeletal	20.6	8.5	14.4
Feet	2.5	5.5	4.0
Endocrine	0.3	1.5	0.9
Neoplasms	0.6	1.2	0.9
Infectious and parasitic	1.0	0.3	0.6
Underweight, overweight and other	3.2	1.5	2.3
Nonmedical reasons	0.3	1.2	0.8

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

Table 2. Percent distribution of principal defects of registrants inducted for limited service and rejected for limited service or remediable defects 1/

Wyoming

Inducted for limited service		Rejected for limited service or remediable defects	
Defect	Percent	Defect	Percent
Total	100.0	Total	100.0
Eyes	40.9	Hernia	31.3
Teeth	20.1	Teeth	16.7
Musculoskeletal	9.4	Eyes	14.7
Feet	7.4	Feet	9.3
Hernia	4.7	Musculoskeletal	8.0
Other	17.5	Other	20.0

1/ Based on a sample of DSS Forms 221 received at National Headquarters April 1942-March 1943.

METHODS USED IN COMPUTING COMBINED LOCAL BOARD AND INDUCTION STATION REJECTION RATES

The combined local board and induction station rejection ates were calculated on the following basis:

1. If one hundred registrants are ordered to report for ocal board examination, it follows that:

a. If 10 percent are rejected at the local board, 90 out of 100 would be forwarded to the induction station;

b. If 30 percent of the 90 registrants are rejected at the induction station, then 27 registrants would be rejected at the induction station;

c. Hence, out of the original 100 registrants ordered for examination, 10 were rejected at the local board and 27 at the induction station, making a combined total of 37 out of 100 examined or a rejection rate of 37 percent.

Table 1
Local Board and Induction Station Rejection Rates, by Race,
November 1940-December 1943

Time Period	Rate Per 100 Examined								
	Local Board			Induction Station			Local Board and Induction Station		
	Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
November 1940-September 1941	43.8	43.3	47.2	16.0	15.1	23.1	52.8	51.9	59.4
July and August 1942	11.3	*	*	35.2	32.5	47.1	42.5	*	*
September 1942	9.7	*	*	29.9	28.1	41.0	36.7	*	*
October 1942	7.4	*	*	31.6	30.3	40.4	36.7	*	*
November 1942	9.9	*	*	34.8	33.5	42.7	41.3	*	*
December 1942	7.6	*	*	32.8	31.5	39.7	37.9	*	*
January 1943	6.8	*	*	26.4	23.7	44.8	31.4	*	*
February 1943	6.5	4.9	16.7	29.0	27.2	44.1	33.6	30.8	53.4
March 1943	6.4	5.5	12.6	29.6	27.7	44.2	34.1	31.7	51.2
April 1943	6.8	5.9	11.9	36.3	34.6	49.0	40.6	38.5	55.1
May 1943	6.6	5.8	10.6	38.1	35.4	53.3	42.2	39.1	58.3
June 1943	6.7	5.7	11.5	37.6	34.0	54.8	41.8	37.8	60.0
July 1943	6.6	5.7	10.5	38.3	35.0	54.4	42.4	38.7	59.2
August 1943	5.6	5.1	7.5	40.1	36.7	56.1	43.5	39.9	59.4
September 1943 2/	5.6	5.1	7.5	43.3	39.2	60.6	46.5	42.3	63.6
October 1943 2/	5.6	5.1	7.5	42.6	38.6	59.2	45.8	41.7	62.3
November 1943 2/	5.6	5.1	7.5	42.8	39.6	56.1	46.0	42.7	59.4
December 2/	5.6	5.1	7.5	43.7	39.8	57.1	46.9	42.9	60.3

* Data not available.
1/ Includes all races other than Negro.
2/ August local board rejection rates used since rates are not available for these months.

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Table 2
Induction Station Rejection Rates, by Race
July 1942-December 1943

Month	Number examined			Number rejected			Rejection Rate per 100		
	Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
July 1942	428,611	363,340	65,271	158,320	126,396	31,924	36.9	34.8	48.9
August 1942	463,773	398,619	65,154	150,805	121,247	29,558	32.5	30.4	45.4
September 1942	462,229	395,206	67,023	138,403	110,941	27,462	29.9	28.1	41.0
October 1942	562,815	487,884	74,931	178,122	147,841	30,281	31.6	30.3	40.4
November 1942	562,440	482,622	79,818	195,806	161,739	34,067	34.8	33.5	42.7
December 1942	501,232	425,885	75,347	164,237	134,302	29,937	32.8	31.5	39.7
January 1943	526,455	458,441	68,014	138,970	108,476	30,494	26.4	23.7	44.8
February 1943	572,709	512,204	60,505	166,209	139,545	26,664	29.0	27.2	44.1
March 1943	576,656	508,031	68,625	170,919	140,611	30,308	29.6	27.7	44.2
April 1943	442,112	390,849	51,263	160,536	135,427	25,109	36.3	34.6	49.0
May 1943	440,724	372,874	67,850	168,123	131,940	36,183	38.1	35.4	53.3
June 1943	448,692	371,911	76,781	168,660	126,564	42,096	37.6	34.0	54.8
July 1943	456,710	378,461	78,249	174,839	132,302	42,537	38.3	35.0	54.4
August 1943	372,677	307,634	65,043	149,397	112,876	36,521	40.1	36.7	56.1
September 1943	360,289	290,451	69,838	156,079	113,761	42,318	43.3	39.2	60.6
October 1943	345,500	278,256	67,244	147,117	107,318	39,799	42.6	38.6	59.2
November 1943	333,584	269,426	64,158	142,613	106,629	35,984	42.8	39.6	56.1
December 1943	347,186	269,778	77,408	151,589	107,368	44,221	43.7	39.8	57.1

1/ Includes all races other than Negro.

Table 3
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations
April 1942-March 1943.

Principal Cause for Rejection	Local Board			Induction Station			Local Board and Induction Station		
	Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.4	6.5	2.8	8.8	9.2	6.3	7.8	8.5	4.8
Ears	2.3	3.2	0.4	6.0	7.1	0.9	5.0	6.1	0.7
Teeth	1.8	2.2	0.9	2.2	2.5	0.7	2.1	2.4	0.8
Mouth and gums	0.5	0.6	0.2	0.4	0.5	0.2	0.4	0.5	0.2
Nose	0.3	0.4	0.1	0.9	1.1	0.3	0.7	0.9	0.2
Throat	0.1	0.1	0.1	2/	2/	2/	0.1	0.1	0.1
Lungs	1.8	2.2	0.8	2.4	2.5	1.6	2.2	2.4	1.3
Tuberculosis	2.6	3.3	0.8	4.1	4.4	2.9	3.7	4.1	2.0
Cardiovascular	4.3	5.3	2.2	10.6	10.5	11.5	8.8	9.2	7.6
Blood and blood-forming	0.1	0.2	2/	0.1	0.1	2/	0.1	0.1	2/
Hernia	8.3	9.9	4.4	7.6	8.1	5.1	7.8	8.6	4.8
Kidney and urinary	0.4	0.5	0.1	1.7	1.8	1.0	1.3	1.4	0.6
Abdominal viscera	0.9	1.1	0.2	2.0	2.3	0.5	1.7	2.0	0.4
Genitalia	0.9	0.9	0.9	1.6	1.3	3.3	1.4	1.2	2.3
Syphilis	30.1	13.7	69.1	1.0	0.7	2.6	9.4	4.0	30.4
Gonorrhea and other venereal	0.3	0.1	0.8	1.2	0.4	5.0	0.9	0.3	3.2
Skin	0.7	0.8	0.4	0.7	0.7	0.5	0.7	0.7	0.5
Hemorrhoids	0.5	0.6	0.4	0.5	0.5	0.5	0.5	0.5	0.5
Varicose veins	1.2	1.4	0.7	1.3	1.4	0.9	1.3	1.4	0.8
Educational deficiency	0.5	0.4	0.6	10.6	6.8	30.2	7.7	5.2	17.8
Mental deficiency	3.6	4.5	1.4	2.8	2.4	4.8	3.0	2.9	3.4
Mental disease	3.1	4.0	1.0	16.3	17.7	9.3	12.5	14.2	5.8
Neurological	8.8	11.5	2.1	4.2	4.4	3.0	5.5	6.3	2.6
Musculoskeletal	16.3	20.0	7.5	6.4	6.7	4.6	9.3	10.1	5.8
Feet	1.1	1.3	0.7	1.2	1.0	1.6	1.1	1.1	1.2
Endocrine	1.5	2.1	0.2	1.3	1.4	0.4	1.3	1.6	0.3
Neoplasms	0.4	0.5	0.2	0.7	0.8	0.3	0.6	0.7	0.2
Infectious and parasitic	2/	2/	2/	0.1	0.1	0.1	0.1	0.1	0.1
Underweight, overweight and other	2.1	2.5	1.0	2.4	2.6	1.3	2.3	2.6	1.2
Nonmedical reasons	0.1	0.2	2/	0.9	1.0	0.6	0.7	0.8	0.4

1/ Includes all races other than Negro.
2/ Less than 0.1 percent.

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Table 4
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations, by Race
April 1943-December 1943

Principal Cause for Rejection	Local Board			Induction Station			Local Board and Induction Station		
	Total	White 1/	Negro	Total	White 1/	Negro	Total	White 1/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.7	2.8	2.4	6.9	7.6	4.0	6.3	6.9	3.8
Ears	2.0	2.4	0.5	5.1	6.3	0.8	4.7	5.7	0.8
Teeth	0.4	0.5	0.4	1.5	1.8	0.4	1.4	1.6	0.4
Mouth and gums	0.3	0.4	0.1	0.2	0.3	0.1	0.3	0.3	0.1
Nose	0.4	0.4	0.1	1.3	1.5	0.3	1.1	1.4	0.3
Throat	0.1	0.1	*	0.1	0.1	0.1	0.1	0.1	*
Lungs	2.3	2.6	1.2	2.1	2.3	1.6	2.1	2.3	1.5
Tuberculosis	3.7	4.3	1.6	2.9	3.1	2.0	3.0	3.2	2.0
Cardiovascular	5.5	6.2	3.5	7.3	7.3	7.5	7.0	7.1	6.9
Blood and blood-forming	0.2	0.2	*	0.1	0.1	*	0.1	0.1	*
Hernia	17.5	19.0	12.5	4.4	4.8	2.7	6.3	6.8	4.2
Kidney and urinary	0.6	0.7	0.2	1.6	1.8	0.9	1.4	1.6	0.8
Abdominal viscera	1.9	2.3	0.5	1.6	1.9	0.5	1.6	1.9	0.5
Genitalia	1.1	1.1	1.2	1.5	1.5	1.3	1.4	1.5	1.2
Syphilis	14.9	4.6	50.3	1.8	1.2	3.8	3.7	1.7	11.0
Gonorrhea and other venereal	0.3	0.1	1.0	0.3	0.1	1.1	0.3	0.1	1.1
Skin	0.6	0.6	0.5	0.8	0.9	0.6	0.8	0.9	0.5
Hemorrhoids	0.7	0.7	0.6	0.4	0.4	0.4	0.5	0.5	0.4
Varicose veins	1.4	1.5	1.0	1.0	1.1	0.7	1.1	1.2	0.8
Educational deficiency	0.4	0.4	0.5	11.9	7.3	29.5	10.2	6.3	25.0
Mental deficiency	3.5	3.9	2.1	4.1	2.6	9.7	4.0	2.8	8.5
Mental disease	4.2	4.9	1.7	20.2	21.5	15.0	17.9	19.2	13.0
Neurological	10.3	12.3	3.5	4.1	4.3	3.7	5.0	5.4	3.6
Musculoskeletal	18.2	20.2	11.2	7.4	8.0	4.8	8.9	9.8	5.8
Feet	1.2	1.3	1.0	2.8	2.5	3.8	2.6	2.4	3.4
Endocrine	2.2	2.7	0.4	0.9	1.0	0.2	1.0	1.3	0.3
Neoplasms	0.6	0.6	0.4	0.8	1.0	0.3	0.8	0.9	0.3
Infectious and parasitic	*	0.1	*	0.1	0.2	0.1	0.1	0.1	0.1
Underweight and overweight	0.9	1.0	0.4	2.3	2.7	0.9	2.1	2.5	0.8
Other medical	1.4	1.5	0.9	0.8	0.8	0.6	0.9	0.9	0.7
Nonmedical	0.5	0.6	0.3	3.7	4.0	2.6	3.3	3.5	2.2

* Less than 0.1 percent.
1/ Includes all races other than Negro.

Table 5
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations, by Race

Principal Cause for Rejection	April 1942-March 1943			April 1943-December 1943		
	Total	White 1/	Negro	Total	White 1/	Negro
Eyes	100.0	100.0	100.0	100.0	100.0	100.0
Blindness, bilateral	1.3	1.2	2.0	0.8	0.8	1.2
Blindness, unilateral	12.5	11.8	17.9	6.1	5.5	10.4
Eye diseases	43.5	41.7	56.8	46.7	44.5	61.8
Defective vision	42.7	45.3	23.3	46.4	49.2	26.6
Ears	100.0	100.0	100.0	100.0	100.0	100.0
Deafness, bilateral	2.8	2.7	3.1	1.7	1.7	3.0
Deafness, unilateral	3.0	2.6	3.7	1.7	1.6	3.2
Otitis media	62.5	63.8	60.3	61.9	62.2	53.3
Other ear defects	24.7	24.6	24.9	28.8	28.9	26.1
Defective hearing	7.0	6.3	8.0	5.9	5.6	14.4
Teeth	100.0	100.0	100.0	100.0	100.0	100.0
Dentures	21.5	22.9	6.8	12.9	13.1	9.3
Missing teeth	52.7	53.4	45.5	47.5	49.0	25.8
Caries	11.2	9.6	28.0	24.2	23.0	42.0
Other dental defects	14.6	14.1	19.7	15.4	14.9	22.9
Mouth and gum defects	100.0	100.0	100.0	100.0	100.0	100.0
Nose	100.0	100.0	100.0	100.0	100.0	100.0
Sinusitis	40.6	40.0	52.2	31.4	30.7	44.2
Vasomotor rhinitis	31.4	32.4	13.0	31.8	32.3	22.1
Nasal diseases and deformities	20.4	19.8	31.3	18.4	17.7	30.7
Nasal obstruction	7.6	7.8	3.5	18.4	19.3	3.0
Throat	100.0	100.0	100.0	100.0	100.0	100.0
Tonsil defects	31.6	24.3	60.5	48.6	48.3	51.9
Other throat defects	68.4	75.7	39.5	51.4	51.7	48.1
Lungs	100.0	100.0	100.0	100.0	100.0	100.0
Asthma	60.6	59.9	66.3	62.1	61.6	65.0
Other lung defects, except tuberculosis	39.4	40.1	33.7	37.9	38.4	35.0
Tuberculosis	100.0	100.0	100.0	100.0	100.0	100.0
Tuberculosis, active pulmonary	33.1	33.6	29.2	34.8	35.4	37.2
Other tuberculosis	4.4	4.5	3.7	3.4	3.6	2.7
Tuberculosis, arrested pulmonary	29.4	28.9	33.8	30.7	31.3	33.0
Tuberculosis, suspected or unspecified pulmonary	33.1	33.0	33.3	31.1	29.7	27.1

Table 5
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations, by Race

Principal Cause for Rejection	April 1942-March 1943			April 1943-December 1943		
	Total	White 1/	Negro	Total	White 1/	Negro
Cardiovascular	100.0	100.0	100.0	100.0	100.0	100.0
Cardiovascular diseases other than rheumatic or valvular	5.8	6.1	4.2	6.0	6.5	4.2
Rheumatic heart disease	9.7	11.2	2.5	11.7	13.5	4.6
Valvular heart disease	33.5	33.7	33.0	35.2	35.8	33.0
Cardiac hypertrophy	3.9	3.6	4.9	3.1	2.9	3.9
Hypertension, arterial	36.6	34.4	47.4	33.9	30.4	47.2
Other cardiovascular defects	3.7	3.6	3.9	3.4	3.4	3.1
Tachycardia	6.4	7.1	3.5	5.7	6.2	3.5
Cardiac arrhythmia	0.3	0.3	0.4	0.3	0.4	0.2
Functional murmurs	0.1		0.2	0.7	0.9	0.3
Blood and blood-forming organs	100.0	100.0	100.0	100.0	100.0	100.0
Hernia and relaxed rings	100.0	100.0	100.0	100.0	100.0	100.0
Inguinal hernia	89.0	89.8	83.6	88.2	89.1	83.3
Abdominal hernia	7.4	6.7	12.8	6.8	5.7	13.0
Hernia, other and unspecified	3.1	3.1	2.8	3.6	3.7	2.9
Relaxed rings	0.5	0.4	0.8	1.4	1.5	0.8
Kidneys and urinary system	100.0	100.0	100.0	100.0	100.0	100.0
Nephritis and pyelonephritis	25.6	26.1	19.6	20.3	21.1	14.3
Nephrolithiasis, cystitis, etc.	29.6	31.0	14.0	22.1	23.7	10.4
Urinary findings, laboratory	44.8	42.9	66.4	57.6	55.2	75.3
Abdominal viscera	100.0	100.0	100.0	100.0	100.0	100.0
Gastric ulcer	65.3	66.0	51.9	75.1	75.9	63.4
Other gastro-intestinal defects	34.7	34.0	48.1	24.9	24.1	36.6
Genitalia	100.0	100.0	100.0	100.0	100.0	100.0
Absence or atrophy of testicle	3.7	4.4	1.5	4.2	4.7	1.9
Undescended testicle	43.7	53.8	14.4	44.6	49.3	23.7
Varicocele	8.1	9.1	5.2	15.5	17.7	5.8
Other genital defects	44.5	32.7	78.9	35.7	28.3	68.6
Syphilis	100.0	100.0	100.0	100.0	100.0	100.0
Neurosyphilis	2.7	6.3	0.9	24.7	43.0	14.2
Cardiovascular syphilis	0.2	0.3	0.2	1.8	1.2	2.2
Syphilis, other	24.6	23.9	24.9	21.6	24.0	20.3
Positive serology	72.5	69.5	74.0	51.9	31.6	63.3

Table 5
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations, by Race

Principal Cause for Rejection	April 1942-March 1943			April 1943-December 1943		
	Total	White 1/	Negro	Total	White 1/	Negro
Gonococcus infection and other venereal disease	100.0	100.0	100.0	100.0	100.0	100.0
Gonococcus infection	91.2	96.4	89.2	85.3	95.9	80.8
Other venereal infection	8.8	3.6	10.8	14.7	4.1	19.2
Skin diseases and conditions	100.0	100.0	100.0	100.0	100.0	100.0
Hemorrhoids and other rectal defects	100.0	100.0	100.0	100.0	100.0	100.0
Varicose veins	100.0	100.0	100.0	100.0	100.0	100.0
Illiteracy and mental deficiency	100.0	100.0	100.0	100.0	100.0	100.0
Moron, imbecile, and idiot	13.7	18.4	6.9	6.7	10.4	2.9
Educational deficiency	73.8	65.6	85.8	71.7	69.0	74.6
Mental deficiency, unspecified	12.5	16.0	7.3	21.6	20.6	22.5
Mental diseases	100.0	100.0	100.0	100.0	100.0	100.0
Grave mental or personality disorders	10.9	11.4	6.0	5.8	6.2	3.8
Major abnormalities of mood	2.0	2.2	0.7	2.1	2,3	0.9
Psychopathic personality	27.3	25.7	41.5	31.2	28.4	46.7
Psychoneurotic disorders	51.6	52.2	46.4	56.7	58.6	46.0
Chronic inebriety and drug addiction	5.9	6.3	2.2	2.9	3.1	1.6
Mental disease not classifiable elsewhere	2.3	2.2	3.2	1.3	1.4	1.0
Neurological	100.0	100.0	100.0	100.0	100.0	100.0
Epilepsy	20.4	20.1	23.8	17.2	17.5	15.3
Chronic encephalitic syndrome	4.1	4.3	2.4	2.8	3.1	1.2
Post-traumatic cerebral syndrome	14.3	13.3	23.8	17.5	15.6	28.0
Poliomyelitis, residuals of	24.3	25.7	10.5	19.7	21.9	7.3
Other neurological defects	36.9	36.6	39.5	42.8	41.9	48.2
Musculoskeletal	100.0	100.0	100.0	100.0	100.0	100.0
Amputation	13.3	12.6	18.5	11.3	10.9	13.9
Osteomyelitis	8.9	9.6	4.0	8.5	9.1	5.0
Ankylosis	6.0	6.1	5.0	4.7	4.7	4.6
Arthritis	8.2	8.3	7.3	7.6	7.7	6.5
Atrophy	5.1	5.2	4.7	4.1	4.2	3.7
Injury, residuals of	31.5	30.9	36.1	34.1	33.5	38.1
Spinal malformations	6.4	6.4	6.2	6.1	6.1	6.1
Musculoskeletal defects, congenital and other	20.6	20.9	18.2	23.6	23.8	22.1

Table 5
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations, by Race

Principal Cause for Rejection	April 1942-March 1943			April 1943-December 1943		
	Total	White 1/	Negro	Total	White 1/	Negro
Feet	100.0	100.0	100.0	100.0	100.0	100.0
Pes planus	75.9	72.7	88.0	84.8	82.4	90.9
Other foot defects	24.1	27.3	12.0	15.2	17.6	9.1
Endocrine disturbances	100.0	100.0	100.0	100.0	100.0	100.0
Diabetes mellitus	41.8	41.8	40.7	42.6	42.8	39.6
Frohlich's syndrome	21.7	21.8	19.6	23.8	23.5	27.8
Thyroid disturbances	21.1	21.2	20.6	18.0	18.0	18.0
Other endocrine disturbances	15.4	15.2	19.1	15.6	15.7	14.6
Neoplasms	100.0	100.0	100.0	100.0	100.0	100.0
Malignant growths	8.8	8.9	7.6	6.5	6.7	5.1
Other neoplasms	42.5	39.1	85.5	37.9	33.8	82.3
Pilonidal cysts	48.7	52.0	6.9	55.6	59.5	12.6
Infectious, parasitic and epidemic diseases	100.0	100.0	100.0	100.0	100.0	100.0
Other diseases, defects and anomalies	100.0	100.0	100.0	100.0	100.0	100.0
Overweight	22.8	23.0	21.2	30.7	31.1	27.4
Underweight	45.3	47.2	27.7	40.4	41.9	27.3
Overheight	1.5	1.4	2.2	1.0	1.1	0.4
Underheight	12.6	12.3	15.9	6.4	6.2	7.7
Other diseases and defects, including nutritional disturbances	17.8	16.1	33.0	21.5	19.7	37.2

1/ Includes all races other than Negro.

Table 6
Incidence of Defects in Examined Registrants, by Race 1/
April 1942-December 1943

Defect Group	Incidence per 1000 Examined		
	Total	White 2/	Negro
All Defects	1000.2	1008.7	953.2
Eyes	136.1	147.9	70.7
Blindness, bilateral	0.4	0.4	0.5
Blindness, unilateral	7.5	7.8	6.1
Eye diseases	37.5	39.3	27.7
Defective vision	90.7	100.4	36.4
Ears	35.1	39.3	11.5
Deafness, bilateral	0.6	0.7	0.3
Deafness, unilateral	1.2	1.3	0.5
Otitis media	13.6	15.6	2.3
Other ear defects	12.3	13.8	3.9
Defective hearing	7.4	7.9	4.5
Teeth	113.0	124.7	47.7
Dentures	36.2	40.9	9.8
Missing teeth	53.1	59.3	18.4
Caries	18.8	19.1	17.2
Other dental defects	4.9	5.4	2.3
Mouth and gum defects	14.5	15.1	11.2
Nose	25.8	29.4	5.6
Sinusitis	2.7	3.0	1.0
Vasomotor rhinitis	5.0	5.7	1.1
Nasal diseases and deformities	2.9	3.2	1.1
Nasal obstruction	15.2	17.5	2.4
Throat	7.3	7.4	6.4
Tonsil defects	6.3	6.3	6.1
Other throat defects	1.0	1.1	0.3
Lungs	15.4	16.0	12.0
Asthma	7.5	7.6	6.7
Other lung defects, except tuberculosis	7.9	8.4	5.3
Tuberculosis	19.1	19.9	14.6
Tuberculosis, active pulmonary	6.7	7.0	5.5
Other tuberculosis	0.9	0.9	0.5
Tuberculosis, arrested pulmonary	6.1	6.3	4.8
Tuberculosis, suspected or unspecified pulmonary	5.4	5.7	3.8

Table 6
Incidence of Defects in Examined Registrants, by Race 1/
April 1942-December 1943

Defect Group	Incidence per 1000 Examined		
	Total	White 2/	Negro
Cardiovascular	51.0	49.8	57.7
Cardiovascular diseases other than rheumatic or valvular	2.4	2.4	2.3
Rheumatic heart disease	3.6	4.0	1.2
Valvular heart disease	12.9	12.6	15.0
Cardiac hypertrophy	1.8	1.7	2.7
Hypertension, arterial	18.4	16.7	27.5
Other cardiovascular defects	3.2	3.2	3.0
Tachycardia	4.5	4.8	2.7
Cardiac arrhythmia	0.6	0.6	0.5
Functional murmurs	3.6	3.8	2.8
Blood and blood-forming organs	0.6	0.7	0.1
Hernia and relaxed rings	50.2	52.1	40.2
Inguinal hernia	35.0	36.4	27.3
Abdominal hernia	3.9	3.3	7.4
Hernia, other and unspecified	3.6	3.9	2.0
Relaxed rings	7.7	8.7	3.5
Kidneys and urinary system	11.5	12.3	7.2
Nephritis and pyelonephritis	2.0	2.2	1.0
Nephrolithiasis, cystitis, etc.	2.7	3.1	0.9
Urinary findings, laboratory	6.8	7.0	5.3
Abdominal viscera	11.0	12.2	4.3
Gastric ulcer	5.8	6.5	1.7
Other gastro-intestinal defects	5.2	5.7	2.6
Genitalia	33.7	34.1	32.0
Absence or atrophy of testicle	3.5	3.8	2.2
Undescended testicle	4.5	5.0	2.2
Varicocele	15.5	17.1	6.7
Other genital defects	10.2	8.2	20.9
Syphilis	50.2	20.8	214.7
Neurosyphilis	1.8	1.2	4.8
Cardiovascular syphilis	0.2	0.1	1.1
Syphilis, other	15.8	6.8	65.9
Positive serology	32.4	12.7	142.9

Table 6
Incidence of Defects in Examined Registrants, by Race 1/
April 1942-December 1943

Defect Group	Incidence per 1000 Examined		
	Total	White 2/	Negro
Gonococcus infection and other venereal diseases	6.3	2.3	28.7
Gonococcus infection	5.9	2.2	26.6
Other venereal infection	0.4	0.1	2.1
Skin diseases and conditions	14.0	15.2	7.2
Hemorrhoids and other rectal defects	11.3	11.6	9.1
Varicose veins	16.2	17.3	9.7
Educational and mental deficiency	50.7	36.8	128.2
Moron, imbecile, and idiot	6.2	5.8	8.7
Educational deficiency 3/	31.5	22.0	84.2
Mental deficiency, unspecified 3/	13.0	9.0	35.3
Mental diseases	67.5	70.6	50.3
Grave mental or personality disorders	5.6	6.3	2.1
Major abnormalities of mood	1.2	1.3	0.2
Psychopathic personality	18.2	17.6	21.5
Psychoneurotic disorders	37.0	39.3	24.1
Chronic inebriety and drug addiction	4.0	4.5	1.1
Mental disease not classifiable elsewhere	1.5	1.6	1.3
Neurological	28.0	29.6	19.0
Epilepsy	5.1	5.3	4.2
Chronic encephalitic syndrome	1.0	1.1	0.4
Post-traumatic cerebral syndrome	3.9	3.8	4.3
Poliomyelitis, residuals of	6.1	6.9	1.6
Other neurological defects	11.9	12.5	8.5
Musculoskeletal	86.1	90.8	59.6
Amputation	10.2	10.4	9.3
Osteomyelitis	3.7	4.1	1.6
Ankylosis	3.3	3.5	2.3
Arthritis	4.8	5.0	3.4
Atrophy	3.0	3.2	1.9
Injury, residuals of	26.0	27.0	19.9
Spinal malformations	10.0	11.0	4.8
Musculoskeletal defects, congenital and other	25.1	26.6	16.4

Table 6

Incidence of Defects in Examined Registrants, by Race 1/
April 1942-December 1943

Defect Group	Incidence per 1000 Examined		
	Total	White 2/	Negro
Feet	54.6	55.0	52.5
Pes planus	48.3	48.3	48.3
Other foot defects	6.3	6.7	4.2
Endocrine disturbances	8.5	9.6	2.5
Diabetes mellitus	2.6	2.9	0.8
Frohlich's syndrome	2.5	2.9	0.5
Thyroid disturbances	2.1	2.3	0.7
Other endocrine disturbances	1.3	1.5	0.5
Neoplasms	9.4	10.2	4.9
Malignant growths	0.3	0.4	0.1
Other neoplasms	4.6	4.6	4.4
Pilonidal cysts	4.5	5.2	0.4
Infectious, parasitic and epidemic diseases	0.6	0.6	0.5
Other diseases, defects, and anomalies	72.5	77.4	45.1
Overweight	44.4	47.0	29.8
Underweight	21.1	23.4	8.0
Overheight	0.1	0.2	0.1
Underheight	1.5	1.5	1.3
Other diseases and defects, including nutritional disturbances	5.4	5.3	5.9

1/ Forms 221 are included for the periods April-July 1942, November-December 1942, January-February 1943, and November-December 1943.
2/ Includes all races other than Negro.
3/ Includes registrants rejected for educational deficiency before June 1, 1943 and for failure to meet minimum intelligence standards after that date, as well as those rejected for mental deficiency.

Table 1
Rejection Rates per 100 Registrants Examined at Local Boards and Induction Stations, by race and State
February 1943-August 1943

State	Total			White 1/			Negro		
	Local Board	Induction Station	Local Board and Induction Station	Local Board	Induction Station	Local Board and Induction Station	Local Board	Induction Station	Local Board and Induction Station
CONT. UNITED STATES	6.5	35.0	39.2	5.5	32.3	36.0	11.8	51.1	56.9
Alabama	10.9	42.8	49.0	5.8	35.8	39.5	18.2	52.3	61.0
Arizona	9.8	32.4	39.0	9.5	31.9	38.4	*	*	*
Arkansas	5.8	53.2	55.9	5.5	43.8	46.9	6.3	68.9	70.9
California	5.4	31.9	35.6	5.3	31.6	35.2	7.2	42.2	46.4
Colorado	7.7	38.3	43.1	7.7	38.2	43.0	*	*	*
Connecticut	3.7	28.3	31.0	3.8	27.7	30.4	3.4	43.2	45.1
Delaware	6.4	27.2	31.9	5.6	23.9	28.2	9.5	38.9	44.7
District of Columbia	12.3	37.7	45.4	6.7	35.3	39.6	19.8	40.9	52.6
Florida	19.8	41.6	53.2	11.4	33.9	41.4	28.8	52.0	65.8
Georgia	10.0	46.1	51.5	7.5	42.6	46.9	12.9	51.6	57.8
Idaho	6.8	24.1	29.3	6.8	23.8	29.0	*	*	*
Illinois	4.5	29.7	32.9	4.0	28.7	31.6	5.8	38.2	41.8
Indiana	3.9	33.6	36.2	3.5	32.9	35.2	9.1	43.1	48.3
Iowa	7.2	27.9	33.1	7.1	27.9	33.0	*	*	*
Kansas	4.4	22.0	25.4	4.5	21.3	24.8	3.6	30.9	33.4
Kentucky	5.6	42.2	45.4	5.5	41.9	45.1	6.2	46.4	49.7
Louisiana	7.6	48.7	52.6	7.3	38.0	42.5	7.9	60.9	64.0
Maine	5.1	34.1	37.5	5.1	34.0	37.4	*	*	*
Maryland	5.2	34.0	37.4	4.3	29.4	32.4	8.1	49.0	53.1
Massachusetts	4.3	34.9	37.7	4.3	34.6	37.4	5.0	49.9	52.4
Michigan	5.0	34.2	37.4	5.0	32.9	36.3	5.2	48.5	51.2
Minnesota	5.0	32.3	35.7	5.0	32.2	35.6	*	*	*
Mississippi	8.1	40.1	45.0	6.3	28.4	32.9	9.5	49.4	54.2
Missouri	6.1	33.1	37.2	6.0	31.3	35.4	6.7	46.8	50.4
Montana	7.4	31.4	36.5	7.4	31.4	36.5	*	*	*
Nebraska	5.1	27.9	31.6	5.1	27.6	31.3	*	*	*
Nevada	6.0	28.6	32.9	5.9	28.4	32.6	*	*	*
New Hampshire	4.8	35.8	38.9	4.8	35.8	38.9	*	*	*
New Jersey	3.0	30.9	33.0	3.0	26.9	29.1	3.7	42.4	44.5
New Mexico	7.7	35.1	40.1	7.7	34.9	39.9	*	*	*
New York	5.9	33.8	37.7	5.6	33.1	36.8	10.0	42.2	48.0
North Carolina	11.7	51.1	56.8	8.5	44.5	49.2	17.2	65.6	71.5
North Dakota	8.0	28.0	33.8	8.0	27.9	33.7	*	*	*
Ohio	6.0	31.7	35.8	6.0	30.6	34.8	6.5	43.2	46.9
Oklahoma	5.2	37.3	40.6	5.1	34.9	38.2	5.8	53.2	55.9
Oregon	4.4	20.9	24.4	4.4	20.9	24.4	*	*	*
Pennsylvania	5.1	28.1	31.8	4.7	27.5	30.9	10.4	36.5	43.1
Rhode Island	2.8	35.5	37.3	2.8	35.4	37.2	*	*	*
South Carolina	8.1	52.0	55.9	6.9	38.7	42.9	9.2	66.3	69.4
South Dakota	5.8	26.9	31.1	5.8	26.9	31.1	*	*	*
Tennessee	9.7	38.8	44.7	6.7	35.8	40.1	17.2	48.6	57.4
Texas	5.7	39.5	42.9	5.2	36.1	39.4	7.1	54.6	57.8
Utah	8.3	19.4	26.1	8.3	19.3	26.0	*	*	*
Vermont	7.8	41.1	45.7	7.8	41.1	45.7	*	*	*
Virginia	11.3	46.1	52.2	8.5	40.4	45.5	16.4	56.8	63.9
Washington	5.6	23.9	28.2	5.5	23.8	28.0	*	*	*
West Virginia	7.1	32.9	37.7	6.9	32.8	37.4	8.9	35.2	41.0
Wisconsin	7.7	33.8	38.9	7.7	33.6	38.7	*	*	*
Wyoming	6.7	24.0	29.1	6.8	24.0	29.2	*	*	*

1/ Includes all races other than Negro.

Table
Percent of Registrants in Each Age Group
April 1942 -

State 1/	All Races					PERCENT	
	18-44 2/ Years	18-24 Years	25-29 Years	30-37 Years	38 Years and Over	18-44 2/ Years	18-24 Years
CONT'L. UNITED STATES	36.0	45.3	33.4	28.1	20.3	36.8	45.8
Alabama	32.8	43.2	31.1	24.1	11.0	28.9	38.5
Arizona	29.9	37.8	27.5	24.0	15.8	29.7	37.3
Arkansas	36.5	46.3	35.9	28.3	13.7	38.2	48.1
California	47.9	59.9	47.5	44.2	34.6	47.9	59.7
Colorado	44.2	55.1	47.4	38.9	28.6	44.2	55.0
Connecticut	34.5	43.6	31.9	23.7	14.2	34.7	43.7
Delaware	17.1	21.0	20.7	13.5	5.8	18.3	22.6
District of Columbia	26.2	39.7	25.2	19.9	13.5	26.2	36.8
Florida	36.3	49.9	34.2	27.0	21.0	41.2	53.3
Georgia	43.0	52.1	43.7	35.3	18.6	53.5	64.9
Idaho	47.0	56.3	44.5	39.0	35.9	47.0	56.4
Illinois	53.2	63.6	40.9	37.1	35.9	53.3	63.6
Indiana	42.7	55.4	40.7	30.4	19.0	43.2	55.4
Iowa	12.6	18.7	12.1	7.5	3.9	12.6	18.7
Kansas	59.3	69.4	58.8	52.4	37.0	59.5	69.3
Kentucky	32.4	40.9	30.6	24.7	14.2	33.2	41.1
Louisiana	29.5	40.6	30.0	22.1	11.7	32.8	43.4
Maine	6.5	8.2	6.4	4.4	3.1	6.5	8.2
Maryland	23.7	32.4	23.5	17.3	8.7	24.7	33.3
Massachusetts	3.8	5.6	3.4	2.5	1.1	3.8	5.7
Michigan	50.5	62.6	47.4	40.8	31.9	50.7	62.6
Minnesota	22.0	32.3	21.1	15.5	9.4	22.0	32.3
Mississippi	35.6	48.0	29.2	24.4	20.9	39.4	52.8
Missouri	51.8	64.4	51.4	42.4	28.9	52.6	64.8
Montana	41.1	54.9	41.0	37.8	25.9	41.2	54.9
Nebraska	17.8	22.7	19.1	15.0	7.9	17.9	22.7
Nevada	47.6	59.9	44.6	45.1	35.9	47.6	59.8
New Hampshire	6.1	9.4	5.9	3.6	1.1	6.1	9.4
New Jersey	49.1	59.0	48.1	41.9	31.8	50.1	59.4
New Mexico	42.2	52.3	41.7	37.1	21.7	42.5	52.3
New York City	20.1	25.0	19.8	17.5	10.9	19.8	24.8
New York (Excl. of N.Y.C.)	38.2	46.0	36.0	30.4	25.0	36.6	46.2
North Carolina	28.5	35.6	27.1	20.0	9.8	25.9	32.1
North Dakota	28.9	36.3	29.2	22.5	14.9	28.9	36.3
Ohio	40.1	50.7	37.4	29.6	19.0	40.0	50.6
Oklahoma	17.9	24.2	17.2	13.0	5.5	17.8	23.9
Oregon	51.8	62.3	55.7	49.4	37.4	51.9	62.3
Pennsylvania	37.4	47.2	34.1	27.2	16.9	37.4	46.9
Rhode Island	22.0	29.2	22.3	15.4	7.8	21.9	29.1
South Carolina	10.0	13.7	7.5	4.4	2.0	10.2	14.9
South Dakota	18.3	24.6	19.5	13.6	5.6	18.3	24.6
Tennessee	28.8	37.4	26.6	20.0	11.8	31.9	39.5
Texas	49.2	60.6	47.3	40.2	30.6	50.9	61.4
Utah	50.0	59.4	44.4	38.1	29.6	50.0	59.5
Vermont	1.3	1.2	2.2	1.8	0.2	1.3	1.2
Virginia	31.9	43.3	27.5	20.7	12.7	33.0	44.5
Washington	53.4	64.6	50.8	46.9	40.9	53.4	64.5
West Virginia	31.4	41.5	28.9	21.8	12.4	32.1	41.6
Wisconsin	54.8	66.5	50.4	43.0	37.7	55.0	66.6
Wyoming	46.8	59.4	50.2	36.2	33.5	46.8	59.3

1/ Includes all races other than Negro.
2/ The tabulation was made by year of birth. These ages represent years of birth as follows:
States having less than 0.3 percent of total Negro registrants are omitted.

2
Found to Have No Defects, by State and Race
March 1943

OF TOTAL EXAMINED							
White 1/			Negro				
25-29 Years	30-37 Years	38 Years and Over	18-44 2/ Years	18-24 Years	25-29 Years	30-37 Years	38 Years and Over
34.0	29.0	21.0	31.3	41.4	30.3	24.0	15.4
26.7	20.9	7.6	37.7	49.7	35.6	27.5	16.0
26.9	23.4	16.4	*	*	*	*	*
37.8	30.8	14.1	31.8	41.2	31.2	23.1	12.4
47.4	44.2	34.6	49.0	67.2	50.2	43.3	34.0
47.5	38.7	28.6	*	*	*	*	*
31.9	23.9	14.4	30.1	43.0	30.8	18.9	10.1
22.6	13.1	5.8	13.0	14.6	14.6	14.2	5.8
24.6	21.4	13.9	26.1	44.8	26.0	18.6	12.9
39.7	32.9	25.8	30.2	45.2	28.1	20.6	14.7
54.9	44.4	23.2	27.2	33.9	25.9	21.4	9.9
44.5	38.9	36.0	*	*	*	*	*
40.1	36.4	35.9	51.4	64.0	54.6	44.2	35.6
41.0	31.1	19.6	34.1	56.3	35.2	23.1	11.0
12.2	7.5	3.9	*	*	*	*	*
58.2	52.5	37.5	56.6	71.3	67.4	51.0	30.3
31.2	25.8	14.5	26.1	38.9	25.9	19.2	12.0
33.3	26.4	13.2	35.3	37.3	26.5	17.7	10.1
6.4	4.4	3.1	*	*	*	*	*
23.5	18.1	9.1	20.5	28.7	23.5	15.3	7.7
3.5	2.5	1.0	2.6	4.5	-	2.4	2.1
47.6	41.1	32.0	43.4	61.1	40.8	37.4	30.7
21.2	15.5	9.3	*	*	*	*	*
33.5	27.7	26.5	33.2	45.2	26.2	22.0	16.5
51.5	42.7	29.1	45.0	59.0	50.0	40.6	27.4
40.9	38.0	25.9	*	*	*	*	*
19.2	15.0	8.1	*	*	*	*	*
44.5	44.8	36.2	*	*	*	*	*
5.9	3.7	1.1	*	*	*	*	*
48.5	43.1	32.2	37.3	51.7	41.3	31.4	19.0
42.0	37.4	21.9	*	*	*	*	*
19.2	16.7	10.6	24.1	28.3	26.2	23.4	14.9
36.4	30.9	25.2	25.4	36.4	21.2	18.0	17.8
25.0	19.3	9.0	32.9	42.1	30.5	21.1	11.7
29.3	22.6	14.9	*	*	*	*	*
37.1	28.9	19.1	41.7	53.2	41.8	37.2	18.2
16.8	13.4	5.4	18.6	27.9	21.0	10.3	6.6
55.6	49.4	37.5	*	*	*	*	*
33.9	26.9	16.9	37.1	55.1	37.9	29.6	16.8
21.9	15.0	7.8	*	*	*	*	*
8.0	4.4	1.9	9.8	12.6	7.1	4.4	2.2
19.5	13.7	5.6	*	*	*	*	*
29.3	23.4	14.2	18.5	27.7	18.6	12.1	5.3
48.9	42.2	31.8	44.0	57.4	43.3	35.2	26.6
44.4	38.1	29.6	*	*	*	*	*
2.2	1.8	0.2	*	*	*	*	*
27.2	21.2	14.0	29.2	39.9	28.1	19.7	9.4
50.9	46.7	41.0	*	*	*	*	*
29.8	22.5	13.2	23.4	38.9	20.6	16.3	6.2
50.6	43.1	37.7	*	*	*	*	*
50.2	35.8	33.5	*	*	*	*	*

1925-1897; 1925-1918; 1917-1913; 1912-1905; 1904-1897.

Table 3
List of States by Regions

East	Midwest	South	Far West
Connecticut	Illinois	Alabama	Arizona
Delaware	Indiana	Arkansas	California
District of Columbia	Iowa	Florida	Colorado
Maine	Kansas	Georgia	Idaho
Maryland	Michigan	Kentucky	Montana
Massachusetts	Minnesota	Louisiana	Nevada
New Hampshire	Missouri	Mississippi	New Mexico
New Jersey	Nebraska	North Carolina	Oregon
New York	North Dakota	Oklahoma	Utah
Pennsylvania	Ohio	South Carolina	Washington
Rhode Island	South Dakota	Tennessee	Wyoming
Vermont	West Virginia	Texas	
	Wisconsin	Virginia	

Table 4

Rejection Rates by Ten Leading Causes for Rejection per 1000 White 1/ Registrants Examined at Local Boards and Induction Stations, April 1942-March 1943

State	Mental Disease	Musculo-skeletal	Cardio-vascular	Hernia	Eye	Neuro-logical	Ear	Educational Deficiency	Tubercu-losis	Syphilis
Continental United States	52.4	37.4	33.8	31.6	31.5	23.1	22.4	19.0	15.2	14.9
Alabama	68.2	50.2	29.4	33.2	30.3	32.3	16.9	50.5	5.6	19.8
Arizona	18.5	38.6	21.9	27.4	41.9	17.3	29.7	-	47.6	34.2
Arkansas	49.1	44.4	46.7	31.9	32.3	19.7	18.1	63.8	17.0	18.3
California	50.7	33.8	34.3	34.5	28.1	23.2	24.8	17.8	23.4	26.6
Colorado	38.3	56.9	58.0	39.2	31.2	17.2	20.4	8.2	4.7	17.9
Connecticut	58.6	24.5	29.5	30.7	27.9	27.0	24.7	7.1	8.1	4.7
Delaware	62.7	25.2	19.5	25.7	27.2	20.0	23.1	4.1	15.8	13.9
Dist. of Columbia	106.3	22.0	25.4	31.2	39.4	16.1	17.7	3.7	24.0	28.7
Florida	60.0	35.7	36.0	34.1	32.4	29.6	19.4	29.2	11.9	16.1
Georgia	69.8	42.3	30.9	33.8	26.0	22.0	19.8	74.5	5.6	20.9
Idaho	36.9	54.8	42.0	47.7	37.1	30.8	21.1	7.0	8.1	18.3
Illinois	66.8	36.1	24.9	34.2	39.2	18.8	28.0	7.2	18.3	8.4
Indiana	62.5	42.6	33.6	31.7	33.2	29.0	24.0	17.5	20.1	23.4
Iowa	25.6	41.6	32.7	31.4	31.3	24.0	18.0	6.8	12.4	6.8
Kansas	31.8	46.5	31.1	33.9	21.3	23.0	17.3	6.2	8.5	17.8
Kentucky	78.5	41.4	33.3	27.0	27.2	23.9	21.4	48.6	23.6	25.2
Louisiana	52.7	45.0	47.0	35.8	31.1	24.2	14.8	43.2	21.2	25.8
Maine	41.8	30.5	21.2	23.4	46.3	21.7	25.3	16.5	12.8	9.6
Maryland	81.9	25.0	28.2	22.6	29.1	21.8	23.7	28.3	20.5	14.8
Massachusetts	80.8	34.9	40.0	16.8	21.6	21.2	23.3	8.4	15.8	10.0
Michigan	73.3	41.1	32.3	33.6	31.0	21.4	26.5	6.2	12.9	11.7
Minnesota	61.5	53.3	28.5	41.0	40.3	30.8	24.3	7.1	10.7	14.7
Mississippi	49.6	43.5	18.2	36.1	23.6	23.9	10.5	38.8	4.8	23.3
Missouri	63.1	42.0	34.1	40.4	21.6	21.5	26.2	42.5	17.7	17.9
Montana	23.0	67.4	32.5	44.1	30.7	34.2	12.8	5.8	7.0	14.1
Nebraska	53.7	45.6	59.4	34.2	25.4	28.5	17.7	6.6	12.1	13.3
Nevada	20.0	63.6	29.9	43.6	22.5	11.8	19.2	5.9	11.8	45.1
New Hampshire	83.1	32.1	46.9	30.8	30.7	23.0	16.5	19.7	8.2	9.5
New Jersey	52.9	29.8	31.4	29.1	28.7	25.7	26.3	18.4	13.5	9.2
New Mexico	27.1	36.2	30.5	27.6	30.8	28.7	39.0	34.9	22.0	35.1
New York (EXCL. NYC)	54.3	26.0	29.8	29.7	21.4	21.6	23.5	4.4	14.6	6.6
New York City	37.2	16.1	18.3	21.0	25.9	19.7	19.3	3.3	13.9	.9
North Carolina	47.4	41.7	43.9	29.1	26.7	23.3	20.7	36.0	8.5	14.0
North Dakota	57.7	38.5	30.2	44.9	36.6	23.9	21.0	14.0	5.1	7.9
Ohio	39.7	30.4	30.7	31.2	31.5	16.1	20.7	6.6	13.6	9.1
Oklahoma	67.8	45.2	26.4	34.7	30.1	26.7	19.7	29.2	7.1	21.7
Oregon	19.4	62.3	39.6	30.8	35.1	29.8	16.7	2.3	11.1	17.3
Pennsylvania	42.5	34.0	45.4	34.6	29.6	21.1	27.6	6.6	13.4	9.4
Rhode Island	68.5	24.1	48.7	22.9	27.7	12.7	27.1	11.4	11.5	5.8
South Carolina	77.5	49.5	34.9	30.3	36.4	17.3	19.5	30.2	6.0	21.1
South Dakota	45.6	44.8	43.4	43.4	35.9	26.2	18.6	4.8	13.8	8.7
Tennessee	38.1	39.0	21.5	31.5	27.0	20.1	17.2	74.4	18.2	24.2
Texas	32.0	40.4	37.8	25.6	35.5	21.3	15.6	58.7	14.7	21.1
Utah	27.3	48.0	65.3	50.8	33.8	26.7	19.5	4.3	5.7	6.5
Vermont	123.0	41.6	38.8	37.4	29.2	31.9	12.1	8.3	9.6	7.2
Virginia	62.6	40.5	43.4	28.2	37.4	27.0	18.0	37.0	19.3	24.4
Washington	27.0	62.8	26.5	39.1	27.4	35.8	24.2	4.8	12.4	14.0
West Virginia	50.5	46.2	44.3	27.2	29.7	27.0	21.8	24.1	26.7	19.4
Wisconsin	54.7	43.2	27.2	40.5	30.1	23.9	17.7	6.2	13.7	6.6
Wyoming	11.3	43.9	28.8	34.5	33.5	10.4	12.7	6.6	6.1	26.0

1/ Includes all races other than Negro.

Table 5
Rejection Rates by Ten Leading Causes for Rejection, Per 1,000 Negro Registrants Examined at Local Boards and Induction Stations; April 1942-March 1943

State	Syphilis	Educational Deficiency	Cardio-vascular	Mental Disease	Musculo-skeletal	Eye	Hernia	Mental Deficiency	Gonorrhea and Other Venereal	Neuro-logical
Cont. U.S.	170.5	99.8	42.5	32.4	32.4	27.0	26.9	19.0	18.2	14.6
Alabama	151.7	186.6	46.1	6.7	30.6	24.9	20.5	12.1	20.7	11.0
Arkansas	176.5	101.9	67.1	47.6	31.4	21.5	31.3	10.3	21.8	12.1
California	96.4	17.3	35.8	48.2	37.1	34.0	33.4	3.1	8.6	15.4
Connecticut	67.8	19.0	40.7	46.1	16.3	43.4	5.4	2.7	2.7	19.0
Delaware	168.8	26.0	13.0	48.7	35.7	32.5	19.5	21.1	22.7	16.2
Dist. of Columbia	224.3	32.3	55.1	49.0	33.4	35.6	25.0	7.8	10.6	18.9
Florida	273.8	110.1	39.5	25.8	36.9	23.5	36.3	6.6	21.6	14.7
Georgia	173.5	157.5	47.3	9.8	29.3	22.3	27.3	5.3	16.4	9.3
Illinois	96.5	20.0	28.5	49.8	41.7	29.1	27.4	33.2	26.1	12.8
Indiana	223.7	45.5	42.9	52.2	39.8	34.1	25.3	10.3	10.3	19.6
Kansas	124.7	12.1	34.2	15.5	32.0	32.0	35.3	4.4	13.2	5.5
Kentucky	199.9	45.3	39.8	51.7	40.9	27.0	29.5	8.6	8.9	19.7
Louisiana	196.8	106.0	41.4	40.3	34.3	22.0	26.2	66.5	14.2	11.9
Maryland	156.4	135.1	27.5	34.5	22.3	19.5	19.7	14.1	32.2	11.7
Massachusetts	146.4	14.0	40.5	91.9	48.3	34.3	10.9	17.1	4.7	29.6
Michigan	113.8	26.9	48.9	70.9	40.0	37.9	28.9	40.0	15.0	16.0
Mississippi	235.0	154.8	19.8	17.7	27.6	22.1	28.3	10.0	12.8	10.9
Missouri	126.3	25.4	37.5	51.2	36.9	31.0	38.4	28.5	23.7	21.0
New Jersey	103.4	45.3	33.8	57.1	34.8	30.5	24.3	11.8	19.7	18.7
New York State (Excl. NYC)	118.9	25.1	26.5	62.3	30.8	25.1	22.9	14.3	5.7	15.0
New York City	21.2	13.0	23.6	30.7	12.4	26.3	15.6	8.4	4.0	9.4
North Carolina	138.9	258.7	63.7	45.8	35.7	26.3	28.4	26.0	25.8	19.8
Ohio	42.6	35.1	40.8	41.3	29.3	32.0	30.9	5.3	17.0	13.5
Oklahoma	130.7	51.1	33.3	63.7	38.0	30.0	36.6	6.6	22.5	16.9
Pennsylvania	155.1	28.6	66.7	39.6	37.9	41.4	33.6	7.2	16.1	18.8
South Carolina	154.1	162.2	40.2	42.7	31.7	24.4	25.3	33.7	11.5	17.5
Tennessee	201.0	74.7	52.6	13.0	38.9	45.9	36.6	12.8	19.9	12.5
Texas	211.9	55.5	39.0	22.2	29.5	29.8	20.8	11.3	17.6	12.9
Virginia	146.9	122.1	43.5	39.0	30.1	25.0	22.0	35.3	32.3	23.7
West Virginia	125.5	36.7	103.0	75.5	62.8	27.8	17.8	5.9	7.1	18.9

1/ States having less than 0.3 percent of total Negro registrants are omitted.

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DEFENDENT'S EXHIBIT 20

MEDICAL STATISTICS BULLETIN NO 4

PHYSICAL EXAMINATIONS
OF SELECTIVE SERVICE REGISTRANTS
IN THE FINAL MONTHS OF THE WAR

— AN ANALYSIS OF NATIONAL AND STATE DATA —

JANUARY 1944 — AUGUST 1945

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
WASHINGTON, D. C.
JUNE 1, 1946

Physical Examinations of Selective Service Registrants in the Final Months of the War

An Analysis of National and State Data



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ABSTRACT

The years 1944 and 1945 were characterized chiefly by a growing need for young men under 26 years of age to serve in the armed forces, and an increasing scarcity of available manpower in this age group. These two facts made it necessary to restrict deferments in essential occupations, including agriculture, to reexamine many registrants who had formerly been rejected, and to accept for military service some men who were unable to meet the physical requirements for general military service. As a result, the rejection rates were higher during the final months of the war than would be expected during a period when the average age of examined men was less than 26 years.

During January 1944 through August 1945, the armed forces physically examined or reexamined some 5,767,000 registrants, of whom 2,536,800, or 44 percent, were rejected for general military service. In addition, an estimated one to two percent were rejected by local boards because of manifestly disqualifying defects.

Eighty-four percent of the registrants physically examined during the last calendar year of hostilities were examined for the first time. These were chiefly men who registered with Selective Service at age 18, and men 19-25 years of age who had never been physically examined because they held deferments in essential occupations. Less than 40 percent (37.6) of this group were rejected on preliminary, or preinduction examination.

The leading causes for all rejections during 1944--including local board rejections--were, in order of relative importance: Mental disease, accounting for 26.8 percent of all rejections; failure to meet the minimum intelligence standards, 12.8 percent; musculoskeletal defects, 8.8 percent; cardiovascular defects, 8.0 percent; hernia, 4.9 percent; ears 4.4 percent; neurological disorders, 4.1 percent; eye defects, 4.0 percent; tuberculosis, 3.4 percent; and mental deficiency, 2.6 percent. These ten defects combined accounted for 80 percent of all rejections during the year.

Tuberculosis, cardiovascular defects, and musculoskeletal defects were of greater relative importance as causes for rejection among older men than among those under 26 years of age, who were more apt to be rejected because of mental and personality disorders.

BACKGROUND OF THE DATA

This bulletin presents information on the results of physical examinations during the period January 1944 through August 1945. The data on physical and mental defects found in 1944 are based on sample studies of the Reports of Physical Examination and Induction, DSS Forms 221. Information on monthly rejection rates during 1944 and 1945 and also that on causes for rejection in the final year of the war was derived from armed forces' reports on the results of physical examination.

The selection of men for physical examination has always been a function of the Selective Service System. The physical standards for acceptability of registrants, however, have been at all times fixed by the armed forces. Until 1944, local board physicians, guided by the armed forces' standards, examined every registrant who was considered eligible for induction and rejected those who were manifestly disqualified for military service. 1/ During the period covered by this bulletin, however, local board examinations were given only to registrants who requested such examination because they claimed manifestly disqualifying defects, or who were known to possess such defects. Other registrants were forwarded to the armed forces' induction stations for preinduction examination. Those found acceptable could be returned for induction without need for reexamination if they reported within a specified time period. Thus, the armed forces' examiners made both preliminary and final determination as to acceptance of nearly all the registrants who were ordered to report for physical examination, and the data on local board rejections represent only the most serious and handicapping physical and mental defects. 2/

1/ Until August 1942, the local board physicians also rejected men who were qualified for limited service only. In 1940 and 1941, when they made the majority of the rejections, they were guided by the War Department Mobilization Regulation (MR 1-9), Standards of Physical Examination During Mobilization. Beginning in 1942, the defects for which local board physicians could reject men were contained in the "List of Defects", DSS Form 220; this list was also prescribed by the War Department. The Form 220 greatly restricted the number and types of defects for which the local board physician could reject registrants.

2/ The procedures governing the preinduction plan are outlined in Local Board Memorandum No. 178, January 6, 1944 and June 8, 1944.

The methods used in selecting registrants for physical examination during 1944 and 1945, and the effects of the acute manpower problems upon the selective process were important in their relation to physical examinations. The processes and problems governing selection are discussed briefly in the following paragraphs.

The Occupation Factor. From the beginning of Selective Service operations each registrant whose order number was reached was considered for possible deferment for other than physical or mental reasons before he was placed in a class available for physical examination. The order of the deferred classes for which he was considered varied with the changing needs for manpower both in the armed forces and in civilian production. For example, during 1940 and 1941, when no great number of men were needed in the Army, deferments on the grounds of dependency were more important than those for occupation; from 1942 on, as the war progressed, the emphasis gradually shifted to the need for deferring men in essential industry or agricultural pursuits; and by February 1944, the need for men had become so acute that dependency deferments were no longer considered except in cases where it was proved that extreme hardship and privation to dependents would result from induction. The deferment class for registrants who were essential in agriculture was retained as well as that for men considered essential to war production and the national health, safety, or interest. However, the need for younger men in the armed forces had become so great by 1944 that local boards were requested to reconsider carefully all occupational deferments of men under 26 years of age, including those in agriculture and, later in the year, to forward all the young men in the occupationally deferred classes for physical examination. 1/ Some of these registrants were probably found acceptable to the armed forces but their deferments were continued because of the essential nature of their occupation. However, on August 1, 1945, only 4.9 percent of all registrants under 26 years of age were still in occupationally deferred classes.

The Age Factor. The restrictions against occupational and agricultural deferments during the period 1944-1945 were directed primarily toward the procurement of men under 26 years of age whom the armed forces considered necessary for combat duty. Liberal interpretations were made of the requirements governing the deferment of men 26 through 37 years of age during most of 1944, but the adverse turn of events in Europe at the end of the year resulted in authorization of a stricter application of deferment qualifications for the older men, particularly those 26 through 33 years of age. 2/

Men under 26 years of age who had been occupationally deferred without having previous examinations and youths who registered as they became 18 years of age provided the only new sources of manpower available for induction during 1944 and 1945. The first of these groups had previously been depleted by withdrawal of men for induction as their reasons for deferment expired. The second group—70,000 to 75,000 men registering at 18 years of age—was smaller by some 25,000 to 30,000 each month than it would have been had youths not been permitted to enlist voluntarily at age 17.

Limited Service. During the first half of 1944, registrants were inducted for limited service on a quota basis, not exceeding five percent of the net Army call by race in any one month. Under this procedure, men were inducted for limited service from January through June. Beginning in July, however, no local board forwarded registrants for induction after they were classified as acceptable for limited service only, unless instructed to do so by the State Director of Selective Service. 3/ The effect of this change was to further restrict the pool of men who could be made available for induction. From July 1944 until June 1945, the armed forces had classified more than 95,000 men as qualified for limited service only; and when the need for men became acute during the spring of 1945, the War Department again authorized induction of men under 26 years of age in this group who met physical standards slightly lower than those required for general service, but in some respects higher than the minimum standards for limited service. 4/

1/ Local Board Memoranda Nos. 155, January 6, 1944 and May 12, 1944; telegram to all State Directors, February 26, 1944; State Director Advices Nos. 255-D, March 25, 1944; 264, April 3, 1944; 255-E, April 1 and April 15, 1944; 288, January 3, 1945.

2/ Rigid deferment policies for registrants 18-37 years of age, and especially those under 34, were prescribed in Local Board Memorandum No. 115, February 21, 1945, and amended March 24, 1945.

3/ Local Board Memorandum No. 178, June 8, 1944.

4/ Local Board Memoranda Nos. 77-E, May 23, 1945; 77-F, May 26, 1945; and State Director Advice No. 311, June 22, 1945. Men forwarded for examination pursuant to these instructions were recorded as reporting under the provisions of War Department Letter AG-PR I 327.31 (26 May 45).

Reexaminations. Since no Selective Service deferment was considered permanent, registrants who were disqualified under one set of physical standards were subject to reexamination if any of the standards were lowered. Thus, when the psychological tests were revised in June 1944, many registrants rejected for failure to pass the previous tests were sent back to armed forces' induction stations for new preinduction examinations. From 10 to 17 percent of the registrants given preinduction examination during the last five months of 1944 were men who had been previously examined.

The decision of the armed forces to accept men for "military service" over and above those inducted for "general military service" in June 1945 necessitated forwarding many men for reexamination. In the months immediately preceding this decision, only about ten percent of the registrants forwarded for preinduction physical examination had been previously examined. In June, 26 percent of the men reporting for preinduction were sent up for reexamination; in July, 35 percent; and in August, the last month of the war, 39 percent of all the men given preinduction examination had been examined before.

Throughout the entire 20-month period covered by the bulletin, other reexaminations were authorized in the hope of obtaining men for general military service. The regulations governing these are discussed in the next chapter in connection with their effect upon monthly rejection rates.

Summary of Groups Selected for Examination. As a result of the armed forces' requirements and procedures during the period January 1944-August 1945, men selected for physical examination were drawn from two groups. One group included men submitted for the first time. It consisted of youths who registered with Selective Service as they became 18 years of age and registrants with occupational or dependency deferments who were processed for immediate or potential induction. 1/ In the second group were men forwarded for reexamination in the hope that they would be acceptable to the armed forces under changed standards or procedures. The large number of youths who enlisted in the armed forces and were in service at the time they became 18 years of age are not covered by this analysis; nor does it include men in the 18-37 year age group who had volunteered for enlistment at recruiting stations prior to December 1942 when enlistments from this group were discontinued. Registrants and non-registrants commissioned direct from civilian life are likewise not covered. 2/ The rates of rejection of Selective Service registrants are therefore considerably higher than they would have been if these volunteers had been processed through the System and thus added to the number of inductions.

Physically Examined Men as of August 1, 1945.

It should be emphasized that the physical examination experience described in this bulletin represents only that of the final twenty months of hostilities during World War II. The rejection rates and the relative importance of the various causes for rejection during any one period are determined largely by the administrative policies and procedures which prevailed during that period. For example, rigid physical standards, and a ban on induction of men with less than the equivalent of a fourth grade (English) education produced high rejection rates in 1940-1941; lower standards, including induction of some educationally deficient men and some with limited service defects, reduced rates of rejection during 1942-1943; and the scarcity of manpower, occasioned largely by previous enlistments of 17-year old youths, tended to raise the rates during 1944-1945. A comprehensive study of the entire experience of Selective Service would show a rate of rejection as low or lower than those for any of the separate periods, since reexaminations would not be included. Such a study is now in process of preparation.

Although the reexamination of men previously rejected had continued throughout the entire period of Selective Service operations, on August 1, 1945 there still remained some 4,828,000 registrants 18-37 years of age in the rejected classes IV-F, II-A(F), II-B(F) and II-C(F). These men comprised about one-third of all registrants examined for induction, and almost one-third of those examined for induction and for enlistment. The estimated number and percentage who had been rejected for each of thirty broad defect groups are shown in Table 4, Appendix B.

1/ In addition, during a part of the period, both non-registrant volunteers and registrants who had received certain types of discharges from the armed forces were processed for induction if circumstances indicated they were again eligible for service.

2/ A third group of men who received physical examinations during this period consisted of registrants 18-37 years of age who had been deferred because of essential occupation but had left the employment for which they were deferred without first requesting and receiving approval from their local board. Such men were known as "job-jumpers" and during January 1945-June 1945, 7,771 of these men were inducted for general military service. Their physical examinations are not included in this bulletin.

REJECTION RATES

From January 1944 through August 1945 , 44 percent of all the registrants who were physically examined by the armed forces were rejected for general service either upon preinduction physical examination or upon the time they reported for induction (Table 1). The rate of rejection for white registrants was 41.3 percent, that for Negroes, 62.7 percent. 1/

In view of the increasing number of registrants under 26 years of age who were physically examined , a rate of 44 percent was unexpectedly high. Previous Selective Service experience had shown that rejections tended to decrease as age decreased. Several factors, however , counterbalanced the reduction in rates which would normally have occurred as the average age of the examined men was lowered.

Table 1. Rejection Rates per 100 Registrants Physically Examined by the Armed Forces

January 1944-August 1945

Time Period	Rate per 100 Examined		
	All Races	White 1/	Negro
January 1944-August 1945	44.0	41.3	62.7
January 1944-December 1944	43.4	40.3	64.0
January 1945-August 1945	45.0	43.2	59.8

1/ Includes all races other than Negro.

Factors Involved. In the first place , as Selective Service was required to depend more on registrants under 26 years of age to meet monthly calls it became evident that from the ranks of the men registering as 18 year olds there had been lost many of the most physically fit through voluntary enlistment at age 17. The depletion in this group was sufficiently serious that among the 18 year old registrants the rejection rates in this period approached 40 percent. Also many of the younger men among occupationally deferred registrants of the 18-25 age group had been withdrawn previously as their qualification for deferment expired. Most of this group now submitted for reexamination had been previously rejected. 2/

These factors , in addition to the existence of physical and mental standards for military service which are higher than those necessary for useful civilian life , resulted in rejection rates which were not necessarily indexes to the physical fitness of the total population group. Nevertheless , the fact that so large a percentage of the young men examined could not meet the military standard indicates a real and definite need for preventive and corrective measures to improve the general health and physical fitness of the Nation.

The increase in rate during 1945 as compared to that for 1944 was slight , but it reflected the growing scarcity of manpower and the higher rejections attendant upon the reexamination of white registrants who had previously been rejected or classified as capable of performing limited service duty only. The Negro rates actually decreased during the last few months of the war. The greater proportion of their reexaminations had occurred during the last three months of 1944 and the first two months of 1945.

Rejection Rates By Month.

The monthly rejection rates during 1944 and 1945 reflect , to a greater degree than in any previous period , the changes in the policies of the armed forces and in the application of physical and mental standards. This was true because the changes of this period were more closely related than before to obtaining men for physical examination and induction. There were no large pools of eligible white registrants and as groups were made available under special regulations of Selective Service they were immediately processed for induction to aid in meeting monthly calls.

The rates of rejection for all races and those for each major type of cause for rejection are shown by month in Table 2. 4/ These rates decreased from a peak of 47.1 in February 1944, the first month in which the preinduction examination was in full operation , to a low point of 37.3 percent of the registrants who were examined in May. The decrease resulted primarily from the forwarding of large numbers of men for preinduction examination, particularly those under 26 years of age.

1/ During this period , the local boards rejected only those registrants with substantiated claims of defects which were manifestly disqualifying for any form of military service , and their rejections are estimated at one to two percent of all men who were ordered for preinduction physical examination.

2/ During 1944 and 1945 , men who were physically examined were 18 through 37 years of age, with increasing emphasis laid upon the need for men under 26 years of age. In 1942 and 1943 , however , the age limits had been 18 through 44 years.

3/ The composition of the different groups physically examined by the armed forces during each of the months August 1944-August 1945 is shown in Tables 5 and 6, Appendix C.

4/ The method used in computing combined preinduction and induction rejection rates is described in Appendix C.

Table 2. Rejection Rates for Physical and Mental Defects Per 100 Registrants Given Preinduction and Induction Examinations, by Month

All Races
January 1944-August 1945

Month and Year of Examination	Rejections per 100 Examined			
	Total	Physical Defects 1/	Mental Defects	
			Mental Deficiency 2/	Mental Disease
1944				
January	46.5	26.2	6.5	13.8
February	47.1	28.1	6.0	13.0
March	43.2	26.2	5.5	11.5
April	37.9	22.6	5.1	10.2
May	37.3	21.4	6.2	9.7
June	39.6	19.5	10.8	9.3
July	43.4	21.4	11.1	10.9
August	45.1	23.1	10.0	12.0
September	47.8	25.0	9.0	13.8
October	51.5	25.1	9.6	16.8
November	53.2	26.3	8.1	18.8
December	50.0	25.3	8.0	16.7
1945				
January	43.8	24.0	7.0	12.8
February	42.3	23.2	7.2	11.9
March	40.9	23.6	6.2	11.1
April	41.8	25.6	6.0	10.2
May	42.2	26.0	6.0	10.2
June	49.4	28.7	7.7	13.0
July	54.1	30.9	8.8	14.4
August	58.6	34.1	8.4	16.1

1/ Includes registrants found acceptable for limited service but not inducted; these were rejected for administrative reasons. A small proportion of other administrative rejections also appears in this group, but they amounted to less than 1 percent of the total rejections.

2/ Includes those failing to meet minimum intelligence standards as well as morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.

An increase in rejection rates which began in June 1944 and reached 53.2 percent of all examined in November of that year, had three main factors as a basis. The initial increases in June and July occurred with the adoption by the armed forces of the revised mental test, whose purpose was to better determine which men with borderline intelligence should be accepted and which should be rejected. The higher passing score required for the basic test, however, created more borderline cases upon which decisions had to be made. Also, local boards forwarded for reexamination many registrants who they hoped would qualify under the new psychological testing procedure and the rejection rate for this group ran very high. 1/

A second reason for the increased rates was the fact that, while heavy preinduction examinations during the earlier months of 1944 had created a pool of acceptable men, many of these men were not forwarded for induction within ninety days and so had to undergo a complete reexamination. During the time between preinduction examination and reporting for induction, some of the physical and mental standards had been changed and many of the previously acceptable men could no longer qualify for induction. 2/ In addition, a relatively small proportion of the registrants had incurred injuries or contracted or developed diseases which rendered them unfit for military service.

The third factor which contributed to the higher rejection rates from August through November 1944 was the increasingly strict interpretation of the physical and mental standards as the armed forces required fewer replacements than they had anticipated after the invasion of Europe. The monthly calls upon Selective Service were for fewer men, and so more time was afforded for each examination. This was immediately reflected in higher rejection rates, particularly those for psychiatric defects. The rapid rise in total rates to more than 50 percent in the fall of 1944 became a matter of such concern that the problem was given special attention by the War and the Navy Departments. The lower rejection rates during

1/ The reexamination of registrants previously rejected solely because of educational deficiency or failure to pass the psychological tests was authorized in Local Board Memorandum 77-B, July 27, 1944.

2/ A revised edition of the War Department MR 1-9, Standards of Physical Examination During Mobilization, was issued on April 19, 1944. Eye standards and those relating to other defects which did not involve acceptance of large numbers of registrants were revised by Changes No. 2, MR 1-9, September 8, 1944.

the next few months were due both to more liberal interpretation of standards and to the more urgent need for manpower in the armed forces after the disastrous "Battle of the Bulge" in December of that year. In March 1945, the rejection rate was 40.9 as compared to 50.0 percent in the previous December in spite of the fact that men 26 through 33 years of age had again been designated by the armed forces as acceptable and a number of them had been physically examined or reexamined.

An increase in rejection rates began with 42 percent in April 1945 and reached 59 percent in August. The greatest single contributing factor was the acute scarcity of manpower which made necessary the reexamination of men who might qualify for military service under standards lower than those required for general service.

Physical Defects. The fluctuations in rejection rates for physical defects did not follow closely those for all defects. The decrease from 28.1 percent in February 1944 to 21.4 percent in May corresponded somewhat to the decrease in the total rate, but the rise in monthly rates during the latter half of 1944 was reflected less in physical than in mental causes for rejection. The rates for physical defects in this period reached a peak of 26.3 percent in November, decreased to 23.2 percent in February 1945, and rose steadily thereafter to a high point of 34.1 percent of the registrants examined during August. The February-August increase in rates for physical defects resulted primarily from reexamination of men over 26 years of age and those who were selected from the former limited service group for possible induction under the special standards prescribed for less than general service, or "military service." Selection of men under less than general service standards was made largely from those who had been classified as acceptable for limited service because of physical rather than mental defects. 1/

Mental Defects. The rates of rejection for mental defects closely paralleled the total rejection rates except during the first five months of 1945, when the physical rejections contributed most to the rejection picture. In May 1944, the mental defect rate (mental deficiency and mental disease combined) was 15.9; in June it increased to 20.1 and in November had reached a peak of 26.9 rejections per 100 registrants examined. There was a gradual decrease to 16.2 percent in May 1945, but the rate increased in June and was 24.5 (representing the rejection of almost one-fourth of all examined men because of mental defects) during the final month of the war.

Mental deficiency rates were characterised chiefly by marked upward changes in June of each year. The rise from 6.2 percent in May 1944 to 10.8 in June followed the use of the new mental tests, with the higher basic passing score and the reexamination of men rejected for failure to pass the previous tests. During July 1944, the mental deficiency rate was 11.1, and from that point decreased to 6.0 by May 1945, when it rose again, reaching 8.4 percent in August as the War Department began carrying out plans to discontinue its special training units for illiterates.

Mental disease rejections contributed most to the total rates during the fall of 1944, when they paralleled the overall rates. The probable cause for this, as discussed in a preceding paragraph, was the fact that as monthly calls decreased because of need for fewer replacements, more time was afforded for psychiatric examinations. The rate of 9.3 in June 1944 had more than doubled in November (18.8). A psychological factor which may also have had some weight in increasing these rates was the general feeling on the part of both civilian and military personnel that the end of the European phase of the war was near. The realization that this was not true, coupled with War Department instructions for more liberal interpretation of standards, resulted in decreased rejection rates for mental disease to 10.2 per 100 examined in May 1945. This was the month of Germany's surrender. In June the total rejection rate had increased by 17 percent, while the mental disease rate was 13.0, an increase of 28 percent over that for May. By August 1945 the total rate had increased 39 percent over that for May and the mental disease rate was 58 percent higher.

White Rejection Rates. The rejection rates for white and for Negro registrants, shown in Tables 3 and 4, have been reduced to graphical representation in Figure 1. For white registrants, the trend in rejections from January 1944 through August 1945 was similar to that for all registrants. The fact that white registrants comprised almost 90 percent of all persons examined is responsible for the small difference between white rates and those for all races.

The white rejection rates rose sharply in three distinct peaks with each peak and each trough exceeding the previous one. Physical defects contributed most to the first and the third and while they rose, they were not the primary contributing factor to the second peak. Mental disease rejections rose to a record high in November 1944 and were the greatest single factor which contributed to the high total rejection for that month.

Mental deficiency rejections fluctuated less than those of the other major defect groups. They did show an appreciable rise, however, after the introduction of the new testing procedure and after many

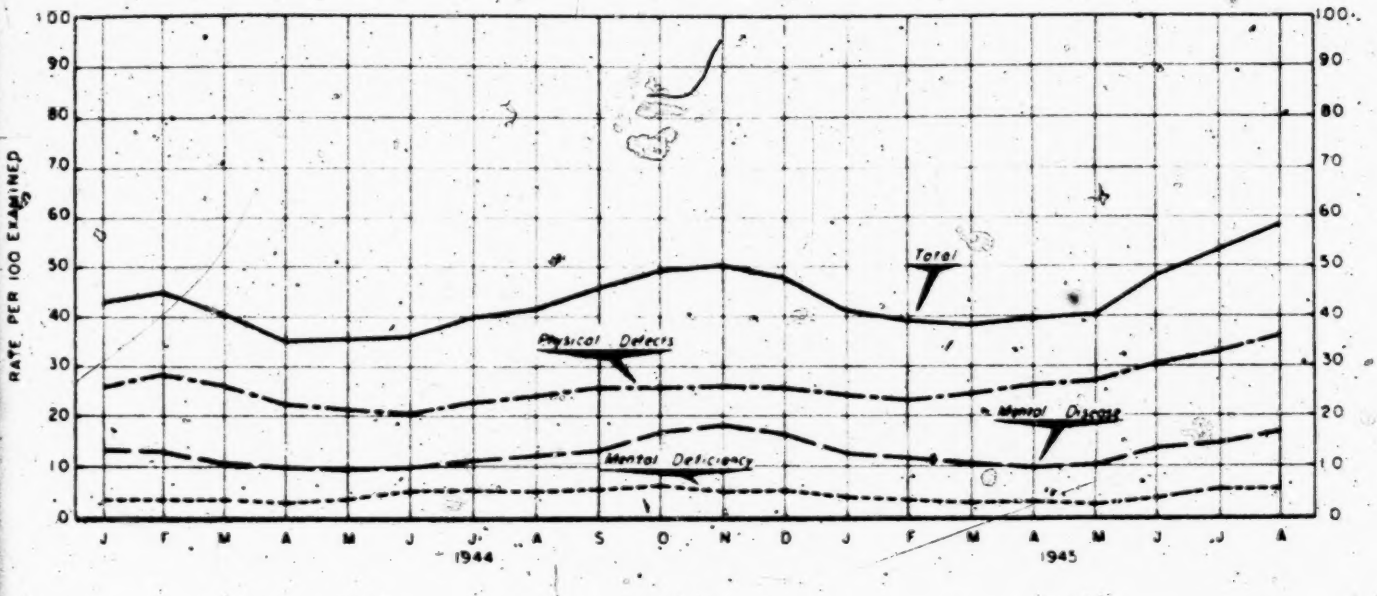
1/ Administrative rejections are also included in Tables 2, 3, and 4 in the column of rejection rates for physical defects, since men designated as acceptable for limited service were given administrative rejections. These limited service rejections comprised almost the entire proportion of rejections for administrative reasons. Less than one percent were moral and other nonmedical rejections.

FIGURE 1

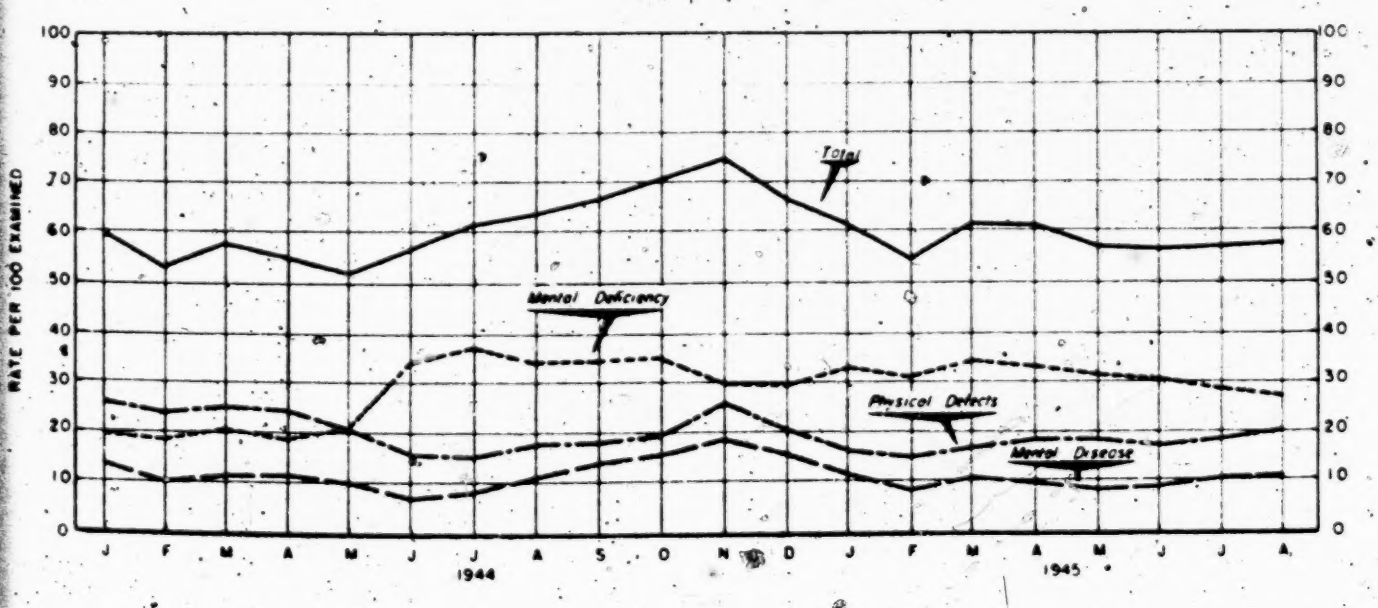
REJECTION RATES FOR MAJOR DEFECT GROUPS BY MONTH

JANUARY 1944 - AUGUST 1945

WHITE



NEGRO



registrants under 26 years of age were submitted for reexamination. This defect group ... least to the total rejection rate in each month from January 1944 through August 1945.

Table ... Rejection Rates for Physical and Mental Defects Per 100 White Registrants Given Pre-Induction and Induction Examinations, by Month 1/

January 1944-August 1945

Month and Year of Examination	Rejections per 100 Examined			
	Total	Physical Defects 2/	Mental Defects	
			Mental 3/ Deficiency	Mental Disease
1944				
January	43.5	26.2	3.5	13.8
February	45.6	28.6	3.6	13.4
March	41.3	26.4	3.5	11.4
April	35.6	22.5	3.0	10.1
May	35.0	21.6	3.8	9.6
June	36.2	20.9	5.2	10.1
July	40.1	23.0	5.4	11.7
August	41.8	24.3	5.3	12.2
September	45.6	25.9	5.8	13.9
October	49.4	25.8	6.6	17.0
November	50.8	26.3	5.7	18.8
December	48.1	25.8	5.6	16.7
1945				
January	41.9	24.6	4.3	13.0
February	39.6	23.8	3.8	12.0
March	38.6	24.4	3.1	11.1
April	39.9	26.4	3.2	10.3
May	40.5	27.1	2.9	10.5
June	48.4	30.7	4.0	13.7
July	53.8	33.1	5.5	15.2
August	58.7	36.3	5.4	17.0

1/ Includes all races other than Negro.

2/ Includes registrants found acceptable for limited service but not inducted; these were rejected for administrative reasons. A small proportion of other administrative reasons also appears in this group, but they amounted to less than 1 percent of the total rejections.

3/ Includes those failing to meet minimum intelligence standards as well as morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.

Negro Rates. Negro rejection rates during the period January 1944-August 1945 did not follow any simple graphical curve. Rejections for Negroes were characterised by an extremely high peak in November 1944 at which time the rate reached 74.9 percent of the men examined. Lower peaks occurred in January 1944, March 1944, and March 1945, but these were insignificant in comparison to the major rise during the fall of 1944. Rates for mental disease and for physical defects caused the rising trend observed from May through November 1944, but mental deficiency contributed the most to the total rejection rate in all months after May 1944. Physical defects were the most important of the three groups prior to that time.

Negro rejections for mental deficiency reached a high point of 37.4 per 100 registrants examined in July 1944, but showed a gradual decrease from that time until August 1945 when they were responsible for 27.1 rejections per 100 examinations. Negro rates for physical defects were at their highest point during January 1944 and were lowest in February 1945 (15.6 per 100 registrants examined). The 1944 rates for physical defects decreased to a low point in June and July 1944 and then increased through November 1944. They next decreased through February and then started a very gradual increase until the end of the period of this study. Rejections for mental disease fluctuated very little except for the tremendous increase recorded from June 1944 through November 1944 and a similar rapid decrease from November 1944 through February 1945. The highest rate for mental disease occurred in November 1944 (18.8 per 100 examined); the average for the remainder of the period was approximately 10 percent of those examined.

White and Negro Rates Compared. A comparison of the rejection rates for the two racial groups shows that while more than one-half of the Negroes examined in each month were disqualified for general military service, this was true of white registrants during only three months of the 20-month period. The rates of rejection for physical defects and those for mental disease were somewhat similar for the races; but the mental deficiency rates ranged from four to fifteen times higher among Negroes than among white registrants. The fluctuations from month to month in rejection rates for each race did not follow the same general trends, since they were affected by varying factors governing selection of the men for examination.

Table 4. Rejection Rates for Physical and Mental Defects Per 100 Negro Registrants Given Preinduction and Induction Examinations, by Month

January 1944-August 1945

Month and Year of Examination	Rejections per 100 Examined			
	Total	Physical Defects 1/	Mental Defects	
			Mental Deficiency 2/	Mental Disease
1944				
January	59.5	26.1	19.9	13.5
February	53.3	24.1	18.9	10.3
March	57.8	25.4	20.9	11.5
April	55.4	24.7	19.1	11.6
May	52.4	21.1	21.0	10.3
June	57.3	15.9	34.1	7.3
July	61.5	15.8	37.4	8.3
August	63.5	17.8	34.2	11.5
September	66.9	18.9	34.3	13.7
October	70.5	19.7	35.8	15.5
November	74.9	26.0	30.1	18.8
December	66.8	21.4	29.8	15.6
1945				
January	61.3	16.6	33.1	11.6
February	54.9	15.0	31.2	8.7
March	61.8	16.9	34.0	10.9
April	61.4	18.4	33.3	9.7
May	57.8	18.0	31.7	8.1
June	56.7	17.1	30.9	8.7
July	57.1	18.3	28.6	10.2
August	57.8	20.2	27.1	10.5

1/ Includes registrants found acceptable for limited service but not inducted; these were rejected for administrative reasons. A small proportion of rejections for other administrative reasons also appears in this group, but they amounted to less than 1 percent of all rejections.

2/ Includes those failing to meet minimum intelligence standards as well as morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.

Preinduction and Induction Rejection Rates

The rates of rejection among registrants who were given preinduction examination and those who reported for induction are shown, by month and race in Tables 1 and 2, Appendix C. The summary below presents the results of each type of examination from February 1944, the first month in which the preinduction procedure was followed fully, through August 1945.

Table 5. Results of Preinduction and Induction Examination
February 1944-August 1945

Race	Registrants Reporting For					
	Preinduction Examination			Induction		
	Number Examined	Number Rejected 1/	Rate 1/	Number Examined	Number Rejected	Rate 1/
All Races	5,469,200	2,177,000	39.8	2,340,900	163,000	7.0
White 2/	4,844,100	1,850,300	38.2	2,096,200	125,700	6.0
Negro	625,100	326,700	52.3	244,700	37,300	15.2

1/ Rate per 100 examined. Preinduction rates include registrants acceptable for limited service.

2/ Includes all races other than Negro.

As Table 5 shows, nearly 5,500,000 preinduction examinations were given during the 19 months. Nearly 2,200,000 of these resulted in rejection for general or "less than general" military service--a rate of approximately 40 rejections in each 100 examinations. 1/ Corresponding figures for white registrants were 4,850,000 examinations with 1,850,000 rejections (38.2 percent); for Negro registrants, 625,000 examinations and 327,000 rejections (52.3 percent).

1/ An unknown percentage of registrants who were given second preinduction examinations under the provisions of Local Board Memorandum No. 195, December 8, 1944 are included in these figures.

Of the 2,341,000 registrants who reported for induction during February 1944 through August 1945, a total of 163,000, or 7.0 percent, were rejected. The white rejection rate, 6.2 of each 100 registrants examined, was less than one-half that of the Negro registrants (15.2).

The preinduction figures shown in Table 5 represent a summary of Selective Service experience in procuring men for the armed forces, rather than an accurate index of the acceptability of individual registrants. This is true because the data include reexaminations of some registrants for whom both first and second examinations occurred within the nineteen months' period. The rates of rejection among registrants given preinduction examination who had not been previously examined, shown in Table 6, provide a truer index of the individual's acceptability under the physical and mental standards and the administrative policies which prevailed during the final year of hostilities. 1/

Table 6. Preinduction Rejection Rates and Percent Distribution of Examined Registrants, by Race and Examination Status

August 1944-August 1945

Race	Rejection Rate per 100			Percent of Total Examined		
	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined
All races	40.6	37.6	56.8	100.0	84.2	15.8
White 1/	39.3	36.1	56.0	100.0	84.1	15.9
Negro	53.4	51.3	64.8	100.0	85.0	15.0

1/ Includes all races other than Negro.

The rejection rate for registrants appearing for first examination (i.e., 18 year old registrants and those who had been deferred in industry or in agriculture without having been physically examined) was 37.6. Among reexamined registrants it was 56.8 percent. Nevertheless, the high rate of rejection in the latter group added only three percentage points to the total rate (40.6) since the reexamined men were a relatively small group - 15.8 percent of those examined.

Among white registrants examined for the first time the rate was 36.1 and among Negroes, [illegible] per 100 examined. The reexamination rates were 56.0 and 64.8 respectively, but in each race the percentage reexamined was low, so that the total rates were only slightly higher than those for registrants not previously examined.

Rejection Rates for Major Defect Groups

Rejection rates for each of the thirty broad groups of defects which were principal causes for rejection by the armed forces during 1944 and 1945 are shown in Table 7. The defect rates for 1944 are estimated by applying sample data on the percentages of rejection for these defects to the total rejection rates for the period. The defects of men found acceptable for limited service only are included in the rejection rates for the specific defect groups. The data for 1945 are based on a total count of rejections made by the War Department. The limited service defects are not distributed in this portion of the table, since these registrants were counted as administrative rejections and are included in the "Non-medical" category. The ten leading causes for rejection during 1944 are shown, by race, in Figure 2, and discussed in a later chapter on principal causes for rejection.

This difference in the method of counting limited service rejections affects any comparison of the rejection rates for defect groups which contain defects acceptable for limited service — notably certain defects of the eyes, ears, feet, and musculoskeletal system. Normally, these rates should be lower in the 1945 data than for 1944. Actually, they were the same or higher for these groups, indicating that many of the registrants with limited service defects who were selected and sent for reexamination during June-August 1945 were rejected outright instead of again being designated as acceptable for limited service. Thus, 19.6 per 1,000 registrants examined by the armed forces in 1944 were either rejected outright because of ear defects or were designated as acceptable for limited service, whereas in 1945, 23.9 per 1,000 were rejected outright because of these defects.

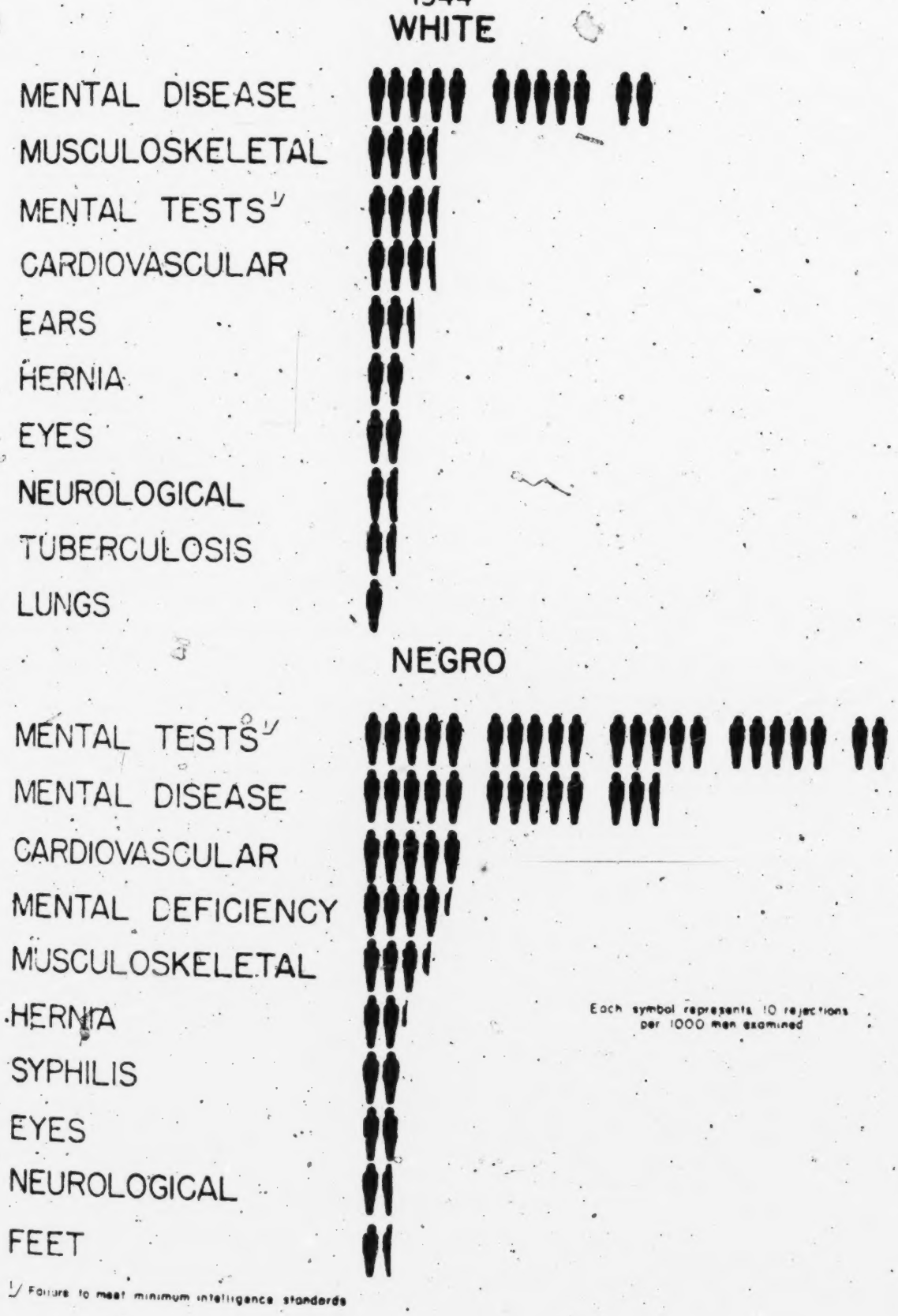
Although differences in rates for other possible limited service defects appear slight, unless the fact that limited service defects are not included in the 1945 data is considered, they indicate the reexamination and rejection of registrants with defects of the teeth, lungs, musculoskeletal system, feet, and skin, and those with endocrine disorders, neoplasms, weight deviation and those in the miscellaneous group of medical defects. For other groups, the slightly lower rates in 1945 may have been due to possible salvage of some men formerly rejected for tuberculosis, cardiovascular defects, hernia, and neurological disorders. The two defect groups which are also invariably cause for disqualification for any type of service - i.e., mental deficiency and mental disease - had almost the same rates of rejection during each year, the rate for mental deficiency being 11 and those for mental disease 120 per 1,000 examined.

1/ Complete data by examination status (i.e., whether or not the registrants had been previously examined) are not available for February-July 1944.

FIGURE 2

LEADING CAUSES FOR REJECTION BY THE ARMED FORCES

1944



1/ Failure to meet minimum intelligence standards

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Table 7. Rejection Rates Per 1,000 Registrants Physically Examined by the Armed Forces, According to Principal Cause for Rejection 1/

January 1944-August 1945

Principal Cause for Rejection	January-December 1944 2/			January-August 1945 3/		
	All Races	White 4/	Negro	All Races	White 4/	Negro
Total	434.6	402.8	640.1	449.6	431.9	598.3
Eyes	17.8	17.7	17.9	18.5	19..	10.8
Ears	19.6	21.8	3.8	23.9	2..3	3.6
Nose and sinus	3.0	3.2	1.3	3.6	3.9	1.2
Throat	0.4	0.4	*	0.5	0.4	0.6
Teeth	0.4	0.8	*	0.9	0.9	0.6
Mouth and gums	0.4	0.4	*	0.5	0.4	0.6
Tuberculosis	14.0	14.5	11.5	10.3	10.4	7.2
Lungs and pleura	9.6	9.7	8.3	11.2	11.7	6.6
Cardiovascular	35.7	33.4	48.1	32.4	32.8	29.9
Varicose veins	5.2	5.2	4.5	4.9	5.2	3.0
Abdominal viscera	8.3	9.3	2.6	9.0	9.5	1.8
Kidney and urinary	7.0	7.3	5.1	7.2	7.8	3.6
Blood and blood-forming	0.4	0.4	*	0.4	0.4	*
Hernia	20.4	20.1	21.8	15.3	16.0	12.5
Hemorrhoids	2.2	2.4	1.9	2.7	3.0	1.8
Genitalia	4.3	4.0	5.1	4.0	4.3	3.6
Syphilis	4.3	2.0	18.6	2.7	1.3	11.4
Gonorrhea and other venereal	0.4	*	1.9	0.9	0.9	1.8
Neoplasms	4.3	4.4	1.9	5.8	6.5	1.8
Musculoskeletal	35.2	35.5	32.0	41.4	43.6	22.1
Feet	8.7	7.7	16.0	12.6	12.1	16.1
Endocrine	3.5	3.6	1.3	4.9	5.6	1.2
Mental disease	120.4	119.3	126.8	120.0	123.1	99.3
Mental deficiency 5/	10.9	6.0	42.2	10.8	5.6	52.1
Minimum intelligence tests 6/	57.8	33.9	219.6	58.5	32.4	269.8
Neurological	16.1	15.8	16.6	10.3	10.8	7.8
Skin	3.9	4.0	3.8	5.4	5.6	3.6
Infectious and parasitic	0.4	0.8	1.3	0.9	0.9	1.2
Acute conditions	2.6	2.8	2.6	3.6	3.5	2.4
Underweight and overweight	5.2	5.6	3.2	7.6	8.2	3.0
Other medical	3.9	4.0	3.8	5.4	5.6	3.0
Nonmedical	8.3	6.8	16.6	13.5	13.8	11.3

* Less than 0.05 per thousand.

1/ Data for 1944 estimated by applying sample distribution of causes for rejection to total rejection rates; 1945 data based on reports from the armed forces.

2/ Includes defects of registrants acceptable for limited service.

3/ Rates for specific defects do not include those of registrants acceptable for limited service. These registrants are included in the "nonmedical" category.

4/ Includes all races other than Negro.

5/ Includes morons, imbeciles, idiots and mental deficiency not specified as to type or degree.

6/ Failure to meet minimum intelligence standards.

During the year 1944, 4.1 percent of all rejected registrants were certified by local boards as unfit for any type of military service. The remaining 95.9 percent were rejected by armed forces' examiners at induction stations. Table 8 shows the percentage of rejections for each defect at local boards, induction stations (including both preinduction and induction examinations) and the two combined. The ten defect groups which accounted for 80 percent of all rejections during 1944 are summarized and briefly discussed below. The influence of local board rejections is apparent in the differences in the order of their importance as compared to the defects listed in Figure 2 as leading causes for rejection by the armed forces.

All Races	White	Negro
Mental disease	Mental disease	Minimum intelligence tests
Minimum intelligence tests	Musculoskeletal	Mental disease
Musculoskeletal	Cardiovascular	Cardiovascular
Cardiovascular	Minimum intelligence tests	Mental deficiency
Hernia	Ears	Musculoskeletal
Ears	Hernia	Hernia
Neurological	Neurological	Syphilis
Eyes	Eyes	Eyes
Tuberculosis	Tuberculosis	Neurological
Mental deficiency	Lungs and pleura	Feet

Mental disease. This group of defects was the leading cause for rejection among all races and among the white registrants, but it was second in importance among Negroes. Mental disease accounted for more than one-fourth (26.8 percent) of all the rejections during 1944; for 28.5 percent of white and 19.5 percent of Negro rejections. Detailed data covering a portion of the year indicate that the principal diagnoses were, in order: psychoneurosis, emotional instability, and asocial and amoral trends. 1/

Minimum intelligence tests. This category consists of registrants who failed to pass the series of psychological tests given by the armed forces. A Qualification Test was given to all registrants who were not high-school graduates. Those whose score on this test was low or who failed completely were given additional tests of a type determined by their ability or inability to speak, read, or write English. Registrants who failed these tests were considered incapable of absorbing military training and were rejected as failing to meet minimum intelligence standards, even though they might be physically qualified for general military service.

Failure to pass the minimum intelligence tests was cause for 12.8 percent of all the 1944 rejections, placing this defect second in order of relative importance. Among white registrants it was in fourth place, accounting for 8.0 percent of white rejections. It was the leading cause for Negro rejections, with 33.5 percent having the notation "Failure to meet minimum intelligence standards" as the principal reason for rejection.

Musculoskeletal defects. Defects of the bones, muscles, and joints were third among causes for rejection. They were recorded as the principal cause for 8.8 percent of all rejections; they were second in relative importance among white registrants, accounting for 9.6 percent of the rejections, and fifth in order among Negroes, causing only 5.4 percent of Negro rejections. The lower percentage of these rejections among Negroes as compared to whites, however, may arise from the tendency to record failure to pass the mental tests the most important cause for rejection in the Negro race, even though some of the registrants rejected for mental deficiency also had disqualifying musculoskeletal defects.

Cardiovascular defects. Defects of the heart and blood vessels were in fourth place, as the principal cause of 8.0 percent of all rejections during 1944. They were third in relative importance as cause for both white and Negro rejections. Hypertension was the most frequent diagnosis, with valvular heart disease not specified as to origin next in order of importance. Heart disease specified as rheumatic accounted for less than 10 percent of the rejections in this defect group.

Hernia. This defect, fifth in order of importance among all races and sixth for white and for Negro registrants, was the basis for 4.9 percent of all rejections, 5.2 percent of those for white registrants and 3.5 percent for Negroes. Inguinal hernias were responsible for approximately 85 percent of the hernia rejections with abdominal hernias and those unspecified as to type accounting for 15 percent of the rejections in this group of defects.

Ear defects. Registrants rejected principally because of ear defects formed 4.4 percent of all rejected registrants during 1944. This defect group, sixth in relative importance as cause for rejection, accounted for 5.2 percent of white and for only 0.6 percent of the Negro rejections. They did not appear

1/ Rowntree, L. G., K. H. McGill, and L. P. Hellman. Mental and Personality Disorders in Selective Service Registrants, J. A. M. A., Vol. 128 August 11, 1945, pp. 1084-87.

Table 8. Percent Distribution of Principal Causes for Rejection by Place of Rejection and Race 1/
January 1944-December 1944

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station 2/		
	Percent of Total Rejections								
	All Races	White 3/	Negro	All Races	White 3/	Negro	All Races	White 3/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.0	4.3	2.8	2.5	2.4	3.2	4.1	4.4	2.8
Ears	4.4	5.2	0.6	2.1	2.2	1.2	4.9	5.4	0.6
Nose and sinus	0.7	0.8	0.2	0.2	0.3	*	0.7	0.8	0.2
Throat	0.1	0.1	*	0.1	0.1	0.1	0.1	0.1	*
Teeth	0.1	0.2	*	0.1	0.1	0.1	0.1	0.2	*
Mouth and gums	0.1	0.1	0.1	0.2	0.3	0.1	0.1	0.1	*
Tuberculosis	3.4	3.7	1.9	6.7	6.7	7.2	3.2	3.6	1.8
Lungs and pleura	2.2	2.4	1.3	2.9	3.0	1.9	2.2	2.4	1.3
Cardiovascular	8.0	8.1	7.5	4.2	4.4	2.7	8.2	8.3	7.5
Varicose veins	1.2	1.3	0.7	1.0	1.1	0.5	1.2	1.3	0.7
Abdominal viscera	2.0	2.4	0.4	2.9	3.1	0.9	1.9	2.3	0.4
Kidney and urinary	1.6	1.8	0.8	1.0	1.0	0.4	1.6	1.8	0.8
Blood and blood-forming	0.1	0.1	*	0.3	0.3	0.3	0.1	0.1	*
Hernia	4.9	5.2	3.5	10.2	10.0	11.1	4.7	5.0	3.4
Hemorrhoids	0.5	0.5	0.3	0.5	0.5	0.6	0.5	0.6	0.3
Genitalia	1.0	1.1	0.8	0.6	0.6	0.8	1.0	1.0	0.8
Syphilis	1.0	0.6	3.1	1.8	0.6	11.6	1.0	0.5	2.9
Gonorrhea and other venereal	0.1	*	0.3	0.1	*	0.4	0.1	*	0.3
Neoplasms	0.9	1.1	0.3	0.9	0.9	0.1	1.0	1.1	0.3
Musculoskeletal	8.8	9.6	5.4	26.1	26.4	23.9	8.1	8.8	5.0
Feet	1.9	1.8	2.5	0.3	0.3	0.3	2.0	1.9	2.5
Endocrine	0.9	1.0	0.2	2.4	2.6	0.3	0.8	0.9	0.2
Mental disease	26.8	28.5	19.5	6.6	6.5	7.7	27.7	29.6	19.8
Mental deficiency 4/	2.6	1.7	6.6	5.5	5.5	5.3	2.5	1.5	6.6
Minimum intelligence tests 5/	12.8	8.0	33.5	0.4	0.4	1.1	13.3	8.4	34.3
Neurological	4.1	4.4	2.9	15.1	15.5	12.3	3.7	3.9	2.6
Skin	0.9	1.0	0.6	0.9	0.9	0.9	0.9	1.0	0.6
Infectious and parasitic	0.2	0.2	0.1	0.1	0.1	-	0.1	0.2	0.2
Acute conditions	0.7	0.7	0.4	1.5	1.5	1.7	0.6	0.7	0.4
Underweight and overweight	1.2	1.4	0.5	0.5	0.5	0.4	1.2	1.4	0.5
Other medical	1.0	1.1	0.6	2.3	2.2	2.9	0.9	1.0	0.6
Nonmedical	1.8	1.6	2.6	-	-	-	1.9	1.7	2.6

* Less than 0.05 percent.
1/ Based on a 20-percent sample of DSS Forms 221, Reports of Physical Examination and Induction for registrants inducted or rejected during 1944.
2/ Includes rejections on preinduction and induction examinations.
3/ Includes all races other than Negro.
4/ Includes morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.
5/ Registrants rejected for failure to meet the minimum intelligence standards.

among the ten leading causes for rejection of Negroes. Indications are that otitis media and defects of the ear drums were by far the most frequent causes for rejection. Unilateral deafness was more frequently mentioned as principal cause for rejection than was defective hearing.

Neurological Disorders.. This defect group, which consists chiefly of residuals of poliomyelitis, was responsible for 4.1 percent of all rejections; for 4.4 percent of those among white and 2.7 percent among Negro registrants during 1944. Epilepsy was also an important diagnosis; it was more important as cause for white than for Negro rejections.

Eye Defects. Four percent of all rejections during the year resulted from eye defects, which were the principal cause for 4.3 percent of the white and 2.8 percent of the Negro rejection. They were eighth in order of importance as cause for white and ninth for Negro rejections. Detailed data indicate that defective vision was most frequently noted; it accounted for more than one-half of the white rejections for eye defects, but only a little more than one-quarter of the Negro rejections in this defect group were made because of defective vision. On the other hand, eye diseases and blindness, both unilateral and bilateral, were much more important as cause for Negro than for white rejections.

Tuberculosis. Tuberculosis caused 3.4 percent of the rejections during 1944. It was almost twice as important among white as among Negro registrants who were rejected, accounting for 3.7 percent of the white and 1.9 percent of the rejections of Negroes, among whom it was in eleventh place as cause for rejection. Active pulmonary tuberculosis was the most frequent diagnosis for each race, while the arrested type was next in relative importance.

Mental deficiency. Although tenth in importance as cause for rejection among all races, mental deficiency did not appear among the ten leading causes for rejection of white registrants. It was fourth in relative importance among Negro rejections, however. This category consisted largely of registrants described as morons, imbeciles, or idiots, those whose mental age or intelligence quotient was very low, and cases diagnosed simply as mental deficiency, with the type or degree not specified.

Syphylis. Seventh in order as cause for Negro rejections during 1944, syphilis caused only 1.0 percent of all rejections, and 0.6 percent of those for white registrants.

Lungs and pleura. Defects of the lungs and pleura were in tenth place as cause for rejection of white registrants but did not appear among the first ten causes for Negro rejections. These defects were the principal cause for 2.4 percent of the rejections among white registrants and for only 1.3 percent of those among Negroes. Asthma was the most frequent diagnosis recorded in this defect group.

Causes for Rejection at Local Boards During 1944.

The preinduction plan of physical examination adopted in 1944 brought a radical change in the function of local board examination. Beginning in February, no registrant appeared before a local board physician unless he requested an examination because he knew or believed he had a manifestly disqualifying defect. Any local board could, however, certify as rejected any registrant for whom there was substantiated evidence of a defect which manifestly disqualified him for military service.

As a result of this change in local board procedures, the number of local board rejections materially decreased, and the defects for which registrants were rejected at the local board level were of a more serious and handicapping nature than when each registrant considered for induction had been examined by a local board physician. 1/

The effect of the preinduction plan on the local board examinations is shown by the fact that during February through December 1944, only 4.1 percent of all rejections occurred at local boards. This is in contrast to rejection by local board physicians of nearly one-half of all registrants considered for induction during the peacetime Selective Service period in 1940-1941; and to rejection of about ten percent of those considered during 1942 and 1943.

The percentage of rejected white registrants whose rejections occurred at local boards was more than twice as high as that of Negro registrants—4.5 percent as compared to only 2.1 percent. The smaller percentage of Negro rejections may be explained by either unawareness on the part of many that they could request local board examination or to lack of realization of the severity of their defects.

Four of the five defects which led as causes for white rejection were the same as those for Negroes. Tuberculosis appeared among the five most important causes for white rejection but was not in this listing for Negroes, while syphilis was relatively important among the Negro registrants and negligible among white registrants. These defects are discussed in the following paragraphs, in the order of their importance.

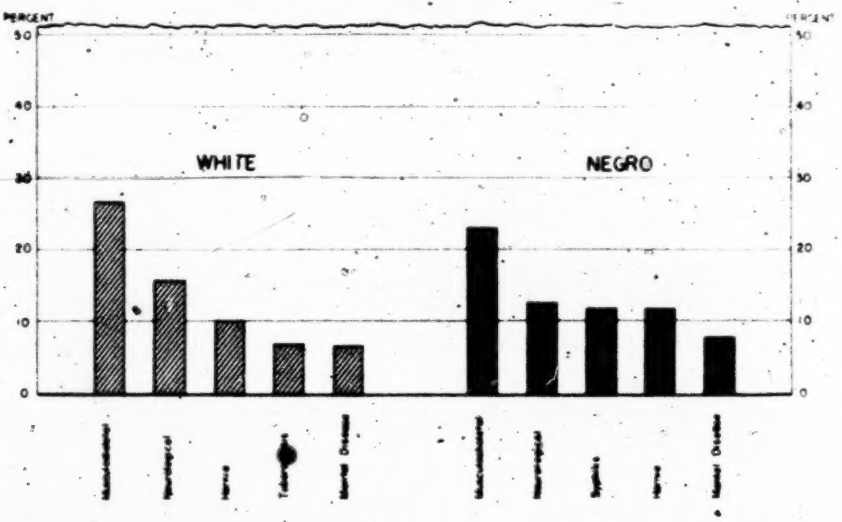
Musculoskeletal defects remained the most important cause for local board rejection (26.1 percent), as they had been during most of the period since the induction of registrants with syphilis began

1/ From January 1942 to January 1944, local board physicians used the List of Defects, DSS Form 220, as a guide in examination of all registrants. During January 1944, serological tests only were made by these physicians under the provisions of Local Board Memorandum No. 178, January 6, 1944.

early in the preceding year. During 1944, however, the percentage of musculoskeletal defects as causes for local board rejections sharply increased. More than one-fourth of the rejections were due to amputations, the most frequently recorded of these being, in order, amputations of the leg, of the fingers, and of the upper arm. Other musculoskeletal defects for which approximately one-fourth of the registrants in this group were rejected at local boards were shortening of one leg or arm, spinal malformation, and congenital deformity, particularly clubfoot.

FIGURE 3

FIVE LEADING CAUSES FOR REJECTION AT LOCAL BOARDS
1944



The bar diagram in Figure 3, based on data in Table 8, shows, by race, the five leading causes for rejection at local boards during 1944.

Neurological defects, which accounted for 15.1 percent of local board rejections, were second in importance among both white and Negro registrants, but they were the basis of 15.5 percent of white as compared to 12.3 percent of Negro rejections. Most of the rejections in this group were made because of deformity or atrophy resulting from infantile paralysis. Epilepsy was also an important cause for neurological rejection at local boards.

Hernia, third among leading causes, accounted for 10.2 percent of the rejections at the local board level. The percentage of white rejections for hernia (10.0 percent) was less than that of Negroes (11.1 percent). For each racial group, approximately 90 percent of the hernia rejections at local boards were inguinal hernias.

Tuberculosis, fourth in relative importance, was the basis of 6.7 percent of the local board rejections in 1944. This figure represents only the most advanced stages of the disease—registrants in hospitals or sanatoriums or those with affidavits from physicians stating that they were under medical care for tuberculosis or had been so during the preceding five years. Here, for the first time in Selective Service experience, the percentage of rejections for tuberculosis was higher among Negro (7.2 percent) than among white registrants (6.7 percent). The difference is slight; nevertheless, previous Selective Service data, which were weighted more heavily with examinations of men 20 years of age and over, had shown both a much smaller percentage of Negro than white rejections for tuberculosis and a lower prevalence of this disease among all the Negroes who appeared for physical examination. The 1944 data include a large proportion of teen age registrants, for whom the death rate is more than nine times as high among Negroes as among whites. This lower prevalence among the older Negroes, coupled with the higher percentage of far-advanced tuberculosis among Negroes rejected at local boards during 1944, tends to substantiate previous observations to the effect that the lower prevalence among living Negroes than among living whites 20-44 years of age who were given Selective Service physical examinations is attributable to the more rapid course of tuberculosis in the Negro race. 1/

1/ A discussion of these differences in the prevalence of tuberculosis, with footnote references to other literature on the subject, may be found pages 10 [illegible] 11, Medical Statistics Bulletin No. 2, issued by National Headquarters, Selective Service System, August 1, 1943.

Mental disease was the principal cause for 6.6 percent of local board rejections in 1944; for 6.5 percent of the white rejections and 7.7 percent of those for Negroes. Since registrants themselves were not likely to apply for local board examination because of mental or personality disorders, these percentages should represent registrants in mental institutions, those with history of commitment to such institutions, and those under past or present observation or treatment for mental or personality disorders.

Syphilis, which ranked third among principal causes for Negro rejections (11.6 percent) at the local board level during 1944, was unimportant in relation to white rejections (0.6 percent). The only forms of syphilis for which the local boards could reject the registrants who requested examination or offered proof of disqualification were cardiovascular, cerebrospinal, or visceral syphilis.

Principal Cause for Induction Station Rejection During 1944.

The induction station data shown in Table 8 represent the armed forces' rejections of registrants sent for preinduction examination and also those who reported for induction. Together they comprised nearly 96 percent of all rejections made during 1944. The leading causes for rejection were, in order of importance: mental disease, failure to meet minimum intelligence standards, cardiovascular defects, musculoskeletal defects, and hernia. Each of the other defect groups accounted for less than five percent of the rejections at induction stations.

The leading causes for rejection among white registrants rejected at preinduction and induction were the same except that rejections for ear defects, fifth in order among white registrants, were replaced by rejections for hernia in the Negro race. Rejection rates for these causes are shown in the pictorial bar chart, Figure 2.

Among white registrants, mental disease, the most frequently noted cause, accounted for 29.6 percent of the rejections. Second in order were musculoskeletal defects, with 8.8 percent of the rejections. Failure to meet the minimum intelligence standards was third in order of importance, accounting for 8.4 percent of the rejections. Cardiovascular defects were responsible for 8.3 percent of the rejections and ear defects for 5.4 percent. No other single defect group was responsible for as much as five percent of rejections except hernia, which was in sixth place among the causes for rejection.

The actual importance of disqualifying physical defects among Negroes rejected by the armed forces was obscured to some extent by the fact that more than one-third were rejected primarily because they failed the psychological tests. It is likely that a large proportion of these registrants also had physical defects for which they would have been rejected if they had passed the tests.

The leading cause for rejection of Negroes at induction stations was failure to meet the intelligence standards, which formed 34.3 percent of their rejections. Mental disease, the second defect group in order of importance, accounted for 19.8 percent of Negro rejections; it was followed, in order, by cardiovascular defects, 7.5 percent, mental deficiency, 6.6 percent, and musculoskeletal defects, 5.0 percent.

Principal Causes For Rejection In Relation To Age

Mental defects caused a larger percentage of rejections of the younger registrants, while physical defects were more important among men 26 years of age and older. (Tables 1, 2, and 3, Appendix B-summarized in Table 9.) This rejection of younger registrants for mental defects was due principally to diagnoses of emotional immaturity and psychoneurosis. Failure to pass the psychological tests was also frequently a cause for rejection among the younger men than among those 26 and over.

White registrants in any age group were less apt to be rejected for mental than for physical defects, but nearly two-thirds of the Negroes in the 18 and the 19-25 year age groups were rejected for mental defects, and in the two older groups, (26-29 and 30-37 years) more than one-half of the rejections were for mental defects.

Three of the defect groups which were among the leading causes for all rejections during the year were increasingly important among rejections in each advancing age group. These were tuberculosis, principal cause for 2.9 percent of the rejections of 18 year old registrants and 3.9 percent of those 30 years of age and over; cardiovascular defects, for which the corresponding percentages were 7.0 and 9.1 percent; and musculoskeletal defects, which accounted for 7.5 percent of the rejections in the youngest age group and 10.5 percent in the oldest.

Other defect groups which increased in importance as cause for rejection with advancing age, although relatively few men were rejected for these reasons, were nasal and dental defects, varicose veins, defects of the abdominal viscera, hemorrhoids, and syphilis.

Decreases in the percentage of rejections among older men occurred for several defect groups. Mental disease was the basis of 27.3 percent of the rejections among 18 year old registrants and 25.8 percent among those 30-37. Feet defects, weight deviation, kidney and urinary defects, and those of the skin and the genitalia were all of less relative importance as cause for rejection in each advancing age group. Failure to pass the psychological tests also followed this general trend. Smaller percentages of rejections for infections and parasitic diseases and acute conditions were noted among older men than among those under 26 years of age.

Table 9

Percentage of Registrants Rejected for Mental, Physical, and Nonmedical Reasons, by Race and Age Group
February 1944-December 1944

Principal Cause for Rejection	All Ages	Percent of Total Rejections — Age Group			
		18	19-25	26-29	30-37
		All Races			
Total	100.0	100.0	100.0	100.0	100.0
Mental	42.3	44.9	47.1	39.6	38.3
Physical	56.1	53.8	51.2	58.8	60.2
Nonmedical	1.6	1.3	1.7	1.6	1.5
		White 1/			
Total	100.0	100.0	100.0	100.0	100.0
Mental	38.3	43.1	42.0	35.7	35.3
Physical	60.2	55.7	56.4	62.8	63.3
Nonmedical	1.5	1.2	1.6	1.5	1.4
		Negro			
Total	100.0	100.0	100.0	100.0	100.0
Mental	60.8	65.0	62.8	58.0	55.4
Physical	37.2	33.1	33.6	39.8	42.3
Nonmedical	2.0	1.9	1.8	2.2	2.3

1/ Includes all races other than Negro.

Among white registrants, six defects were increasingly important as principal cause for rejection in each older age group. These were tuberculosis, cardiovascular defects, varicose veins, hemorrhoids, syphilis, and musculoskeletal defects. Defects which were of less relative importance with advancing age were those of the eyes, ears, kidney and urinary system, and feet. Rejections for mental deficiency also decreased in importance, as did failure to pass the intelligence tests.

Negro registrants showed definite upward trends with respect to defects in relation to age in the following groups: lungs, cardiovascular defects, varicose veins, hemorrhoids, syphilis, and defects of the abdominal viscera. Decreases in relative importance among the older men occurred for kidney and urinary defects, infectious and parasitic diseases, and acute conditions.

It is of interest that for both the white and the Negro races failure to pass the psychological tests caused relatively more rejections among younger than among older men. This suggests the possibility that the tests may require a breadth of experience and ability to reason which is more apt to be found in older registrants.

Occupations of Rejected Registrants.

The relative frequency with which certain defects were mentioned as principal cause for rejection of men in the various occupational groups is presented in Table 10. In evaluating this table, it should be borne in mind that because of deferment policies, particularly those in agriculture, the data may not be representative of the groups in the total population. Furthermore, the differing race compositions of each occupation must be borne in mind in the comparison of different occupations.

Table 10

Percentage of Rejections for Selected Defects, by Occupation

February 1944-April 1944

Occupation	Total	Percentage in Each Occupational Group Rejected for: Mental Disease	Musculo-skeletal & Feet 1/	Cardio-vascular	Hernia	Eyes	Tuber-culosis	Neuro-logical	Mental Defici-ency 2/	Other
All occupations	100.0	26.0	12.9	9.2	5.5	4.5	3.7	3.6	12.4	22.2
Professional and semiprofessional	100.0	23.8	15.4	12.1	4.6	8.1	4.5	4.0	0.3	27.2
Farmers, managers, and owners	100.0	29.2	10.4	8.0	4.5	3.5	2.0	3.0	25.8	13.6
Managers and officials	100.0	24.0	14.4	12.7	4.8	5.2	3.8	4.0	1.1	30.0
Clerical and sales	100.0	23.3	15.1	11.5	6.5	5.5	4.9	3.9	1.1	28.2
Craftsmen	100.0	26.7	15.4	9.9	5.7	4.5	4.1	4.2	3.2	26.3
Operatives	100.0	27.3	13.2	9.5	5.8	4.1	3.7	3.7	8.5	24.2
Domestic and protective service	100.0	19.0	13.5	14.4	6.0	4.5	5.0	1.0	3.2	33.4
Other service workers	100.0	23.4	12.8	9.4	7.4	3.9	4.7	1.9	12.3	24.2
Farm laborers	100.0	25.9	8.9	6.4	4.5	3.3	2.1	2.8	34.1	12.0
Laborers (except farm)	100.0	23.6	10.9	7.9	4.9	4.1	2.3	3.0	28.1	15.2
Students	100.0	18.6	13.6	15.1	5.0	9.6	3.6	3.2	0.6	30.7
Emergency and unemployed	100.0	33.2	12.9	4.7	3.8	3.9	5.3	4.7	15.2	16.3
Non-classifiable	100.0	27.6	12.3	7.2	6.7	4.3	4.2	3.6	15.0	19.1

1/ Includes rejections for poliomyelitis and its residuals.
2/ Includes rejections for failure to meet minimum intelligence standards.

Mental disease was the largest single cause for rejection in all the occupations except the two groups of laborers (farm and other). In these two groups mental deficiency and failure to meet the minimum intelligence standards caused the highest percentage of the rejections. Negroes are, of course, particularly concentrated in these groups.

Craftsmen and the professional and semiprofessional groups had a larger percentage of rejections for musculoskeletal and feet defects than did any other major occupations. Students had the highest percentage of rejections for cardiovascular defects; that for hernia was highest among service workers other than domestic and protective (barbers, beauticians, hospital attendants, etc.). The highest percentage of eye defects noted as cause for rejection was among students; tuberculosis and neurological disorders each accounted for relatively more rejections of emergency workers and the unemployed than of any other group. Of the gainfully employed registrants, however, the highest percentage of tuberculosis rejections was found among domestic and protective service workers.

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THE PREVALENCE OF DEFECTS

In addition to the principal defects which have been presented in the preceding tables, data on a maximum of two other defects per registrant examined were obtained for the year 1944. This represents an underestimate of the total number of defects actually found upon physical examination; however, the data compare favorably with similar data recorded during the first two years of the war. 1/ Table 11 presents the prevalence of the specific defect groups among men inducted or rejected during the eleven-month period.

A total of 1,205 defects was recorded for each 1,000 registrants physically examined--an average of 1.2 defects per man. The corresponding figure for white registrants was 1,194.2 and for Negro registrants, 1,274.0.

The ten defects most frequently recorded were, in order of their importance:

White	Negro
Eyes	Minimum intelligence tests
Mental disease	Syphilis
Musculoskeletal	Mental disease
Feet	Feet
Cardiovascular	Eyes
Teeth	Cardiovascular
Genitalia	Musculoskeletal
Nose and sinus	Mental deficiency
Ears	Hernia
Underweight and overweight	Genitalia

The prevalence rate for each defect varied by Selective Service classification. For example, defects were recorded for 975.2 in every 1,000 white registrants inducted for general service, a rate of less than one defect per man. They were noted for 1,716.3 per 1,000 inducted for limited service, and for 1,442.2 rejected. Corresponding figures for Negro registrants were 901.4 per 1,000 inducted for general service, 1,732.4 inducted for limited service, and 1,478.8 for those rejected.

Eye defects. These were the most frequently recorded defects of all races and of white registrants, and they were recorded almost twice as often for white as for Negro registrants (177.2 and 89.2 per 1,000 respectively). As might be expected, a much higher prevalence of eye defects was noted among each 1,000 men who were inducted for limited service than among those inducted for general service, or among the rejected registrants.

Mental disease. This defect group was noted with almost the same frequency among white and Negro registrants. However, it was found less frequently among both inducted and rejected Negroes than among whites in these categories. Nine white registrants in each 1,000 inducted for general service and 7 per 1,000 inducted for limited service had some form of mild mental or personality disorder; but more serious forms of these disorders were found in 304 per 1,000 of the rejected white men and 221 per 1,000 rejected Negroes.

Musculoskeletal. Defects of the bones, muscles, and joints were recorded more frequently for white registrants than for Negroes, except among those inducted for limited service. In this category, 145 per 1,000 white and 162 per 1,000 Negroes had musculoskeletal defects noted on their physical examination reports.

Feet defects. These defects were fourth in relative frequency among both white and Negro registrants. They consisted mainly of descriptions of flat feet (pes planus) and were found more often in Negro than in white registrants, among inducted as well as rejected groups.

Cardiovascular. Defects of the heart and blood vessels were found more often in Negro than in white registrants; but among inducted men, they were less frequent in Negroes. Hypertension was the most frequently recorded cardiovascular defect of Negro registrants.

Teeth. The prevalence shown for teeth defects is an underestimate, as the 1944 coding of physical examination reports did not include routine coding of the dental chart from which data had been obtained on the reports used for a previous study of peacetime experience. 2/ Nevertheless, teeth defects were the fifth defect in order of frequency among white registrants. This was occasioned by recording of dental defects for inducted men, both general and limited service. They were not sufficiently serious from a military standpoint, however, to appear often in the summary of defects for rejected white or Negro registrants.

1/ Medical Statistics Bulletin No. 3, pp. 124-127. During the peacetime period of Selective Service, all the defects noted on the physical examination forms by local board physicians were counted, and the results are shown in Medical Statistics Bulletin No. 2, Table 7, pp. 24-37.

2/ Edwards, Thomas I. and L. P. Hellman: Methods Used in Processing Data from the Physical Examination Records of the Selective Service System. Journal American Statistical Association, June 1944, Vol. 39, pp. 165-182.

Table 11. All Recorded Defects of Registrants Inducted or Rejected by Race and Availability for Service

February 1944-December 1944

Defect	Rate Per 1,000 Examined											
	Inducted and Rejected			Inducted for General Service			Inducted for Limited Service			Rejected		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total defects	1205.3	1194.8	1274.0	968.4	975.2	901.4	1717.2	1716.3	1732.4	1448.7	1442.2	1478.8
Eyes	165.5	177.2	89.2	187.6	197.3	92.9	633.8	636.8	581.0	131.2	141.5	83.8
Ears	41.5	45.6	14.4	22.1	23.5	7.8	42.7	41.3	66.9	62.3	72.0	17.7
Nose and sinus	40.7	46.1	5.8	56.2	61.1	8.4	67.8	70.4	21.1	23.4	27.5	4.2
Throat	11.4	12.2	6.6	18.1	18.6	12.8	15.2	15.8	3.5	4.1	4.4	3.1
Teeth	52.2	58.1	13.7	84.3	89.9	29.0	78.8	81.3	35.2	17.0	19.6	4.9
Mouth and gums	36.5	39.3	18.1	59.8	61.6	41.6	50.6	50.5	52.8	11.1	12.5	4.7
Tuberculosis	35.4	36.9	25.6	26.9	27.5	20.2	18.7	19.4	7.0	44.9	48.4	28.7
Lungs and pleura	16.6	17.1	13.1	5.2	5.3	3.7	6.4	5.9	14.1	29.1	31.5	18.3
Cardiovascular	63.6	59.9	87.9	18.9	19.3	17.5	15.4	15.4	14.1	112.5	109.2	127.7
Varicose veins	20.0	21.2	11.9	20.5	21.6	9.6	26.4	26.7	21.2	19.3	20.7	13.2
Abdominal viscera	12.9	14.1	4.5	2.7	2.8	2.3	1.3	1.4	-	24.0	28.0	5.8
Kidney and urinary	12.4	12.7	10.7	1.9	1.9	1.8	1.9	2.0	-	24.0	25.8	15.8
Blood and blood-forming	1.1	1.1	1.3	0.6	0.5	1.0	0.6	0.6		1.7	1.7	1.4
Hernia	38.3	36.3	50.9	4.8	3.2	21.2	269.1	268.5	281.7	69.1	69.7	66.0
Hemorrhoids	7.7	8.0	5.6	6.8	7.1	4.0	7.1	7.5	-	8.6	9.1	6.5
Genitalia	52.4	53.2	47.6	73.6	73.3	76.0	55.6	54.4	77.4	29.7	29.3	31.6
Syphilis	27.8	9.5	147.6	28.7	7.9	232.4	13.9	5.3	169.5	27.3	11.4	100.1
Gonorrhea and other venereal	4.6	1.7	23.4	5.3	2.2	36.3	1.5	0.8	14.1	3.9	1.2	16.3
Neoplasms	14.8	16.1	6.3	14.5	15.3	6.9	11.8	12.5	-	15.2	17.3	6.0
Musculoskeletal	106.5	109.6	86.4	83.0	84.6	67.9	145.9	145.0	162.0	130.8	138.3	96.2
Feet	83.2	81.8	92.3	107.2	104.7	131.2	107.7	105.8	140.8	56.8	53.9	70.3
Endocrine	6.0	6.6	2.3	1.9	2.1	0.6	1.3	1.4	-	60.6	12.2	3.3
Mental disease	142.2	142.0	143.9	9.0	9.1	7.2	7.1	7.5	-	288.8	303.5	221.2
Mental deficiency	15.8	9.6	56.6	1.0	0.7	3.4	0.6	0.6	-	32.2	20.3	86.8
Minimum intelligence tests 3/	63.7	38.9	225.2	-	-	-	-	-	-	133.7	86.2	352.4
Neurological	24.2	24.1	24.9	1.2	1.2	1.1	7.5	7.3	10.6	49.3	51.1	38.3
Skin	30.0	32.7	12.5	40.9	43.7	13.2	37.3	38.6	14.1	18.2	19.5	12.1
Infectious and parasitic	1.2	1.2	1.2	0.1	0.1	-	-	-	-	2.4	2.5	1.9
Acute conditions	3.9	3.9	3.6	0.2	0.2	0.2	0.2	0.2	-	7.9	8.4	5.4
Underweight and overweight	41.8	44.9	21.3	49.2	51.3	28.4	55.4	56.4	38.7	33.5	37.0	17.3
Other medical	31.4	33.2	19.6	36.2	37.6	22.8	35.6	37.0	10.6	26.1	27.9	17.8

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Failure to meet minimum intelligence standards.

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Genitalia. The count for this group of defects was also obtained largely by coding minor defects of inducted men. They were noted more frequently among Negroes than among whites in both the inducted and the rejected groups; but the prevalence rate among all the examined Negroes (i.e., inducted and rejected) was lower than among the white registrants.

Nose and sinus. These defects were tabulated almost nine times as often for white as for Negro registrants. There was a tendency to induct men in both racial categories with moderate nasal defects and deformities, for either limited or general service.

Ears. Defects and deformities of the ear, ninth in order of frequency among white registrants, were noted more often among white than among Negro registrants. Relatively more Negroes than whites who had ear defects were inducted for limited service, possibly those with deformities or other disfigurations of the ear.

Underweight and overweight. Underweight and overweight also occurred more frequently among white than among Negro registrants in each of the classifications. They were less frequently tabulated for Negro registrants than were neurological disorders, gonorrhea, and tuberculosis, none of which were among the ten defects most often noted among Negroes.

Other defects. Other defects which were much more important among Negroes than among whites were failure to meet the minimum intelligence standards and mental deficiency, which together were recorded for 281.8 in each 1,000 Negroes examined and only 48.5 per 1,000 whites; and syphilis, recorded for 147.6 per 1,000 Negroes as compared to 9.5 per 1,000 whites examined. A relatively large proportion of inducted Negroes had syphilis -- 232 in every 1,000 who were inducted for general service and 165.5 per 1,000 inducted for limited service. 1/ Corresponding figures for white registrants were 7.9 and 5.3 per 1,000 respectively. Syphilis was mentioned on the reports of 11.2 per 1,000 white men who were rejected, as compared to 100.1 per 1,000 Negroes.

RESULTS OF PHYSICAL EXAMINATION IN INDIVIDUAL STATES

Physical examinations in the individual states necessarily differed in their results from those for the Nation as a whole. The figures presented in preceding sections are an average of the data from all the states, which varied widely among themselves with respect to the proportion of men sent for reexamination, the ages and racial composition of the examined groups, and in interpretation by armed forces' examiners of the physical standards and by local boards concerning the policies on deferment. Information on the percentage of men in each state who appeared for first examination by the armed forces and those who were reexamined during the final calendar year of hostilities; the general service rejection rates for each of these groups; and the percent distribution of principal causes for rejection in each state during 1944, is contained in Appendix D.

Preinduction Examination

Examination Status. Since the vast majority of rejections occurred when men were sent for preinduction physical examination and since reexaminations contributed to the high rejection rates, it is important to know what types of registrants were being forwarded in the various states. The first four tables in Appendix D divide the examined men into two groups. Those who had not been previously examined were chiefly the eighteen year old registrants. This group also included men 19 years of age and over who had been given occupational or other deferment and who had never undergone Selective Service physical examination. The previously examined men consisted of: (a) registrants who had been rejected on previous examination and who were reexamined as standards were changed or the conditions causing rejection were removed; and (b) registrants found acceptable on preinduction examination and later rejected when they reported for induction, or found acceptable for limited service only and again forwarded for reexamination as standards changed. Thus, some of the previously examined men may have been examined more than once during the period for which shown in the appendix tables under discussion. In the data for men examined for the first time, however, each registrant is represented only once.

On a national basis, an average of 84.2 percent of all registrants given preinduction physical examination appeared for the first time. Among the states, this proportion varied from 67.1 percent in New York to 97.5 in South Dakota. In 30 states, 84 percent or more of the men reporting had no previous examinations.

White registrants not previously examined comprised 84.1 percent of the men in their race who were given preinduction examination. Thirty-three states had percentages as high or higher than 84 percent. The states with the lowest and the highest percentages of white registrants appearing for first examinations were, respectively, New York and South Dakota.

1/ Registrants with syphilis might be given limited service classification until preliminary treatment was completed.

PREINDUCTION REJECTION RATES PER 100 REGISTRANTS EXAMINED
AUGUST 1944 — AUGUST 1945
ALL RACES

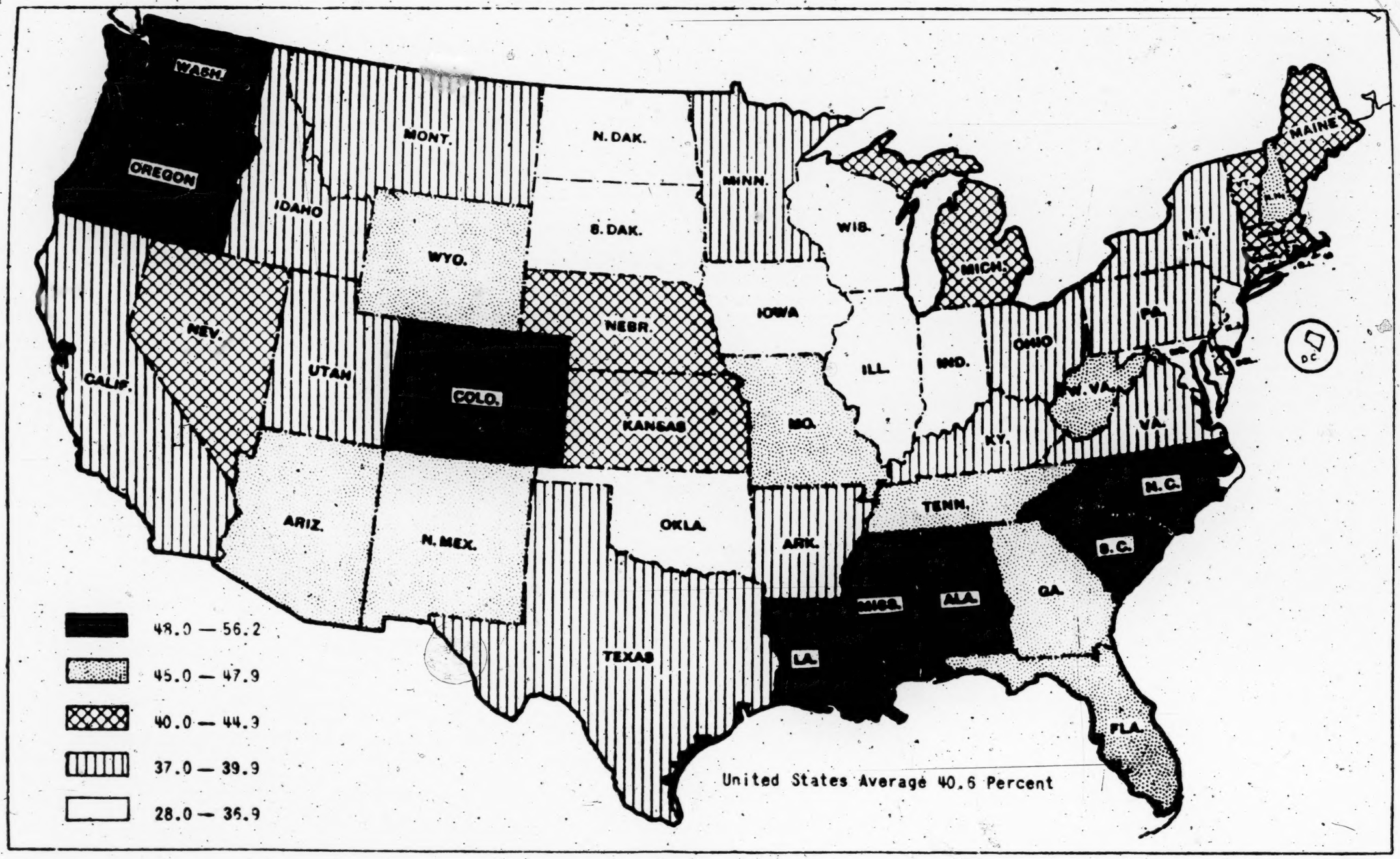


FIGURE 4

Eighty-five percent of all the Negroes given preinduction examination appeared for the first time and in none of the states for which the distribution was calculated were fewer than 74.5 percent of the registrants in the group not previously examined. This percentage was found in Florida, while Arkansas had the highest percentage (93.7) of Negroes given first examination.

Rejection rates. The preinduction rejection rates for each state are shown in Table 2, Appendix D, and in Figure 4. For the one-year period, the national rate was 40.6, with a range in the state rates from 28.5 rejections per 100 registrants examined in Wisconsin to 56.2 in Mississippi. The same states (Wisconsin and Mississippi) had the lowest and the highest rates for registrants not previously examined - 25.9 and 52.0, respectively, as compared to a national rate of 37.6. Among previously examined men, rejection rates were much higher-56.8 percent for the Continental United States, with a low rate of 39.9 in the District of Columbia and the highest, 80.8, in Mississippi (Table 12).

Table 12

Range of Rejection Rates, by State, Among Registrants Forwarded for Preinduction Examination August 1944-August 1945

Examination Status	All Races			White 1/			Negro		
	Cont. U.S.	Lowest State	Highest State	Cont. U.S.	Lowest State	Highest State	Cont. U.S.	Lowest State	Highest State
Total	40.6	28.5	56.2	39.3	28.4	51.7	53.4	29.9	71.2
Not previously examined	37.6	25.9	52.0	36.1	25.8	51.1	51.3	28.3	70.0
Previously examined	56.8	39.9	80.8	56.0	38.2	77.2	64.8	44.5	85.1

1/ Includes all races other than Negro.

White rejection rates on preinduction followed essentially the same pattern as that for all races, except that the highest rejection rate among registrants not previously examined (51.1) occurred in Oregon. Since it appears unlikely that 18 year old registrants should differ so widely in physical fitness in the various states, it may be assumed that among the group of white registrants given first examination some indication appears as to result of differences in application of deferment policies. In states which had been strict in regard to granting occupational deferments to men under 26 who were apparently physically fit for military service, rejection rates for men not previously examined were apt to be higher than in states which had more physically fit registrants to examine under the instructions for examination of all men under 26 with occupational deferments except those who had been placed in occupationally deferred classes after being rejected for physical reasons. 1/ Reexaminations of white registrants resulted in rejection of 56 per 100, with rates as high or higher in 33 states. The lowest rate was in the District of Columbia (38.2) and the highest in Mississippi (77.2).

The Negro rejection rate on preinduction examination during August 1944-August 1945 was 53.4 per 100 examined. In ten of the thirty states which examined at least 50 Negroes during the period, the rates were as high or higher than the national average. The lowest state rate for Negroes was 29.9 in Kentucky while the highest, 71.2, was reported in Georgia (Table 12).

Negro registrants not previously examined had a rejection rate of 51.3, with higher rates in ten states. In Kentucky, only 28.3 percent of the Negroes given first examination were rejected, in contrast to 70.0 percent in Georgia. Reexaminations of Negro registrants yielded a rejection rate of 64.8, with rates in the individual states ranging from 44.5 in the District of Columbia to 85.1 in Georgia.

Induction Examination

The term "induction examination" as used in this bulletin denotes the disposition of registrants who reported for induction, regardless of whether they were given complete physical examination or subjected to a physical inspection only. Table 3; in Appendix D, presents the rates separately for men not previously examined and those who reported either for physical inspection or for complete reexamination. The first group was composed of: (a) men who, when ordered to report for preinduction examination, signed requests to be immediately inducted if they were found physically acceptable for general military service; and (b) delinquents, or registrants who had failed to report for preinduction physical examination. The second group was made up of men who had been given preinduction physical examinations prior to the date of reporting for induction. Less than three percent of these had been rejected on preinduction examination. The remainder had been designated as acceptable for either general, "military", or limited service.

1/ Rejected registrants who were in essential occupations could be transferred from classes IV-F and I-A-L to classes indicating their occupational status, but their "F" and "L" designations were retained - as II-A(F), II-C(F), II-A(L), etc. See State Director Advice No. 288, January 3, 1945.

Table 13

Range of Rejection Rates, by State, Among Registrants
Reporting for Induction
August 1944-August 1945

Examination Status	All Races			White 1/			Negro		
	Cont. U. S.	Lowest State	Highest State	Cont. U. S.	Lowest State	Highest State	Cont. U. S.	Lowest State	Highest State
Total	9.5	3.9	15.8	8.4	3.9	14.9	19.2	10.6	34.5
Not previously examined	31.5	4.0	50.0	27.9	4.0	47.2	50.8	18.3	73.2
Previously examined	8.2	3.6	15.2	7.3	3.6	14.2	16.5	3.9	30.6

1/ Includes all races other than Negro.

During August 1944 through August 1945, 9.5 percent of all registrants reporting for induction were rejected. The range of rates within the states was from 3.9 in Minnesota to 15.8 in North Carolina. Twenty-six states had rates higher than the national average.

Registrants examined for the first time when they were reporting for induction were rejected at a rate of 31.5 per 100. This high rejection rate as compared to only 8.2 for previously examined registrants contributed little to the overall rate of 9.5, because the group forwarded for first examination was only five percent of all the registrants reporting for induction. In South Dakota, the rejection rate on first examination was only 4 per 100 examined; in Louisiana it was 50.

The fact that armed forces' examiners found a registrant qualified on preinduction examination did not constitute his final acceptance for military service. Of these previously examined registrants, 8.2 percent were rejected when they reported for induction. As explained in a preceding chapter these rejections might be due to changes in the physical standards during the interval between preinduction examination and time of returning for induction. They might also occur because of stricter interpretation of the standards as a result of changes in assignments of medical and psychiatric examiners to the induction stations; or registrants might have acquired temporary or permanent defects between preinduction and induction examinations. The state which had the lowest rejection rate for previously examined men was Wisconsin, with only 3.6 percent rejected, while North Carolina had the highest rate, 15.2 (Table 13).

The white rejection rates followed a pattern similar to those for all races, but Negro rates for the Continental United States were more than twice as high for all Negroes examined as were white rates—19.2 as compared to 8.4 for white registrants. Corresponding rates for not previously examined registrants were 50.8 and 27.9. For previously examined registrants, they were 16.5 and 7.3.

PREPARATION AND PROCESSING OF FORM 221

Information on the defects of registrants physically examined during 1944 was obtained from a 20 percent sample study of DSS Forms 221, Reports of Physical Examination and Induction. The reproduced form shown in Figure 5 is the revision of June 19, 1944, on which changes were made primarily to provide for recording the results of physical inspection on induction examinations and for certain changes in recording local board physical examinations. 1/ Figure 6 is a reproduction of the punch card to which information on the Form 221 was transferred in order to obtain data for analysis.

Preparation of the Report

At the time a registrant was ordered to report for preinduction examination, the local board clerk prepared a set of Forms 221 for recording the results of the physical examination. Section I of the form was completed by the local board clerk, using the latest information available from the registrant's file. The local board number and address were stamped in the box on page 1 at the upper right corner of the form.

Section II, on page 2, was used only when the registrant requested deferment because of a defect manifestly disqualifying for any form of military service. In this case, the registrant was either referred to a local board physician for examination or, if the registrant was unable to appear for physical examination, the local board referred to the physician for review the registrant's affidavit from a reputable physician or institution to the effect that he possessed one or more manifestly disqualifying defects. Any registrant who was disqualified by the local board physician therefore had only the first two sections of his physical examination report completed.

If the registrant did not request deferment by the local board, he reported to the armed forces induction station for a preinduction examination, which was recorded in Section IV, on pages 3 and 4, of the Form 221. The results of the mental tests, as well as the physical and psychiatric examinations, were entered in this section and the recommendation of the armed forces' examiners as to acceptability was recorded at the end of the examination. Then the registrant was returned to his home, unless he had requested immediate induction, and the complete set of Forms 221 was sent back to his local board, to be forwarded again when he reported for induction. If he appeared within the time limit set by the armed forces (90 days) Sections V and VI were completed to show the results of physical inspection by the induction station and the disposition of the registrant. If this time limit had been exceeded, however, a completely new set of Forms 221 had to be prepared. In such a case, the first set of forms was attached to the new one for reference on the part of the medical examiners. 2/ Section III, which contained miscellaneous information for the armed forces, was filled out only if the registrant was accepted for military service.

Sampling Procedure. During 1944 the actual work of sampling and coding Forms 221 was done by the Office of the Surgeon General, War Department, following a plan agreed upon jointly by the Selective Service System and the War and Navy Departments. Under this cooperative arrangement for obtaining medical defect data, random samples were drawn from each month's receipts of the physical examination reports. Schedules for registrants whose order numbers ended with certain digits were withdrawn, and the total schedules thus obtained were carefully checked against both actual and expected receipts of Form 221 to determine whether the sample was representative. The size of the sample was adjusted each month to a limit of 70,000 or 80,000 forms which could be processed, and the samples thus obtained varied from 10 to 30 percent of the inductions and rejections during the month. A 20-percent sample was drawn from the data to provide the information for the entire year.

The data for 1944 were limited by the fact that the original and copies of the physical examination reports of men who received preinduction examination but were not returned for induction because of changes in age groups acceptable or continuation of occupational deferments remained in their files. The samples selected for statistical study were thus based upon only inducted and rejected men, rather than all examined men.

Codes and Punch Cards. The data shown in the headings of the columns on the punch card (Figure 6) were coded from the Forms 221 and transferred to the card for tabulation. As the card shows, the data were of four types: identification according to the registrant's local board county, state, and order number; socio-economic data from page 1 of the form; the medical data, obtained from either Section II or Section IV; and the results of the preinduction or induction examination, from Section V.

Under the system of joint processing of Form 221 for the Selective Service System, the Army and the Navy, a medical code was formulated which would meet the needs of each of the agencies. This code consisted of 542 titles which contained key words likely to appear in the description of defects. The titles were listed alphabetically in manuals, with the code numbers which were to be assigned to each.

1/ During the first six months of 1944, the Form 221 revision of September 20, 1943 was used.
2/ Beginning in July 19..., registrants whose preinduction examination was more than 90 days old could be forwarded for induction without a second preinduction physical examination. (Local Board Memorandum 178, June 8, 19...)

Thus, if the medical examiner recorded "unilateral blindness" as the most important cause for rejection, the coder assigned "002" to designate this defect; however, if the cause for rejection was stated as "defective vision; less than minimum requirements," the code assigned was "004".

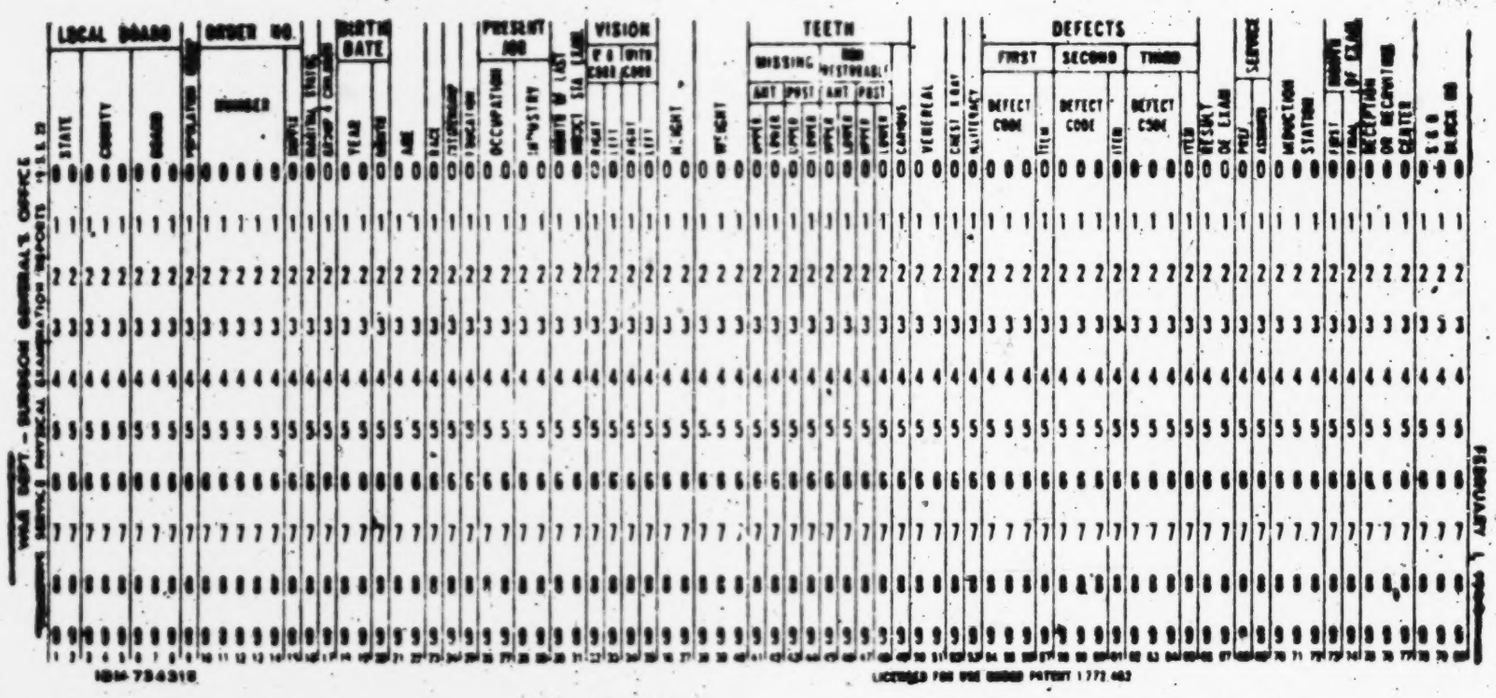


Figure 5. Punch Card Used for Porcessing Forms 221 During 1944.

The physical and mental defects selected for coding during 1944 were obtained primarily from the "Summary of Defects," shown in line 67 of the Form 221 , which is reproduced as Figure 5. Three defects were coded for each registrant, however, if they appeared on the form, either in the summary, in the preceding lines which described "Other Defects," or in the main body of the form. When more than three defects were recorded, the three most likely to be handicapping from the standpoint of military service were usually selected for coding.

The 542 titles of the defect code were classified into 27 major sections. To avoid the risk of overcounting causes for rejection, only one defect was coded within each of the 27 sections. This was accomplished by use of a "priority system" explained in the coding manual. 1/ Thus, if an examiner recorded "rheumatic heart disease with mitral regurgitation," only rheumatic heart disease was coded, although a code number had been provided for entries which described mitral regurgitation.

1/ See "Defect Code Used Jointly by the Selective Service System, War Manpower Commission, The Office of the Surgeon General, War Department, and the Bureau of Medicine and Surgery, Navy Department, for the list of codes used in Processing of Reports of Physical Examination and Induction, DSS Forms 221", November 1943.

DO NOT DEFACE THIS STAMP

Local Board No. 1 01
Thornton County 001
July 7 1944
County Court House
Thornton, Maryland 001

(Local Board of Origin Date Stamp with Code)

REPORT OF
PHYSICAL EXAMINATION AND INDUCTION

(See appropriate instructions before preparation and distribution)

Plate Imprint	Armed Forces Serial No.

SECTION I.—GENERAL (Local board will prepare from latest information available).

1. Name JONES (Last—in capitals) JESSE (First) MELVIN (Middle)
2. Present address RFD 1 (Street or rural route) Thornton (Town or city) Thornton (County) Maryland (State)
3. Registrant's order No. 356 4. Social Security No. 521-01-1221
5. Marital status: Single ☒ Married ☐ Widower ☐ Divorced ☐ Separated ☐
6. Number of Group 4 children 7. Birthdate of registrant June (Month) 10, (Day) 1926 (Year)
8. Birthplace of registrant Thornton (Town or city) Maryland (State) U S A (Country)
9. Race: White ☒ Negro ☐, Other (specify)
10. Citizenship: (a) United States citizen: Yes ☐ No ☐ (b) First papers: Yes ☐ No ☐ (c) If not citizen of United States, citizen or subject of (specify country)
11. Court record: (a) Convicted of a crime other than minor traffic violation: Yes ☐ No ☒
(b) If "yes," specify crime, date, location of court, and sentence
(c) Now in custody of the law? Yes ☐ No ☒
(d) If answer to (c) is "yes," is necessary release or waiver attached? Yes ☐ No ☐
12. United States military service: (a) Previous service: None ☒ Army ☐ National Guard ☐ Navy ☐ Marine Corps ☐ Coast Guard ☐.
(b) Date of discharge — (c) Type of discharge
13. Education: (Number of years completed) Elementary school 7 High school 2 Trade, night, or business school — College or university —
14. Occupation and industry: (a) Title and duties of present job Saw Mill Helper
(b) Length of experience: Years 1 Months —
(c) Business of present employer Saw Mill Owner
15. Employment class (present job): Employee ☒ Independent worker ☐ Employer ☐ Unpaid family worker ☐ Student ☐ Unemployed ☐
16. (a) Number of times previously sent to armed forces for examination or induction None
(b) Date last sent
17. (a) If transferred for preinduction physical examination, local board of transfer is Local Board No. — County or City of — State of —
(b) If transferred for induction, local board of transfer is Local Board No. — County or City of — State of —

Do Not Use
RESIDENCE
State
County
Place inducted
Date Inducted
Day
Month
Year
Serial
Order
Year of birth
Race and citizenship
Education
Occupation
Marital status

DSS Form 221 (Rev. 6-1-44)

Budget Bureau No. 33-R083.1 Approval expires 9-31-45

Figure 6

SECTION II.—LOCAL BOARD EXAMINATION AND CLASSIFICATION. (Fill out Items 18 and 19 for only those registrants for whom required and Item 20 for each registrant for whom Form 221 is prepared.)

18. To be filled in by local board:

(a) List all defects or diseases claimed by the registrant .....

(b) Are any of the defects or diseases listed in Item 18 (a) included in the List of Defects (Form 220)? Yes ☐ No ☐

(c) Registrant or affidavit referred to local board examining physician: Yes ☐ No ☐

19. Statement of local board examining physician:

(a) ☐ Registrant appeared in person.

(b) ☐ Registrant was unable to appear in person because of physical defects as follows: .....

(c) I have personal professional knowledge of the defect or defects specified in (e) below.

(d) ☐ Affidavits or statements were attached to the original Form 221 specifying the defects indicated in (e) below.

(e) Findings:

☐ Registrant does not have a defect listed in Form 220.

☐ Registrant has defect or defects listed in Form 220 as follows: (List in order of significance): .....

(f) Signature of examining physician .....

(g) Place ..... (h) Date .....

20. Determination of local board:

(a) Registrant classified in Class ..... (b) Date of classification .....

SECTION III.—MISCELLANEOUS (To be filled out at Induction Station for only those registrants accepted for military service)

21. (a) Organization and serial number of previous U. S. military service (if known) .....

(b) Reason for discharge .....

(c) Religious preference (voluntary for Army) .....

22. (a) Nearest relative (other than wife or minor child) (Name in full) .....

(b) Relationship ..... (c) Address .....
(Number and street or rural route, if none, so state) (City, town, or post office) (State or country)

(d) Person to be notified in case of emergency (Name in full) .....

(e) Relationship ..... (f) Address .....
(If friend, so state) (Number and street or rural route, if none, so state) (City, town, or post office) (State or country)

23. (a) The persons eligible to be my beneficiary are:

.....
(Full name of wife, if no wife, or if she is deceased or divorced, so state) (Wife's full address)

.....
(Full name and address of each minor child and each dependent child over 21 years of age)

.....
(If there are no children, so state. If the address is the same as the wife's, so state. Do not repeat address)

(b) In the event of my leaving no widow or child, I then designate as my beneficiary to receive the six months' death gratuity the dependent relative whose name, relationship and address are shown below:

.....
(If designation of beneficiary is declined, man must state in own handwriting: "I decline to designate any person as my beneficiary.")

(c) In the event of the death or disqualification of the last-named dependent relative, I then designate as my beneficiary to receive the six months' death gratuity, the dependent relative whose name, relationship, and address are shown below:

.....
(If beneficiary is named in line 23b but naming of alternate is declined, man must state in own handwriting: "I decline to designate an alternate beneficiary.")

24. (a) Signature of registrant .....
(First name) (Middle name) (Last name)

(b) Witnessed at ..... on ..... 19...

.....
(Signature of witness attesting) (Name of witness typed) (Grade and organization)

16—88580-2

Figure 6

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SECTION IV.—PHYSICAL AND MENTAL EXAMINATION

25. (a) High school graduate: Yes ☐ No ☒ (b) English speaking: Yes ☒ No ☐
(c) Qualification test (Form used 1) Score 15
(d) Group target score — (e) Individual examination —
(f) Non-English individual examination score —
(g) Illiterate: Yes ☐ No ☒
(h) Does registrant meet minimum intelligence standards: Yes ☒ No ☐

26. Limited classification: (a) 590: Yes ☐ No ☐ (b) Useful occupation: Yes ☐ No ☐
(c) Trade test: Name WSL
(d) R. I. test score
(e) If physically qualified for limited service, does registrant meet limited classification standards: Yes ☐ No ☐

27. Psychiatric diagnosis: normal
28. Neurological diagnosis: normal
29. Psychiatric or neurological symptoms: none
30. Eye abnormalities: none
31. Ear, nose, throat abnormalities: none
32. Mouth and gum abnormalities: none

33. TEETH: (a) Indicate restorable carious teeth by circling; nonrestorable carious teeth by /; missing natural teeth by X; teeth replaced by denture by horizontal line over X——; teeth replaced by fixed bridge by oval to include abutments (X)

Right								Examiner's							
8	7	6	5	4	3	2	1	1	2	3	4	5	6	7	8
16	15	(14)	13	12	11	10	9	9	10	11	12	13	14	15	16

(b) Remarks, including other defects: missing teeth and one restorable
(c) Prosthetic dental appliances: none

34. Skin: acne, mild
35. Varicose veins: none
36. Hernia: none
37. Hemorrhoids: none
38. Genito-urinary (nonvenereal): normal
39. Venereal diseases: none
40. Feet: normal
41. Musculoskeletal defects: amputation of thumb and three fingers on right hand
42. Abdominal viscera: normal
43. Cardiovascular system: normal
44. Lungs: normal
45. Chest X-ray: negative
46. Endocrine system: normal

Do Not Use

47. Vision, without correction:
(a) Right eye 20/ 20
(b) Left eye 20/ 20
(c) Both eyes 20/ 20

48. Vision, with correction:
(a) Right eye 20/
(b) Left eye 20/
(c) Both eyes 20/

49. Color perception*

50. Hearing:
(a) Right ear 15/15
(b) Left ear 15/15

51. Height 68 inches
52. Weight 160 pounds
53. Girth at nipples:
(a) Inspiration 38 inches
(b) Expiration 35 inches
54. Girth, at umbilicus 32 inches
55. Posture:
Good ☒ Fair ☐ Poor ☐
56. Frame:
Heavy ☐ Med. ☐ Light ☐
57. Color of eyes Blue
58. Color of hair Brown
59. Complexion Ruddy
60. Pulse, sitting 72
61. Pulse, after exercise*
62. Pulse, 2 minutes after exercise*
63. Blood pressure:
(a) Systolic 120
(b) Diastolic 72
64. Urinalysis:
(a) Specific gravity 1.012
(b) Albumin Negative
(c) Sugar Negative
(d) Microscopic*

65. Serological test (syphilis)
(a) First specimen:
Date 12 July 1944
Result Negative
Type: Flocculation ☒
Complement fixation ☐
(b) Confirmatory test:
Date
Result
Type: Flocculation ☐
Complement Fixation ☐
Entered by

66. Other data:
None

Figure 6

SECTION IV.—PHYSICAL AND MENTAL EXAMINATION—Continued.

Do Not Use

67. MEDICAL HISTORY: (a) Has registrant had spells of unconsciousness, convulsions, fits, encephalitis, nervous trouble of any sort, tuberculosis, asthma, hay fever, diabetes, enuresis, stomach ulcer, rheumatic fever, heart trouble, migraine (recurrent sick headache), somnambulism (sleep walking); been treated at hospital, asylum, or sanitarium; is or has been addicted to alcohol, narcotics, or habit-forming drugs: Yes ☐ No ☒ If yes, specify .....

(b) Specify other defects or diseases claimed by registrant none

68. Other defects, diseases, and/or remarks none

69. Summary of defects: (a) Principal defect amputation of fingers
missing teeth
acne, mild

(b) Other defects in order of significance none

70. (a) I CERTIFY that the above-named registrant was carefully examined, physically and mentally, that the results of the examination have been carefully recorded on this form, and that, to the best of my knowledge and belief, he is—

(1) Qualified for general military service ☐

(2) Qualified for limited service ☐ because of .....

(3) Disqualified for any military service ☒ because of loss of fingers and thumb

(b) Signature of medical examiner Everett C. Daly

(c) Name typed or stamped EVERETT C. DALY (d) Title Captain, MC

(e) Place Baltimore, Maryland (f) Date 11 Jul 1944

SECTION V.—PHYSICAL INSPECTION AT TIME OF INDUCTION.

71. (a) Results (if different from Section IV, specify) .....

(b) Signature of medical examiner .....

(c) Place ..... (d) Date .....

SECTION VI.—DISPOSITION OF REGISTRANT BY ARMED FORCES.

72. Registrant's service preference: None ☐ Army ☐ Navy ☐ Marine Corps ☐ Coast Guard ☐

73. (a) I CERTIFY that the qualifications of the above-named registrant have been considered in accordance with the most recent regulations governing the acceptance of Selective Service registrants and that he was this date—

(1) Inducted into Army ☐ Navy ☐ Marine Corps ☐ Coast Guard ☐
and was ordered to report to .....
(Time) (Date)

(2) Rejected for service in the armed forces because of: Medical ☒ Moral ☐ Alien ☐
Other ☐ If other, specify .....

(b) Signature of inducting officer Everett C. Daly

(c) Name typed or stamped EVERETT C. DALY

(d) Place Baltimore Maryland (e) Date 11 Jul 1944

SECTION VII.—TRANSFER FROM RECEPTION CENTER.

74. Above-named man was transferred from Reception Center to—

..... on .....
(Place and organization, if known) (Date)

SECTION VIII.—FINGERPRINTS—RIGHT HAND (for only those registrants who are inducted).

1. THUMB	2. INDEX	3. MIDDLE	4. RING	5. LITTLE

Figure 6

Table 1. Percent Distribution of Principal Defects of Rejected Registrants, by Age Groups 1/ February 1944-December 1944

All Races

Principal Cause for Rejection	All Ages	Percent of Total Rejections, Age Group 18	19-25	26-29	30-37
Total	100.0	100.0	100.0	100.0	100.0
Eyes	4.0	4.8	3.7	4.1	4.0
Ears	4.4	5.5	3.9	4.8	4.2
Nose and sinus	0.7	0.5	0.5	0.8	0.8
Throat	0.1	0.1	*	0.1	0.1
Teeth	0.1	0.1	0.1	0.1	0.2
Mouth and gums	0.1	0.2	0.1	0.1	0.1
Tuberculosis	3.4	2.9	2.9	3.5	3.9
Lungs and pleura	2.2	2.1	2.2	2.3	2.2
Cardiovascular	8.1	7.0	7.3	8.4	9.1
Varicose veins	1.1	0.3	0.7	1.3	1.8
Abdominal viscera	2.0	0.3	1.4	2.5	3.1
Kidney and urinary	1.6	2.2	1.7	1.6	1.2
Blood and blood-forming	0.1	0.1	0.1	0.1	0.1
Hernia	4.8	3.5	5.5	4.9	4.7
Hemorrhoids	0.5	0.1	0.2	0.5	0.8
Genitalia	1.0	1.3	1.1	0.8	0.8
Syphilis	0.8	0.3	0.8	0.9	1.1
Gonorrhea and other venereal	0.1	0.1	0.1	0.1	0.1
Neoplasms	1.0	0.8	1.1	1.2	0.9
Musculoskeletal	9.0	7.5	7.5	9.8	10.5
Feet	2.0	2.4	2.1	2.1	1.7
Endocrine	0.8	1.1	0.7	0.9	0.8
Mental disease	26.7	27.3	27.6	26.1	25.8
Mental deficiency 2/	2.9	3.6	4.0	2.5	1.9
Minimum intelligence tests 3/	12.7	14.0	15.5	11.0	10.6
Neurological	4.2	4.3	3.7	4.3	4.4
Skin	0.9	1.1	0.9	0.9	0.9
Infectious and parasitic	0.2	0.2	0.2	0.2	0.1
Acute conditions	0.7	0.8	0.8	0.7	0.5
Underweight and overweight	1.2	2.5	1.0	0.9	1.1
Other medical	1.0	1.7	0.9	0.9	0.9
Nonmedical	1.6	1.2	1.7	1.6	1.5

* Less than 0.05 percent.

1/ Based on a 20-percent sample of Reports of Physical Examination and Induction, DSS Forms 221, for registrants inducted or rejected.

2/ Includes morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.

3/ Includes registrants rejected for failure to meet the minimum intelligence standards.

Table 2.- Percent Distribution of Principal Defects of Rejected Registrants by Age Groups 1/
February 1944-December 1944

Principal Cause for Rejections	White 2/				
	Percent of Total Rejections				
	All Ages	Age Group			
		18	19-25	26-29	30-37
Total	100.0	100.0	100.0	100.0	100.0
Eyes	4.3	5.1	4.0	4.3	4.2
Ears	5.2	6.4	4.9	5.6	4.8
Nose and sinus	0.8	0.5	0.7	1.0	0.9
Throat	0.1	0.1	*	*	0.1
Teeth	0.2	0.1	0.1	0.2	0.2
Mouth and gums	0.1	0.2	0.1	0.1	0.1
Tuberculosis	3.7	3.1	3.3	3.8	4.2
Lungs and pleura	2.4	2.2	2.5	2.6	2.4
Cardiovascular	8.2	7.3	7.6	8.4	9.0
Varicose veins	1.2	0.3	0.8	1.5	2.0
Abdominal viscera	2.4	0.3	1.7	2.9	3.5
Kidney and urinary	1.8	2.4	2.0	1.8	1.5
Blood and blood-forming	0.1	0.1	0.1	0.1	0.1
Hernia	5.0	3.8	6.0	5.1	4.8
Hemorrhoids	0.5	0.1	0.3	0.5	0.9
Genitalia	1.1	1.5	1.2	0.9	0.8
Syphilis	0.5	0.2	0.3	0.5	0.8
Gonorrhea and other venereal	*	*	*	*	*
Neoplasms	1.1	0.9	1.3	1.4	1.0
Musculoskeletal	9.7	8.1	8.3	10.6	11.2
Feet	1.9	2.3	2.1	2.0	1.5
Endocrine	1.0	1.3	0.8	1.1	1.0
Mental disease	28.3	28.9	30.0	27.5	27.2
Mental deficiency 3/	1.9	2.8	2.4	1.4	1.2
Minimum intelligence tests 4/	8.1	9.4	9.6	6.8	6.9
Neurological	4.5	4.7	4.0	4.6	4.6
Skin	1.0	1.2	1.0	1.0	0.8
Infectious and parasitic	0.2	0.2	0.2	0.2	0.1
Acute conditions	0.7	0.8	0.9	0.7	0.5
Underweight and overweight	1.4	2.7	1.2	1.0	1.2
Other medical	1.1	1.8	1.0	0.9	1.0
Nonmedical	1.5	1.2	1.6	1.5	1.4

* Less than 0.05 percent.
1/ Based on a 10-percent sample of Reports of Physical Examination and Induction, DSS Forms 221, for registrants inducted or rejected.
2/ Includes all races other than Negro.
3/ Includes morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.
4/ Includes registrants rejected for failure to meet minimum intelligence standards.

Table 3. Percent Distribution of Principal Defects of Rejected Registrants by Age Group 1/
February 1944-December 1944

Principal Cause for Rejections	All Ages	Negro: Percent of Total Rejections: Age Group 18	19-25	26-29	30-37
Total	100.0	100.0	100.0	100.0	100.0
Eyes	2.8	3.0	2.8	2.8	2.9
Ears	0.6	0.6	0.5	0.8	0.8
Nose and sinus	0.2	0.1	0.2	0.1	0.2
Throat	*	-	*	0.1	0.1
Teeth	*	-	*	-	0.1
Mouth and gums	*	0.1	*	*	*
Tuberculosis	1.9	2.1	1.6	1.6	2.1
Lungs and pleura	1.2	1.1	1.1	1.2	1.3
Cardiovascular	7.6	5.2	6.4	8.6	9.5
Varicose veins	0.7	0.2	0.4	0.7	1.0
Abdominal viscera	0.4	0.1	0.3	0.6	0.6
Kidney and urinary	0.8	1.2	0.8	0.8	0.6
Blood and blood-forming	*	-	*	0.1	*
Hernia	3.6	2.3	3.6	4.1	3.9
Hemorrhoids	0.3	0.1	0.2	0.5	0.6
Genitalia	0.7	0.7	0.8	0.6	0.7
Syphilis	2.6	1.0	2.4	3.2	3.2
Gonorrhea and other venereal	0.3	0.3	0.4	0.3	0.2
Neoplasms	0.3	0.3	0.4	0.3	0.3
Musculoskeletal	5.4	4.8	4.5	5.6	6.7
Feet	2.5	3.2	2.3	2.7	2.3
Endocrine	0.2	0.3	0.2	0.1	0.3
Mental disease	19.0	19.2	19.4	18.9	18.5
Mental deficiency 2/	7.8	8.0	9.2	7.8	5.8
Minimum intelligence tests 3/	34.0	37.8	36.0	31.3	31.1
Neurological	2.8	2.5	2.7	3.1	2.9
Skin	0.6	0.7	0.6	0.5	0.6
Infectious and parasitic	0.1	0.2	0.1	0.1	0.1
Acute conditions	0.4	0.5	0.4	0.4	0.3
Underweight and overweight	0.5	1.3	0.3	0.3	0.6
Other medical	0.7	1.2	0.6	0.6	0.4
Nonmedical	2.0	1.9	1.8	2.2	2.3

* Less than 0.05 percent.
1/ Based on a 20-percent sample of Reports of Physical Examination and Induction, DSS Forms 221, for registrants inducted or rejected.
2/ Includes morons, imbeciles, idiots, and mental deficiency not specified as to type or degree.
3/ Includes registrants rejected for failure to meet the minimum intelligence standards.

Table 4. Estimated Principal Causes for Rejection of Registrants 18-37 Years of Age in Class IV-F and Classes with "F" Designation 1/
August 1, 1945

(Preliminary)

Principal Cause for Rejection	Number	Percent
Total	4,828,000	100.0
Manifestly disqualifying defects	510,500	10.6
Mental disease	856,200	17.7
Mental deficiency 2/	676,300	14.0
Physical defects	2,708,700	56.1
Musculoskeletal	367,600	7.6
Cardiovascular	317,500	6.6
Hernia	260,600	5.4
Syphilis	254,800	5.3
Neurological	235,400	4.9
Eyes	234,300	4.9
Ears	189,700	3.9
Tuberculosis	129,900	2.7
Lungs	86,900	1.8
Underweight and overweight	69,600	1.4
Feet	69,200	1.4
Abdominal viscera	64,700	1.3
Kidney and urinary	53,300	1.1
Varicose veins	48,200	1.0
Genitalia	48,000	1.0
Endocrine	45,300	0.9
Teeth	36,200	0.7
Neoplasms	32,200	0.7
Skin	31,900	0.7
Nose	29,400	0.6
Hemorrhoids	19,300	0.4
Gonorrhea and other venereal	18,400	0.4
Mouth and gums	12,500	0.3
Infectious and parasitic	6,000	0.1
Throat	4,400	0.1
Blood and blood-forming	4,400	0.1
Other medical	39,000	0.8
Nonmedical	76,300	1.6

1/ Includes registrants in Classes II-A, B and C with "F" designation.
2/ Includes (1) registrants with more than one disqualifying defect who were rejected for educational deficiency prior to June 1, 1943; (2) registrants rejected for failure to meet minimum intelligence standards beginning June 1, 1943; (3) morons, imbeciles and idiots rejected November 1940-July 1945.

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METHODS USED IN COMPUTING COMBINED PREINDUCTION AND INDUCTION REJECTION RATES

The combined rates of rejection for registrants given preinduction examination and those reporting for induction appear in Tables 2, 3, and 4 of the text, in the section on Rejection Rates. These combined rates were calculated as follows:

1. Of one hundred registrants ordered to report for preinduction examination:

   a. If 40 were rejected on preinduction examination, 60 would be forwarded for induction;

   b. If 10 percent of the 60 registrants were rejected at the induction station, then 6 registrants would be rejected when they reported for induction;

   c. Hence, out of the original 100 registrants ordered for examination, 40 were rejected on preinduction and 6 at the induction station, making a combined total of 46 rejected out of 100 examined, or a rejection rate of 46 percent.

Table 1. Results of Preinduction and Induction Examination, by Month and Race
February 1944-December 1944

Month of Examination	Results of Preinduction Examination			Results of Induction Examination		
	Examined	Rejected 1/	Rejection Rate 2/	Examined	Rejected 1/	Rejection Rate 2/
All Races						
1944						
February	604,994	262,750	43.4	80,676	5,300 4/	6.6
March	816,916	340,541	41.7	239,980	6,228	2.6
April	730,300	263,341	36.1	223,339	6,531	2.9
May	514,615	181,093	35.2	191,271	6,082	3.2
June	228,873	84,742	37.0	159,247	6,677	4.2
July	130,336	51,828	39.8	117,819	6,996	5.9
August	111,984	44,924	40.1	110,952	9,302	8.4
September	99,021	41,206	41.6	91,381	9,776	10.7
October	116,986	52,002	44.5	89,171	11,361	12.7
November	107,433	48,236	44.9	83,396	12,503	15.0
December	118,481	51,039	43.1	83,128	10,098	12.1
White 3/						
1944						
February	524,004	219,994	42.0	70,153	4,100 4/	6.2
March	725,610	292,028	40.2	217,282	4,144	1.9
April	641,307	218,060	34.0	201,349	4,703	2.4
May	449,580	149,927	33.3	170,338	4,086	2.5
June	188,594	63,833	33.8	142,065	4,944	3.6
July	109,716	40,685	37.1	104,955	4,887	4.7
August	94,952	35,626	37.5	98,292	6,805	6.9
September	89,258	35,729	40.0	83,402	7,814	9.4
October	106,355	45,723	43.0	80,972	9,077	11.2
November	99,079	43,031	43.4	75,675	9,933	13.1
December	108,578	45,539	41.9	74,460	7,890	10.6
Negro						
1944						
February	80,990	42,756	52.8	10,523	1,200 4/	12.9
March	91,306	48,513	53.1	22,698	2,084	10.1
April	88,993	45,281	50.9	21,990	1,828	9.1
May	65,035	31,166	47.9	20,923	1,996	10.5
June	40,279	20,909	51.9	17,182	1,733	11.2
July	20,620	11,143	54.0	12,864	2,109	16.4
August	17,032	9,298	54.6	12,660	2,497	19.7
September	9,763	5,477	56.1	7,979	1,962	24.6
October	10,631	6,279	59.1	8,199	2,284	27.9
November	8,354	5,205	62.3	7,720	2,570	33.3
December	9,903	5,500	55.5	8,668	2,208	25.5

1/ Includes registrants acceptable for limited service.
2/ Rate per 100 examined.
3/ Includes all races other than Negro.
4/ Estimated.

Table 2. Results of Preinduction and Induction Examination, by Month and Race
January 1945-August 1945

Month of Examination	Results of Preinduction Examination			Results of Induction Examination		
	Examined	Rejected 1/	Rejection Rate 2/	Examined	Rejected 1/	Rejection Rate 2/
All Races						
1945						
January	249,586	94,731	38.0	104,599	9,842	9.4
February	309,815	113,005	36.5	113,803	10,284	9.0
March	321,858	114,470	35.6	124,837	10,269	8.2
April	281,152	103,728	36.9	122,865	9,585	7.8
May	251,758	93,336	37.1	115,239	9,363	8.1
June	176,307	80,194	45.5	113,698	8,118	7.1
July	164,558	82,658	50.2	98,749	7,779	7.9
August	134,185	73,133	54.5	76,761	6,893	9.0
White 3/						
1945						
January	229,391	84,241	36.7	93,675	7,701	8.2
February	280,411	97,134	34.6	101,719	7,862	7.7
March	293,998	99,508	33.8	112,216	8,049	7.2
April	258,607	91,601	35.4	110,834	7,598	6.9
May	228,027	81,313	35.7	102,984	7,594	7.4
June	155,225	69,547	44.8	101,775	6,630	6.5
July	143,855	72,159	50.2	86,947	6,261	7.2
August	117,550	64,617	55.0	67,098	5,593	8.3
Negro						
1945						
January	20,195	10,490	51.9	10,924	2,141	19.6
February	29,404	15,871	54.0	12,084	2,422	20.0
March	27,860	14,962	53.7	12,621	2,220	17.6
April	22,545	12,127	53.8	12,031	1,987	16.5
May	23,731	12,023	50.7	12,255	1,769	14.4
June	21,082	10,647	50.5	11,923	1,488	12.5
July	20,703	10,499	50.7	11,802	1,518	12.9
August	16,635	8,516	51.2	9,663	1,300	13.5

1/ Includes registrants acceptable for limited service.
2/ Rate per 100 examined.
3/ Includes all races other than Negro.

Table 3. Preinduction Rejection Rates Per 100 Registrants Examined by Month, Race, and by Examination Status 1/

August 1944-August 1945

Month and Year of Examination	Total	Not Previously Examined	Previously Rejected	Previously Acceptable
All Races				
1944				
August	40.1	38.0	57.2	40.3
September	41.6	38.0	61.3	43.1
October	44.5	41.5	64.6	40.2
November	44.9	42.5	65.0	41.2
December	43.1	41.7	59.8	37.1
1945				
January	38.0	36.1	60.3	23.4
February	36.5	34.8	60.4	21.3
March	35.6	35.0	57.8	17.8
April	36.9	36.9	54.3	18.8
May	37.1	36.9	54.0	20.1
June	45.5	38.3	65.5	66.5
July	50.2	40.4	69.0	65.4
August	54.6	42.4	74.9	66.2
White 2/				
1944				
August	37.5	35.2	55.8	40.0
September	40.0	36.4	60.5	43.2
October	43.0	40.0	63.6	42.2
November	43.4	41.2	63.7	41.4
December	41.9	40.6	58.9	36.9
1945				
January	36.7	35.0	59.8	23.2
February	34.6	33.2	58.9	21.0
March	33.8	33.4	56.0	17.7
April	35.4	35.5	52.6	18.6
May	35.7	35.5	52.5	19.7
June	44.8	36.7	65.3	67.3
July	50.2	39.1	68.9	65.9
August	55.0	41.4	75.3	66.8
Negro				
1944				
August	54.6	53.5	65.4	43.8
September	56.1	54.1	68.4	42.2
October	59.1	57.0	71.5	27.8
November	62.3	59.9	73.6	54.9
December	55.5	54.0	65.3	42.0
1945				
January	51.9	49.8	62.9	35.0
February	54.0	51.7	66.8	30.1
March	53.7	52.4	66.0	20.8
April	53.8	52.8	65.0	27.5
May	50.7	49.6	63.5	35.8
June	50.5	48.3	68.7	52.8
July	50.7	47.1	70.9	50.2
August	51.2	47.1	69.3	48.2

1/ Includes registrants found acceptable for limited service.
2/ Includes all races other than Negro.

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Table 4. Rejection Rates Per 100 Registrants Reporting for Induction by Month, Race, and Examination Status

August 1944-August 1945

Month and Year of Examination	Total	Not Previously Examined 1/	Previously Rejected	Reporting for Reexamination 2/	Reporting for Physical Inspection 3/
		All Races			
1944					
August	8.4	30.3	41.0	11.7	2.7
September	10.7	30.3	41.9	15.1	2.7
October	12.7	32.2	39.7	19.7	3.3
November	15.0	35.9	40.3	24.8	3.7
December	12.1	33.7	42.5	21.1	2.6
1945					
January	9.4	28.8	41.7	15.7	1.6
February	9.0	29.8	47.8	16.8	1.8
March	8.2	31.2	48.4	17.4	2.2
April	7.8	32.7	43.6	18.3	2.3
May	8.1	32.9	45.8	17.2	2.5
June	7.1	30.9	44.0	13.4	2.3
July	7.9	32.8	35.4	14.3	2.9
August	9.0	30.1	31.3	18.4	3.9
		White 4/			
1944					
August	6.9	25.4	35.4	9.7	2.4
September	9.4	26.7	38.9	13.6	2.4
October	11.2	28.2	38.9	17.8	3.1
November	13.1	31.4	35.1	23.2	3.2
December	10.6	29.5	38.6	19.8	2.4
1945					
January	8.2	25.6	40.9	14.5	1.5
February	7.7	26.8	46.2	15.1	1.7
March	7.2	27.5	46.7	15.7	2.0
April	6.9	29.4	47.9	16.7	2.1
May	7.4	29.7	43.9	16.0	2.3
June	6.5	28.3	41.7	12.6	2.1
July	7.2	30.1	32.5	13.5	2.8
August	8.3	28.5	28.3	18.5	3.7
		Negro			
1944					
August	19.7	54.3	62.6	27.5	5.6
September	24.6	52.6	60.3	28.8	6.8
October	27.9	56.3	43.2	33.1	6.9
November	38.3	61.7	64.2	34.8	14.6
December	29.5	57.8	61.3	27.3	6.0
1945					
January	19.6	51.1	47.3	21.5	3.7
February	20.0	46.8	56.0	24.4	3.5
March	17.6	50.1	55.4	28.3	4.1
April	16.5	50.1	48.0	27.9	4.4
May	14.4	46.9	53.5	25.5	4.0
June	12.5	44.6	52.7	19.3	3.8
July	12.9	46.7	57.2	18.9	4.3
August	13.5	38.2	60.5	18.1	5.4

1/ Includes delinquents and registrants reporting for immediate induction.
2/ Registrants reporting for induction more than 90 days after preinduction examination.
3/ Registrants reporting for induction 90 days or less after preinduction examination.
4/ Includes all races other than Negro.

Table 5. Percent Distribution of Registrants Given Preinduction Examination by Race and by Examination Status 1/

August 1944-August 1945

Month and Year	Total	Not Previously Examined	Rejected on Previous Examination	Found Acceptable on Previous Examination
		All Races		
1944				
August	100.0	87.8	11.0	1.2
September	100.0	84.3	14.6	1.1
October	100.0	85.7	13.0	1.3
November	100.0	87.9	10.7	1.4
December	100.0	90.0	8.3	1.7
1945				
January	100.0	87.7	9.1	3.2
February	100.0	88.5	8.2	3.3
March	100.0	89.3	6.1	4.6
April	100.0	88.8	5.7	5.5
May	100.0	89.1	6.0	4.9
June	100.0	73.9	18.9	7.2
July	100.0	64.9	29.3	5.8
August	100.0	61.3	33.7	5.0
		White 2/		
1944				
August	100.0	87.6	11.1	1.3
September	100.0	84.3	14.6	1.1
October	100.0	86.3	12.5	1.2
November	100.0	88.4	10.1	1.5
December	100.0	90.4	7.8	1.8
1945				
January	100.0	88.2	8.4	3.4
February	100.0	89.2	7.3	3.5
March	100.0	89.6	5.5	4.9
April	100.0	88.7	5.4	5.9
May	100.0	89.0	5.7	5.3
June	100.0	72.1	20.1	7.8
July	100.0	62.2	31.3	6.5
August	100.0	58.6	35.8	5.6
		Negro		
1944				
August	100.0	89.1	10.1	0.8
September	100.0	84.2	15.0	0.8
October	100.0	79.9	18.1	2.0
November	100.0	81.6	17.8	0.6
December	100.0	85.7	13.8	0.5
1945				
January	100.0	81.7	17.4	0.9
February	100.0	81.8	17.0	1.2
March	100.0	86.2	12.6	1.2
April	100.0	88.9	10.2	0.9
May	100.0	89.7	9.0	1.3
June	100.0	86.9	9.9	3.2
July	100.0	83.5	15.0	1.5
August	100.0	80.2	18.5	1.3

1/ Rejections include those found acceptable for limited service.
2/ Includes all races other than Negro.

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Table 6. Percent Distribution of Registrants Given Induction Examination by Race and Examination Status 1/

August 1944-August 1945

Month and Year	Total	Not Previously Examined	Rejected on Previous Examination 2/	Reported for Reexamination 3/	Reported for Physical Inspection 4/
			All Races		
1944					
August	100.0	7.2	0.9	36.9	55.0
September	100.0	8.2	1.1	42.9	47.8
October	100.0	7.1	1.3	42.0	49.6
November	100.0	6.3	1.2	41.7	50.8
December	100.0	4.9	1.0	41.2	52.9
1945					
January	100.0	6.1	1.1	40.6	52.2
February	100.0	5.7	0.9	35.0	58.4
March	100.0	4.6	0.8	28.7	65.9
April	100.0	4.0	0.7	25.0	70.3
May	100.0	3.5	0.8	29.1	66.6
June	100.0	3.9	0.8	30.6	64.7
July	100.0	4.3	1.3	28.4	66.0
August	100.0	5.3	2.0	21.7	71.0
			White 5/		
1944					
August	100.0	6.8	0.8	37.0	55.4
September	100.0	7.7	1.0	42.3	49.0
October	100.0	6.7	1.2	40.6	51.5
November	100.0	5.9	1.1	39.5	53.5
December	100.0	4.7	0.9	37.8	56.6
1945					
January	100.0	5.9	1.1	37.6	55.4
February	100.0	5.4	0.9	32.2	61.5
March	100.0	4.3	0.7	27.6	67.4
April	100.0	3.7	0.7	23.7	71.9
May	100.0	3.2	0.6	28.7	67.5
June	100.0	3.7	0.7	30.0	65.6
July	100.0	4.1	1.3	27.3	67.3
August	100.0	5.1	2.1	19.2	73.6
			Negro		
1944					
August	100.0	10.8	1.6	36.4	51.2
September	100.0	12.9	1.8	49.6	35.7
October	100.0	10.9	2.9	55.4	30.8
November	100.0	10.1	2.2	63.6	24.1
December	100.0	7.0	1.6	70.2	21.2
1945					
January	100.0	7.3	1.2	66.9	24.6
February	100.0	8.1	1.4	58.8	31.7
March	100.0	7.4	1.5	38.4	52.7
April	100.0	6.4	1.1	37.1	55.4
May	100.0	6.2	1.3	33.2	59.3
June	100.0	6.0	1.5	35.2	57.3
July	100.0	6.0	1.3	36.7	56.0
August	100.0	7.2	1.5	38.6	52.7

1/ Rejections include those found acceptable for limited service, but not inducted.
2/ Includes registrants rejected or found acceptable for limited service (Group C) on previous examination.
3/ Acceptable on previous examination more than 90 days old.
4/ Acceptable on previous examination 90 days or less prior to reporting for induction.
5/ All races other than Negro.

Table 1. Preinduction Rejection Rates, by State, Race, and Examination Status 1/
August 1944-August 1945

State	All Races			White 2/			Negro		
	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined
Continental United States	40.6	37.6	56.8	39.3	36.1	56.0	53.4	51.3	64.8
Alabama	49.6	47.5	63.8	41.1	37.8	60.5	67.6	66.9	74.2
Arizona	45.0	41.8	57.3	44.9	41.8	57.1	50.8	45.0	*
Arkansas	38.2	37.0	49.7	35.4	34.0	48.9	51.5	51.2	55.9
California	38.7	36.0	55.4	38.3	35.7	55.0	48.2	45.0	63.7
Colorado	50.1	48.5	70.1	50.0	48.4	69.9	60.0	56.8	*
Connecticut	44.8	41.4	67.3	44.0	40.9	65.9	62.9	55.8	84.8
Delaware	41.5	38.2	60.9	41.0	37.6	61.7	46.5	44.3	55.7
District of Columbia	34.8	33.0	39.9	35.3	34.2	38.2	33.6	30.6	44.5
Florida	46.0	42.2	59.9	43.2	39.9	57.0	51.3	46.9	64.1
Georgia	47.2	45.2	64.2	37.8	35.2	58.3	71.2	70.0	85.1
Idaho	39.2	37.8	46.4	39.2	37.8	46.4	*	*	*
Illinois	34.5	32.2	59.9	33.4	31.1	59.5	47.1	45.0	62.2
Indiana	34.4	29.9	63.4	34.2	29.6	63.2	42.9	39.0	70.6
Iowa	32.8	30.5	51.4	32.8	30.5	51.4	46.8	45.9	*
Kansas	43.1	36.5	66.9	42.5	36.4	66.5	62.1	55.8	82.2
Kentucky	37.9	34.8	58.8	38.2	35.0	59.1	29.9	28.3	45.0
Louisiana	51.4	47.8	68.5	45.6	41.6	65.1	60.6	57.8	73.6
Maine	42.6	39.9	67.5	42.6	39.8	67.4	*	*	*
Maryland	35.3	29.7	58.9	34.1	28.1	60.2	42.9	40.7	51.4
Massachusetts	43.8	40.1	63.4	43.7	40.0	63.5	50.0	47.8	59.8
Michigan	40.2	36.4	65.6	39.5	35.7	65.2	53.1	49.7	71.5
Minnesota	37.3	36.5	43.0	37.2	36.4	43.0	54.4	55.8	*
Mississippi	56.2	52.0	80.8	49.9	44.7	77.2	61.8	58.3	84.7
Missouri	47.9	42.7	69.3	47.4	41.9	69.3	56.4	54.7	68.6
Montana	39.1	37.7	45.0	39.1	37.7	45.0	*	*	*
Nebraska	41.1	38.4	68.1	40.9	38.2	68.2	65.4	66.4	*
Nevada	44.5	39.4	64.9	43.9	38.9	63.8	66.2	56.4	*
New Hampshire	45.9	38.4	63.8	46.0	38.4	63.8	*	*	*
New Jersey	36.8	32.5	53.9	36.7	32.4	54.1	37.7	34.1	52.8
New Mexico	45.2	42.9	55.4	45.3	42.9	55.3	37.1	35.3	*
New York	38.1	35.5	43.3	38.1	35.5	43.2	38.7	35.4	49.7
North Carolina	50.2	48.6	57.4	46.7	44.6	55.6	57.9	57.1	62.3
North Dakota	31.6	31.0	51.9	31.6	31.0	51.9	*	*	*
Ohio	38.5	34.8	60.8	38.2	34.4	60.8	44.7	42.0	61.6
Oklahoma	34.5	31.5	55.4	34.2	31.1	55.2	40.7	38.9	61.0
Oregon	51.8	51.1	54.2	51.7	51.1	54.0	53.9	47.6	76.3
Pennsylvania	38.5	32.9	63.7	38.4	32.7	64.1	40.5	36.7	57.4
Rhode Island	46.2	42.5	65.8	46.2	42.5	65.9	47.1	44.2	*
South Carolina	48.9	46.1	61.6	43.9	40.0	59.5	56.6	54.8	65.9
South Dakota	29.1	28.5	51.6	29.1	28.5	51.5	*	*	*
Tennessee	47.6	46.4	58.3	47.3	46.4	56.4	50.3	46.9	68.9
Texas	38.1	35.9	53.2	37.7	35.4	53.1	42.3	40.8	54.2
Utah	39.7	35.9	59.7	39.7	35.8	59.6	*	*	*
Vermont	41.2	37.9	64.9	41.3	37.9	64.9	*	*	*
Virginia	37.4	32.9	59.1	37.8	33.0	61.2	35.8	32.3	51.7
Washington	51.1	49.8	56.7	51.0	49.8	56.6	56.5	51.8	71.2
West Virginia	46.1	44.9	57.0	46.1	44.9	56.8	47.4	45.2	63.2
Wisconsin	28.5	25.9	58.1	28.4	25.8	58.0	46.7	44.7	*
Wyoming	45.0	43.1	66.6	44.9	43.0	66.3	*	*	*

* Less than 50 registrants examined.

1/ Rejections include registrants found acceptable for limited service.

2/ Includes all races other than Negro.

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Table 2. Rejection Rates per 100 Registrants Forwarded for Induction, by State; Race and Examination Status 1/

August 1944-August 1945

State	All Races			White 2/			Negro		
	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previou Examin
Continental United States	9.5	31.5	8.2	8.4	27.9	7.3	19.2	50.8	16.5
Alabama	10.7	34.8	9.6	8.6	25.6	7.8	18.2	66.1	16.0
Arizona	10.8	42.7	8.0	10.6	42.2	7.9	19.9	*	13.1
Arkansas	8.3	33.4	7.3	7.5	25.9	6.8	14.4	64.0	11.2
California	10.3	41.8	8.2	9.6	39.5	7.7	25.0	63.3	19.1
Colorado	9.9	35.5	8.3	9.8	34.9	8.2	26.2	*	20.5
Connecticut	6.6	28.3	5.4	6.2	26.4	5.1	15.4	50.9	11.8
Delaware	8.4	44.7	6.4	6.4	30.0	5.4	21.5	70.6	13.6
District of Columbia	11.0	28.9	8.6	7.7	17.9	6.5	15.5	41.5	11.6
Florida	15.5	37.4	13.4	10.5	27.7	8.9	24.0	57.8	23.0
Georgia	12.0	41.3	10.8	8.6	26.1	8.0	26.1	73.2	23.0
Idaho	10.9	30.9	10.6	10.9	30.9	10.6	*	*	*
Illinois	9.0	33.1	7.2	7.8	28.9	6.4	21.0	48.9	15.8
Indiana	6.9	28.3	5.7	6.4	26.9	5.5	18.1	43.5	12.4
Iowa	7.2	18.4	6.8	7.1	18.4	6.7	17.5	*	17.5
Kansas	12.2	33.5	11.4	11.8	31.4	11.0	29.5	*	25.6
Kentucky	8.6	24.5	7.7	8.5	24.9	7.6	10.6	18.3	10.7
Louisiana	15.6	50.0	13.9	12.5	37.8	11.4	21.8	68.4	19.1
Maine	6.9	26.7	7.2	7.9	26.7	7.2	*	*	*
Maryland	7.8	31.0	6.6	6.5	21.6	5.8	13.1	49.1	9.8
Massachusetts	7.4	24.2	6.0	7.3	24.1	5.9	12.4	30.9	10.3
Michigan	7.7	28.9	6.5	7.1	25.9	6.1	18.5	49.3	13.9
Minnesota	3.9	8.3	3.8	3.9	7.9	3.8	8.4	*	3.9
Mississippi	14.3	49.2	13.4	9.9	25.4	9.5	18.6	66.9	17.1
Missouri	12.7	33.4	11.8	11.9	30.1	11.2	25.9	62.4	23.1
Montana	10.3	21.9	10.0	10.2	21.9	10.0	*	*	*
Nebraska	10.3	34.0	9.2	10.1	33.3	9.0	34.5	*	30.6
Nevada	15.5	48.9	10.6	14.9	47.2	10.4	26.8	*	*
New Hampshire	6.5	20.5	5.7	6.5	20.5	5.7	*	*	*
New Jersey	6.5	24.8	5.1	5.5	20.9	4.5	14.4	40.6	10.7
New Mexico	10.0	37.0	8.4	9.9	35.8	8.4	20.8	*	12.7
New York	7.1	29.7	5.6	6.3	26.6	5.1	17.6	44.5	12.4
North Carolina	15.8	40.4	15.2	14.6	33.2	14.2	19.2	62.6	18.2
North Dakota	6.2	6.9	6.2	6.2	6.9	6.2	*	*	*
Ohio	8.5	31.1	7.0	7.9	28.9	6.6	18.1	45.7	13.9
Oklahoma	8.1	23.8	7.2	7.7	22.9	6.8	16.7	39.2	15.2
Oregon	9.1	22.7	8.8	8.8	22.5	8.5	22.2	*	22.9
Pennsylvania	7.4	24.6	6.6	6.8	22.2	6.1	16.8	39.0	14.5
Rhode Island	7.7	25.0	7.2	7.6	24.5	7.2	8.6	*	7.0
South Carolina	13.9	39.4	11.9	10.5	31.5	11.0	16.8	56.3	13.8
South Dakota	4.1	4.0	4.1	4.1	4.0	4.1	*	*	*
Tennessee	13.8	32.9	12.3	11.5	29.6	10.0	29.8	53.5	27.8
Texas	10.9	33.8	9.4	9.9	32.6	8.4	19.4	42.7	17.5
Utah	10.7	37.0	9.5	10.7	36.7	9.5	*	*	*
Vermont	10.5	31.0	10.3	10.5	28.6	10.6	*	*	*
Virginia	9.9	30.2	8.8	6.0	26.6	7.3	14.5	37.6	12.9
Washington	9.8	28.5	8.9	9.3	26.4	8.5	30.4	53.6	25.8
West Virginia	11.6	30.2	9.1	11.2	30.4	9.1	11.8	22.9	10.4
Wisconsin	4.5	21.3	3.6	4.4	21.0	3.6	12.6	*	9.4
Wyoming	10.2	31.0	8.5	10.0	30.2	8.4	*	*	*

* Less than 50 registrants examined.

1/ Rejections include registrants found acceptable for limited service.

2/ Includes all races other than Negro.

Table 3. Percent Distribution of Registrants Given Preinduction Examination by State and by Examination Status

August 1944-August 1945

State	All Races			White 1/			Negro		
	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined
Continental United States	100.0	84.2	15.8	100.0	84.1	15.9	100.0	85.0	15.0
Alabama	100.0	87.2	12.8	100.0	85.6	14.4	100.0	90.5	9.5
Arizona	100.0	79.7	20.3	100.0	79.8	20.2	100.0	74.9	*
Arkansas	100.0	91.0	9.0	100.0	90.4	9.6	100.0	93.7	6.3
California	100.0	86.4	13.6	100.0	86.5	13.5	100.0	82.7	17.3
Colorado	100.0	92.6	7.4	100.0	92.6	7.4	100.0	89.7	10.3
Connecticut	100.0	86.9	13.1	100.0	87.4	12.6	100.0	75.8	24.2
Delaware	100.0	85.5	14.5	100.0	86.0	14.0	100.0	80.7	19.3
District of Columbia	100.0	74.3	25.7	100.0	72.2	27.8	100.0	78.9	21.1
Florida	100.0	78.6	21.4	100.0	80.7	19.3	100.0	74.5	25.5
Georgia	100.0	89.6	10.4	100.0	88.7	11.3	100.0	91.8	8.2
Idaho	100.0	84.0	16.0	100.0	84.0	16.0	*	*	*
Illinois	100.0	91.6	8.4	100.0	91.9	8.1	100.0	87.5	12.5
Indiana	100.0	86.5	13.5	100.0	86.4	13.6	100.0	87.8	12.2
Iowa	100.0	88.8	11.2	100.0	88.9	11.1	100.0	76.8	23.2
Kansas	100.0	88.6	11.4	100.0	88.5	11.5	100.0	89.8	10.2
Kentucky	100.0	87.0	13.0	100.0	86.9	13.1	100.0	90.5	9.5
Louisiana	100.0	82.6	17.4	100.0	82.8	17.2	100.0	82.3	17.7
Maine	100.0	90.0	10.0	100.0	90.0	10.0	*	*	*
Maryland	100.0	80.8	19.2	100.0	81.1	18.9	100.0	79.2	20.8
Massachusetts	100.0	84.0	16.0	100.0	84.0	16.0	100.0	84.7	15.3
Michigan	100.0	86.9	13.1	100.0	87.0	13.0	100.0	84.7	15.3
Minnesota	100.0	87.2	12.8	100.0	87.2	12.8	100.0	87.0	13.0
Mississippi	100.0	85.4	14.6	100.0	84.0	16.0	100.0	86.7	13.3
Missouri	100.0	80.3	19.7	100.0	79.9	20.1	100.0	87.7	12.3
Montana	100.0	80.7	19.3	100.0	80.7	19.3	*	*	*
Nebraska	100.0	91.0	9.0	100.0	91.1	8.9	100.0	80.5	19.5
Nevada	100.0	79.7	20.3	100.0	79.9	20.1	100.0	74.3	25.7
New Hampshire	100.0	70.3	29.7	100.0	70.3	29.7	*	*	*
New Jersey	100.0	80.0	20.0	100.0	80.0	20.0	100.0	80.7	19.3
New Mexico	100.0	81.3	18.7	100.0	81.2	18.8	100.0	97.1	2.9
New York	100.0	67.1	32.9	100.0	66.5	33.5	100.0	77.3	22.7
North Carolina	100.0	82.1	17.9	100.0	81.0	19.0	100.0	84.6	15.4
North Dakota	100.0	97.2	2.8	100.0	97.2	2.8	*	*	*
Ohio	100.0	85.7	14.3	100.0	85.7	14.3	100.0	86.5	13.5
Oklahoma	100.0	87.6	12.4	100.0	87.5	12.5	100.0	91.2	8.8
Oregon	100.0	78.0	22.0	100.0	78.0	22.0	100.0	78.2	21.8
Pennsylvania	100.0	81.9	18.1	100.0	81.9	18.1	100.0	82.0	18.0
Rhode Island	100.0	84.2	15.8	100.0	84.2	15.8	100.0	83.4	16.6
South Carolina	100.0	81.6	18.4	100.0	79.6	20.4	100.0	84.6	15.4
South Dakota	100.0	97.5	2.5	100.0	97.5	2.5	*	*	*
Tennessee	100.0	90.2	9.8	100.0	90.8	9.2	100.0	84.6	15.4
Texas	100.0	87.0	13.0	100.0	86.7	13.3	100.0	89.2	10.8
Utah	100.0	83.9	16.1	100.0	83.9	16.1	*	*	*
Vermont	100.0	87.5	12.5	100.0	87.5	12.5	*	*	*
Virginia	100.0	82.8	17.2	100.0	83.1	16.9	100.0	81.8	18.2
Washington	100.0	81.9	18.1	100.0	82.0	18.0	100.0	75.6	24.4
West Virginia	100.0	89.8	10.2	100.0	89.9	10.1	100.0	87.8	12.2
Wisconsin	100.0	91.9	8.1	100.0	91.9	8.1	100.0	90.1	9.9
Wyoming	100.0	91.8	8.2	100.0	91.9	8.1	*	*	*

* Less than 50 registrants examined.

1/ Includes all races other than Negro.

1440

FIGURE 7

COMPOSITION OF REGISTRANT GROUPS GIVEN PREINDUCTION EXAMINATION

AUGUST 1944 – AUGUST 1945

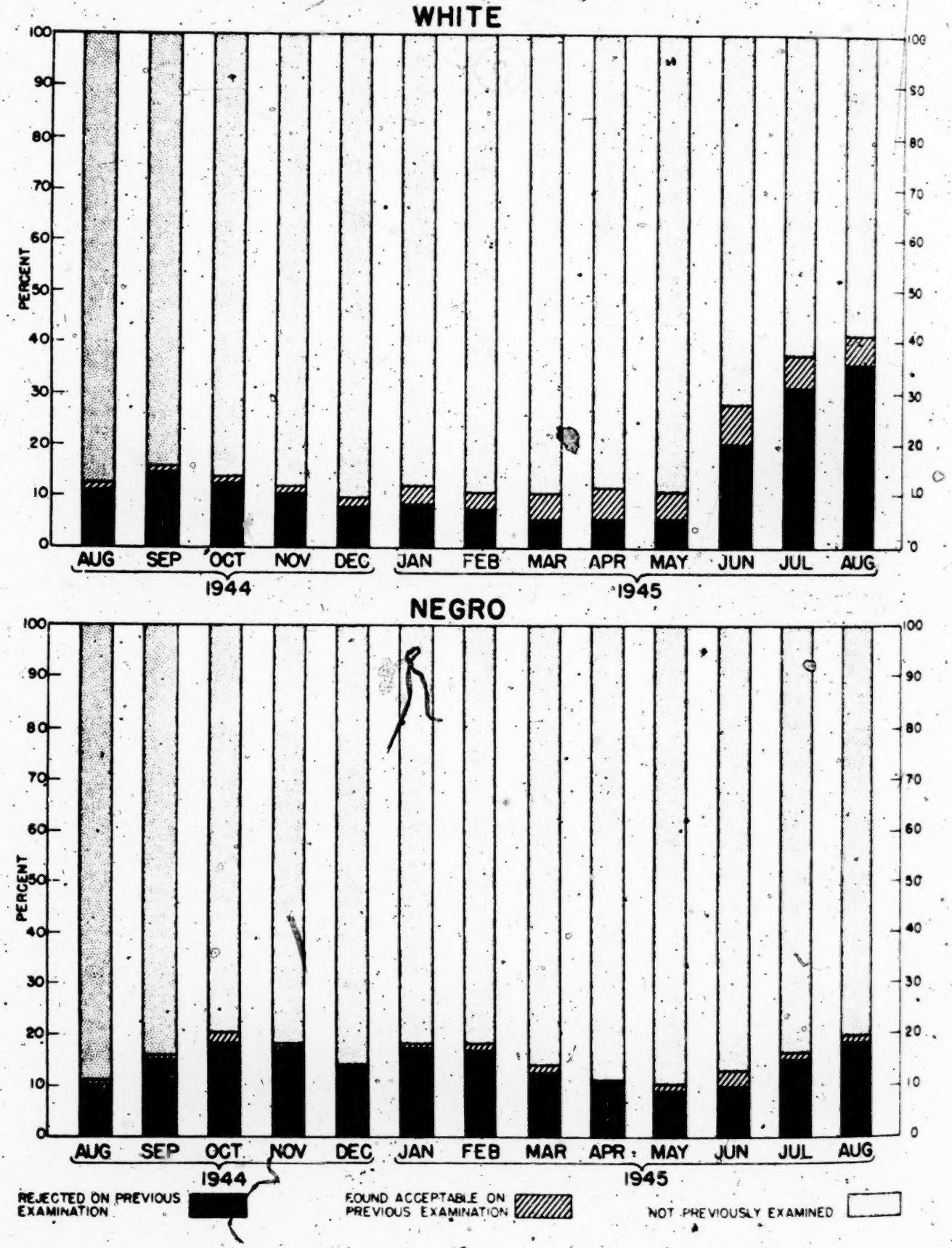


Table 4. Percent Distribution of Registrants Given Induction Examination by State, Race and by Examination Status

August 1944-August 1945

State	All Races			White 1/			Negro		
	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined	Total	Not Previously Examined	Previously Examined
Continental United States	100.0	5.4	94.6	100.0	5.1	94.9	100.0	8.1	91.9
Alabama	100.0	4.2	95.8	100.0	4.2	95.8	100.0	4.4	95.6
Arizona	100.0	8.1	91.9	100.0	7.9	92.1	100.0	16.7	83.3
Arkansas	100.0	3.8	96.2	100.0	3.4	96.6	100.0	6.0	94.0
California	100.0	6.2	93.8	100.0	5.8	94.2	100.0	13.4	86.6
Colorado	100.0	5.8	94.2	100.0	5.7	94.3	100.0	13.1	86.9
Connecticut	100.0	5.3	94.7	100.0	5.1	94.9	100.0	9.3	90.7
Delaware	100.0	5.2	94.8	100.0	3.9	96.1	100.0	13.9	86.1
District of Columbia	100.0	11.8	88.2	100.0	10.8	89.2	100.0	13.1	86.9
Florida	100.0	8.6	91.4	100.0	8.9	91.1	100.0	8.2	91.8
Georgia	100.0	3.6	96.4	100.0	3.1	96.9	100.0	6.1	93.9
Idaho	100.0	1.2	98.8	100.0	1.2	98.8	*	*	*
Illinois	100.0	7.0	93.0	100.0	6.1	93.9	100.0	15.8	84.2
Indiana	100.0	4.6	95.4	100.0	4.4	95.6	100.0	10.0	90.0
Iowa	100.0	3.7	96.3	100.0	3.7	96.3	100.0	10.6	89.4
Kansas	100.0	3.7	96.3	100.0	3.6	96.4	100.0	9.7	90.3
Kentucky	100.0	5.3	94.7	100.0	5.2	94.8	100.0	6.9	93.1
Louisiana	100.0	4.6	95.4	100.0	4.2	95.8	100.0	5.6	94.4
Maine	100.0	3.6	96.4	100.0	3.6	96.4	*	*	*
Maryland	100.0	5.2	94.8	100.0	4.3	95.7	100.0	8.5	91.5
Massachusetts	100.0	7.8	92.2	100.0	7.7	93.3	100.0	12.6	87.4
Michigan	100.0	5.6	94.4	100.0	5.2	94.8	100.0	13.1	86.9
Minnesota	100.0	3.3	96.7	100.0	3.2	96.8	100.0	8.4	91.6
Mississippi	100.0	2.7	97.3	100.0	2.3	97.7	100.0	3.0	97.0
Missouri	100.0	4.0	96.0	100.0	3.8	96.2	100.0	7.2	92.8
Montana	100.0	1.9	98.1	100.0	1.9	98.1	*	*	*
Nebraska	100.0	4.5	95.5	100.0	4.5	95.5	100.0	10.9	89.1
Nevada	100.0	12.8	87.2	100.0	12.3	87.7	100.0	21.4	78.6
New Hampshire	100.0	1.1	98.9	100.0	1.1	98.9	*	*	*
New Jersey	100.0	7.1	92.9	100.0	6.4	93.6	100.0	12.6	87.4
New Mexico	100.0	5.7	94.3	100.0	5.6	94.4	100.0	12.5	87.5
New York	100.0	6.4	93.6	100.0	5.7	94.3	100.0	16.2	83.8
North Carolina	100.0	2.4	97.6	100.0	2.4	97.6	100.0	2.3	97.7
North Dakota	100.0	3.9	96.1	100.0	3.9	96.1	*	*	*
Ohio	100.0	6.5	93.5	100.0	6.0	94.0	100.0	15.0	85.0
Oklahoma	100.0	5.4	94.6	100.0	5.4	94.6	100.0	6.3	93.7
Oregon	100.0	2.3	97.7	100.0	2.3	97.7	100.0	3.6	96.4
Pennsylvania	100.0	4.3	95.7	100.0	3.9	96.1	100.0	9.4	90.6
Rhode Island	100.0	5.8	94.2	100.0	5.7	94.3	100.0	8.0	92.0
South Carolina	100.0	7.2	92.8	100.0	7.2	92.8	100.0	7.2	92.8
South Dakota	100.0	3.1	96.9	100.0	3.1	96.9	*	*	*
Tennessee	100.0	7.3	92.7	100.0	7.2	92.8	100.0	7.8	92.2
Texas	100.0	6.2	93.8	100.0	6.1	93.9	100.0	7.4	92.6
Utah	100.0	4.4	95.6	100.0	4.4	95.6	*	*	*
Vermont	100.0	0.9	99.1	100.0	0.9	99.1	*	*	*
Virginia	100.0	5.2	94.8	100.0	4.7	95.3	100.0	6.4	93.6
Washington	100.0	4.8	95.2	100.0	4.5	95.5	100.0	16.7	83.3
West Virginia	100.0	11.7	88.3	100.0	11.8	88.2	100.0	10.9	89.1
Wisconsin	100.0	4.7	95.3	100.0	4.6	95.4	100.0	9.3	90.7
Wyoming	100.0	7.5	92.5	100.0	7.5	92.5	*	*	*

* Less than 50 registrants examined.

1/ Includes all races other than Negro.

1442

FIGURE 8

COMPOSITION OF REGISTRANT GROUPS REPORTING FOR INDUCTION

AUGUST 1944-AUGUST 1945

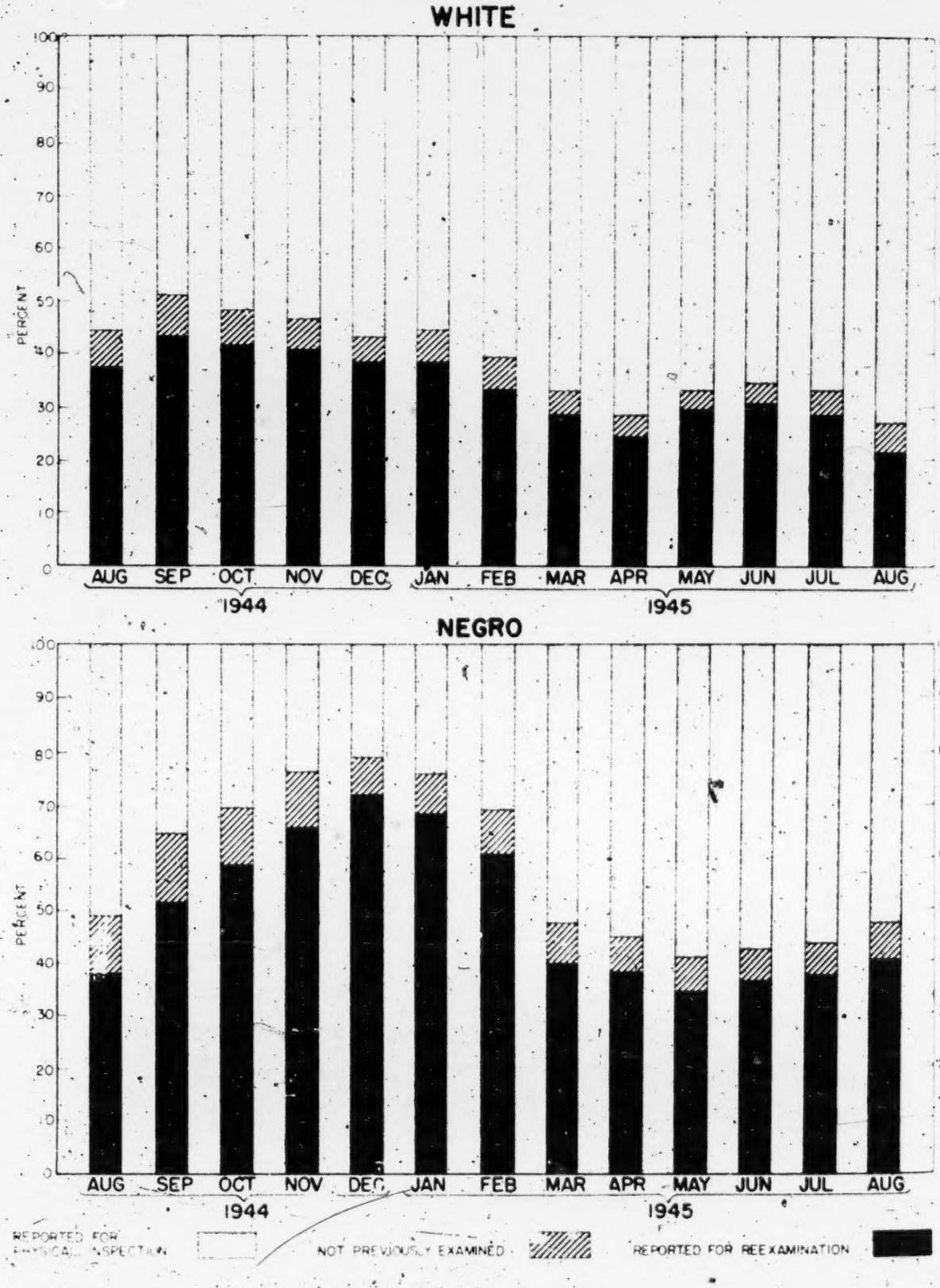


Table 5

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

ALABAMA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.6	2.4	2.7	3.5	3.6	3.1	2.5	2.4	2.7
Ears	2.3	3.8	.5	1.9	1.2	4.7	2.3	3.9	.4
Nose and sinus	.3	.5	-	1.0	1.2	-	.3	.5	-
Throat	*	*	*	.3	.4	-	*	-	*
Teeth	.1	.2	-	-	-	-	.1	.2	-
Mouth and gums	.1	.1	-	1.0	1.2		*	.1	-
Tuberculosis	1.3	1.3	1.2	5.4	5.9	3.1	1.1	1.0	1.2
Lungs and pleura	1.6	2.2	.8	4.1	4.3	3.1	1.5	2.1	.7
Cardiovascular	4.5	2.9	6.6	2.8	3.6	-	4.6	2.9	6.7
Varicose veins	1.0	1.2	.7	.3	.4	-	1.0	1.2	.7
Abdominal viscera	.7	1.3	.1	1.9	2.4	-	.7	1.2	.1
Kidney and urinary	1.1	2.0	.1	.6	.8	-	1.1	2.1	.1
Blood and blood-forming	.1	.2	-	.3	.4	-	.1	.2	-
Hernia	4.4	5.5	3.1	12.6	11.8	15.6	4.1	5.1	2.8
Hemorrhoids	.4	.6	.1	.3	.4	-	.4	.6	.1
Genitalia	.8	1.1	.4	2.8	3.5	-	.7	1.0	.4
Syphilis	1.1	.7	1.7	1.0	.4	3.1	1.2	.7	1.7
Gonorrhea and other venereal	.1	*	.2	-	-	-	.1	*	.2
Neoplasms	.4	.6	.2	1.0	1.2	-	.4	.5	.2
Musculoskeletal	7.3	8.1	6.2	24.3	22.1	32.8	6.5	7.2	5.7
Feet	4.2	4.3	4.1	-	-		4.4	4.5	4.2
Endocrine	.3	.5	.1	.6	.8	-	.3	.5	.1
Mental disease	27.9	34.4	19.8	5.0	5.1	4.7	28.9	36.2	20.1
Mental deficiency	1.0	1.1	1.0	6.0	6.3	4.7	.8	.7	.9
Minimum intelligence tests 3/	26.5	12.6	43.8	-	-	-	27.7	13.4	44.7
Neurological	4.2	4.8	3.4	14.8	15.0	14.1	3.7	4.3	3.2
Skin	.9	1.2	.6	1.6	1.6	1.6	.9	1.1	.6
Infectious and parasitic	.2	.1	.3	-	-	-	.2	.2	.3
Acute conditions	.6	.7	.4	2.8	2.8	3.1	.5	.6	.4
Underweight and overweight	.8	1.2	.2	2.2	2.4	1.6	.7	1.1	.2
Other medical	.7	.8	.5	1.9	1.2	4.7	.6	.8	.4
Nonmedical	2.5	3.6	1.2	-	-	-	2.6	3.8	1.2

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 194[illegible] through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

1441

Table 6

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

ARIZONA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	6.2	4.0	6.3
Ears	7.9	-	8.1
Nose and sinus	.1	-	.1
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	9.3	20.0	9.1
Lungs and pleura	2.4	8.0	2.3
Cardiovascular	5.5	-	5.7
Varicose veins	.6	-	.6
Abdominal viscera	.7	-	.7
Kidney and urinary	.6	-	.6
Blood and blood-forming	-	-	-
Hernia	2.4	-	2.5
Hemorrhoids	.4	-	.4
Genitalia	1.1	-	1.1
Syphilis	1.6	8.0	1.4
Gonorrhea and other venereal	-	-	-
Neoplasms	.3	-	.3
Musculoskeletal	6.7	24.0	6.3
Feet	1.4	-	1.4
Endocrine	.6	-	.6
Mental disease	13.5	4.0	13.7
Mental deficiency	.9	-	.9
Minimum intelligence tests 2/	25.6	-	26.1
Neurological	2.1	16.0	1.8
Skin	.7	8.0	.6
Infectious and parasitic	.6	-	.6
Acute conditions	.5	8.0	.3
Underweight and overweight	3.1	-	3.2
Other medical	.4	-	.4
Nonmedical	4.8	-	4.9

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 7

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

ARKANSAS

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.3	4.3	1.0	2.3	2.2	3.2	3.4	4.5	1.0
Ears	3.4	4.6	.6	2.3	2.2	3.1	3.5	4.8	.6
Nose and sinus	.3	.5	-	-	-	-	.3	.5	-
Throat	-	-	-	-	-	-	-	-	-
Teeth	.4	.6	-	-	-	-	.4	.6	-
Mouth and gums	.1	.1	-	-	-	-	.1	.2	-
Tuberculosis	3.4	4.2	1.7	8.5	8.8	6.5	3.2	3.8	1.6
Lungs and pleura	.8	.9	.4	1.6	1.3	3.2	.7	.9	.3
Cardiovascular	13.7	15.4	9.8	1.9	2.2	-	14.3	16.3	10.0
Varicose veins	.8	1.0	.3	.8	.9	-	.8	1.0	.3
Abdominal viscera	.9	1.3	-	4.3	4.8	-	.8	1.1	-
Kidney and urinary	.6	.7	.3	-	-	-	.6	.8	.3
Blood and blood-forming	-	-	-	-	-	-	-	-	-
Hernia	4.6	5.3	2.9	5.8	5.2	9.7	4.5	5.2	2.7
Hemorrhoids	.5	.6	.3	-	-	-	.5	.6	.3
Genitalia	.8	.9	.5	-	-	-	.8	1.0	.5
Syphilis	.9	.4	2.2	.4	-	3.2	1.0	.4	2.2
Gonorrhea and other venereal	*	*	-	-	-	-	*	*	-
Neoplasms	.6	.9	.1	1.9	2.2	-	.6	.8	.1
Musculoskeletal	8.1	9.8	4.1	33.2	33.8	29.0	6.8	8.2	3.6
Feet	1.5	1.5	1.3	.4	.4	-	1.5	1.6	1.3
Endocrine	.5	.7	-	1.9	2.2	-	.4	.6	-
Mental disease	13.6	17.2	5.1	8.9	9.2	6.5	13.8	17.8	5.1
Mental deficiency	3.0	2.3	4.4	10.0	10.1	9.7	2.6	1.8	4.3
Minimum intelligence tests 3/	30.4	18.3	58.5	-	-	-	32.0	19.6	59.8
Neurological	3.4	3.7	2.6	12.4	12.3	12.9	2.9	3.1	2.4
Skin	.6	.8	.3	-	-	-	.7	.8	.3
Infectious and parasitic	.1	.1	-	-	-	-	*	.1	-
Acute Conditions	.2	.2	.3	1.5	.9	6.5	.1	.2	.1
Underweight and overweight	.8	1.0	.5	-	-	-	.9	1.0	.5
Other medical	.6	.7	.3	1.9	1.3	6.5	.5	.6	.2
Nonmedical	2.1	2.0	2.5	-	-	-	2.3	2.1	2.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

1446

Table 8
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

CALIFORNIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.2	4.2	3.4	1.8	1.5	16.7	4.3	4.4	2.9
Ears	6.8	7.0	.8	1.1	1.1	-	7.2	7.4	.9
Nose and sinus	1.0	1.0	.6	-	-	-	1.0	1.0	.6
Throat	.1	.1	.3	.2	.2	-	.1	.1	.3
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	-	.2	.2	-	.1	.1	-
Tuberculosis	6.9	6.9	5.1	16.6	16.6	16.7	6.3	6.3	4.7
Lungs and pleura	3.1	3.1	1.4	3.7	3.8	-	3.0	3.1	1.4
Cardiovascular	6.7	6.8	4.2	2.7	2.7	-	6.9	7.0	4.4
Varicose veins	1.2	1.2	1.4	-	-	-	1.3	1.3	1.4
Abdominal viscera	2.4	2.5	1.4	1.2	1.3	-	2.5	2.5	1.4
Kidney and urinary	1.8	1.8	.8	.9	.9	-	1.8	1.9	.9
Blood and blood-forming	.1	.1	-	.2	.2	-	.1	.1	-
Hernia	5.2	5.2	4.2	6.6	6.7	-	5.1	5.1	4.4
Hemorrhoids	.3	.3	-	1.2	1.1	-	.3	.3	-
Genitalia	1.1	1.2	-	.4	.4	-	1.2	1.2	-
Syphilis	.8	.7	3.7	2.1	1.8	16.7	.7	.6	3.2
Gonorrhea and other venereal	*	*	.3	-	-	-	*	*	.3
Neoplasms	1.0	1.1	-	.5	.5	-	1.1	1.1	-
Musculoskeletal	11.9	12.0	8.4	23.2	23.5	8.3	11.2	11.3	8.4
Feet	1.8	1.7	5.4	-	-	-	1.9	1.8	5.5
Endocrine	1.2	1.2	1.1	2.5	2.6	-	1.2	1.2	1.2
Mental disease	24.8	24.8	25.3	11.8	11.3	33.3	25.6	25.6	25.1
Mental deficiency	.5	.6	.3	5.5	5.6	-	.2	.3	.3
Minimum intelligence tests 3/	5.8	5.2	21.4	-	-	-	6.2	5.5	22.2
Neurological	4.5	4.6	2.3	16.8	17.0	8.3	3.7	3.8	2.0
Skin	1.3	1.3	.8	.4	.4	-	1.3	1.4	.9
Infectious and parasitic	.2	.2	-	-	-	-	.2	.2	-
Acute conditions	1.1	1.1	1.1	.3	.4	-	1.1	1.1	1.2
Underweight and overweight	1.5	1.5	.6	-	-	-	1.6	1.6	.6
Other medical	.8	.8	.6	.2	.2	-	.9	.9	.6
Nonmedical	1.8	1.7	5.1	-	-	-	1.9	1.8	5.2

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 9
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

COLORADO

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	2.0	1.7	1.9
Ears	3.8	.8	3.9
Nose and sinus	.4	-	.4
Throat	-	-	-
Teeth	.1	-	.1
Mouth and gums	-	-	-
Tuberculosis	1.8	5.8	1.6
Lungs and pleura	2.1	2.5	2.1
Cardiovascular	5.5	7.4	5.4
Varicose veins	.8	-	.8
Abdominal viscera	2.5	2.5	2.5
Kidney and urinary	1.4	4.1	1.3
Blood & blood-forming	.1	1.6	.1
Hernia	3.4	5.0	3.3
Hemorrhoids	.1	1.6	.1
Genitalia	.8	1.7	.8
Syphilis	.5	-	.5
Gonorrhea and other venereal	-	-	-
Neoplasms	.6	.8	.6
Musculoskeletal	8.8	27.3	7.9
Feet	.8	-	.8
Endocrine	1.2	2.5	1.1
Mental disease	46.0	8.3	47.7
Mental deficiency	2.3	3.3	2.3
Minimum intelligence tests 2/	4.8	-	5.0
Neurological	6.0	19.0	5.3
Skin	.6	-	.7
Infectious and parasitic	.2	1.6	.1
Acute conditions	.6	1.7	.6
Underweight and overweight	1.0	-	1.1
Other medical	1.0	.8	1.1
Nonmedical	.8	-	.9

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 10
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

CONNECTICUT

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.9	5.0	2.4	2.7	2.8	-	4.9	5.0	2.4
Ears	4.6	4.8	-	-	-	-	4.7	5.0	-
Nose and sinus	.7	.7	-	-	-	-	.7	.8	-
Throat	-	-	-	-	-	-	-	-	-
Teeth	-	-	-	-	-	-	-	-	-
Mouth and gums	-	-	-	-	-	-	-	-	-
Tuberculosis	1.9	1.9	.8	6.8	6.9	-	1.8	1.8	.8
Lungs and pleura	2.0	2.1	-	-	-	-	2.1	2.2	-
Cardiovascular	12.6	12.9	5.5	4.1	4.2	-	12.8	13.1	5.7
Varicose veins	.8	.8	-	1.3	1.4	-	.8	.8	-
Abdominal viscera	3.0	3.1	.8	10.8	11.1	-	2.8	2.9	.8
Kidney and urinary	.7	.8	.8	1.3	1.4	-	.7	.7	.8
Blood & blood-forming	.2	.2	-	-	-	-	.2	.2	-
Hernia	3.1	3.3	-	1.3	1.4	-	3.2	3.3	-
Hemorrhoids	.1	.2	-	-	-	-	.1	.2	-
Genitalia	.8	.8	.8	-	-	-	.8	.8	.8
Syphilis	.4	.3	.8	-	-	-	.4	.3	.8
Gonorrhea and other venereal	.1	.1	-	-	-	-	.1	.1	-
Neoplasms	.8	.8	-	-	-	-	.8	.8	-
Musculoskeletal	4.4	4.5	1.6	24.3	25.0	-	3.8	3.9	1.6
Feet	.3	.3	.8	-	-	-	.3	.3	.8
Endocrine	1.2	1.2	1.6	10.8	11.1	-	1.0	1.0	1.6
Mental disease	38.0	38.2	34.1	6.8	4.2	100.0	38.8	39.1	33.1
Mental deficiency	5.7	5.0	20.6	4.1	4.2	-	5.8	5.0	21.0
Minimum intelligence tests 3/	6.5	5.6	24.6	-	-	-	6.7	5.8	25.0
Neurological	4.4	4.5	1.6	21.6	22.2	-	3.9	4.0	1.6
Skin	.5	.5	.8	-	-	-	.5	.5	.8
Infectious and parasitic	-	-	-	-	-	-	-	-	-
Acute conditions	.2	.2	-	-	-	-	.2	.2	-
Underweight and overweight	.6	.7	-	-	-	-	.7	.7	-
Other medical	.5	.6	-	4.1	4.1	-	.4	.5	-
Nonmedical	1.0	.9	2.4	-	-	-	1.0	1.0	2.4

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 11

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

DELAWARE

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.9	3.0	2.4	-	-	-	3.0	3.1	2.5
Ears	4.3	5.2	-	-	-	-	4.4	5.3	-
Nose and sinus	.2	.2	-	-	-	-	.2	.2	-
Throat	-	-	-	-	-	-	-	-	-
Teeth	-	-	-	-	-	-	-	-	-
Mouth and gums	-	-	-	-	-	-	-	-	-
Tuberculosis	2.1	2.0	2.4	16.7	11.1	33.3	1.7	1.8	1.2
Lungs and pleura	1.1	1.2	-	-	-	-	1.1	1.3	-
Cardiovascular	7.4	7.5	7.1	-	-	-	7.6	7.6	7.4
Varicose veins	1.3	1.0	2.4	-	-	-	1.3	1.0	2.5
Abdominal viscera	2.1	2.5	-	-	-	-	2.1	2.5	-
Kidney and urinary	.4	.5	-	-	-	-	.4	.5	-
Blood & blood-forming	-	-	-	-	-	-	-	-	-
Hernia	5.6	6.0	3.5	8.3	11.1	-	5.5	5.9	3.7
Hemorrhoids	.6	.8	-	-	-	-	.6	.8	-
Genitalia	.4	.5	-	-	-	-	.4	.5	-
Syphilis	.2	-	1.2	-	-	-	.2	-	1.2
Gonorrhea and other venereal	-	-	-	-	-	-	-	-	-
Neoplasms	1.0	1.0	1.2	-	-	-	1.1	1.0	1.2
Musculoskeletal	4.3	4.7	2.4	25.0	33.4	-	3.8	4.1	2.5
Feet	.8	1.0	-	-	-	-	.9	1.0	-
Endocrine	1.0	.8	2.4	-	-	-	1.1	.8	2.5
Mental disease	43.4	46.0	30.9	-	-	-	44.5	47.1	32.1
Mental deficiency	.6	.5	1.2	8.3	11.1	-	.4	.3	1.2
Minimum intelligence tests 3/	13.0	8.	35.7	16.7	-	66.7	12.9	8.4	34.6
Neurological	3.7	4.5	-	16.7	22.2	-	3.4	4.1	-
Skin	.2	.2	-	-	-	-	.2	.2	-
Infectious and parasitic	.4	.5	-	-	-	-	.4	.5	-
Acute conditions	.8	.5	2.4	-	-	-	.8	.5	2.5
Underweight and overweight	.8	.5	2.4	-	-	-	.8	.5	2.5
Other medical	1.0	1.0	1.2	8.3	11.1	-	.8	.8	1.2
Nonmedical	.4	.2	1.2	-	-	-	.4	.2	1.2

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 12
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

DISTRICT of COLUMBIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.7	5.4	3.8	-	-	-	4.7	5.5	3.9
Ears	2.6	4.4	.6	4.3	6.7	-	2.6	4.4	.6
Nose and sinus	.6	.9	.3	-	-	-	.6	.9	.3
Throat	-	-	-	-	-	-	-	-	-
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and gums	-	-	-	-	-	-	-	-	-
Tuberculosis	3.8	4.3	3.3	13.1	6.7	25.0	3.7	4.3	3.0
Lungs and pleura	3.4	3.5	3.2	-	-	-	3.4	3.5	3.3
Cardiovascular	10.2	6.6	14.3	-	-	-	10.4	6.6	14.5
Varicose veins	1.1	.7	1.5	-	-	-	1.1	.8	1.5
Abdominal viscera	1.9	2.2	1.6	-	-	-	2.0	2.2	1.6
Kidney and urinary	1.9	2.1	1.6	-	-	-	1.9	2.1	1.6
Blood and blood-forming	.3	.1	.5	4.3	6.7	-	.2	-	.5
Hernia	2.9	2.6	3.3	8.7	6.7	12.5	2.9	2.6	3.2
Hemorrhoids	.7	1.0	.5	-	-	-	.7	1.0	.5
Genitalia	.8	1.1	.6	-	-	-	.8	1.1	.6
Syphilis	4.9	1.1	9.1	-	-	-	4.9	1.1	9.2
Gonorrhea and other venereal	.3	.1	.5	4.3	-	12.5	.2	.1	.4
Neoplasms	2.2	4.0	.1	-	-	-	2.2	4.1	.1
Musculoskeletal	7.0	6.9	7.1	26.1	33.3	12.5	6.7	6.4	7.0
Feet	1.6	.9	2.4	-	-	-	1.6	.9	2.5
Endocrine	.7	.7	.6	-	-	-	.7	.8	.6
Mental disease	30.5	39.5	20.6	13.1	-	37.5	30.8	40.2	20.5
Mental deficiency	.6	.6	.6	17.4	26.6	-	.4	.2	.6
Minimum intelligence tests 3/	8.2	1.1	16.2	-	-	-	8.4	1.1	16.3
Neurological	4.2	5.1	3.3	8.7	13.3	-	4.2	4.9	3.3
Skin	1.2	1.2	1.2	-	-	-	1.2	1.2	1.2
Infectious and parasitic	.1	.2	-	-	-	-	.1	.2	-
Acute conditions	.8	.7	.8	-	-	-	.8	.8	.8
Underweight and overweight	.6	.6	.5	-	-	-	.6	.6	.5
Other medical	1.3	2.0	.6	-	-	-	1.3	2.0	.6
Nonmedical	.8	.3	1.3	-	-	-	.8	.3	1.3

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 13
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

FLORIDA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.6	3.0	2.1	4.6	4.9	3.8	2.5	2.8	2.0
Ears	2.2	3.3	.6	1.4	1.5	1.3	2.3	3.5	.6
Nose and sinus	.6	1.0	.1	-	-	-	.6	1.1	.1
Throat	-	-	-	-	-	-	-	-	-
Teeth	*	.1	-	-	-	-	*	.1	-
Mouth and gums	*	.1	-	.4	.5	-	*	*	-
Tuberculosis	.0	.9	1.1	4.6	3.5	7.6	.8	.7	.9
Lungs and pleura	2.8	3.3	2.2	1.4	1.5	1.3	2.9	3.4	2.2
Cardiovascular	5.8	5.4	6.3	2.9	3.0	2.5	6.0	5.7	6.5
Varicose veins	1.0	1.1	.9	1.4	1.5	1.3	1.0	1.1	.9
Abdominal viscera	2.4	3.7	.7	2.5	3.5	-	2.4	3.7	.7
Kidney and urinary	.9	1.5	.1	1.4	2.0	-	.9	1.4	.1
Blood & blood-forming	*	.1	-	-	-	-	*	.1	-
Hernia	8.1	8.1	8.0	17.4	13.8	26.6	7.5	7.7	7.2
Hemorrhoids	.7	.8	.4	.7	1.0	-	.7	.8	.4
Genitalia	1.8	1.3	2.4	.7	-	2.5	1.9	1.5	2.4
Syphilis	1.9	.6	3.7	1.4	.5	3.8	1.9	.6	3.7
Gonorrhea and other venereal	.4	-	.9	.4	-	1.3	.4	-	.8
Neoplasms	1.1	1.6	.4	.4	.5	-	1.1	1.7	.4
Musculoskeletal	10.5	13.9	5.9	27.4	28.7	24.0	9.5	12.7	5.2
Feet	2.6	2.4	2.8	.4	-	1.3	2.7	2.5	2.9
Endocrine	.5	.8	.1	3.2	4.4	-	.3	.5	.1
Mental disease	24.6	27.9	20.0	4.3	3.5	6.3	25.9	29.8	20.6
Mental deficiency	.7	.6	.9	4.3	5.4	1.3	.5	.2	.9
Minimum intelligence tests 3/	17.4	7.3	31.3	-	-	-	18.5	7.9	32.6
Neurological	3.0	3.5	2.3	13.9	15.3	10.1	2.3	2.6	2.0
Skin	1.1	1.2	.8	1.4	1.0	2.5	1.0	1.3	.7
Infectious and parasitic	.1	.1	.1	-	-	-	.1	.1	.1
Acute conditions	1.0	1.2	.8	1.4	1.0	2.5	1.0	1.2	.7
Underweight and overweight	1.9	2.6	.8	.7	1.0	-	1.9	2.7	.8
Other medical	1.3	1.4	1.2	1.4	2.0	-	1.3	1.3	1.3
Nonmedical	2.0	1.2	3.1	-	-	-	2.1	1.3	3.2

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 14
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

GEORGIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.1	3.0	3.2	3.2	2.1	7.1	3.1	3.0	3.2
Ears	1.4	2.3	.4	2.4	3.1	-	1.4	2.2	.4
Nose and sinus	.9	1.6	*	1.6	2.1	-	.8	1.6	*
Throat	*	*	-	-	-	-	*	*	-
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	.1	-	-	-	.1	.1	.1
Tuberculosis	.6	.6	.5	4.0	5.1	-	.5	.5	.5
Lungs and pleura	1.7	2.8	.5	3.2	4.1	-	1.7	2.7	.5
Cardiovascular	7.0	3.3	11.9	4.0	5.2	-	7.1	3.2	11.1
Varicose veins	1.1	1.4	.7	.8	1.0	-	1.1	1.5	.7
Abdominal viscera	.6	1.0	.3	2.4	2.1	3.6	.6	1.0	.2
Kidney and urinary	.4	.6	.2	-	-	-	.4	.6	.1
Blood & blood-forming	*	*	-	-	-	-	*	*	-
Hernia	3.6	4.7	2.5	4.0	4.1	3.6	3.6	4.7	2.5
Hemorrhoids	.3	.4	.2	-	-	-	.3	.4	.2
Genitalia	.6	.8	.4	1.6	-	7.1	.6	.8	.4
Syphilis	.7	.2	1.1	-	-	-	.7	.2	1.1
Gonorrhea and other venereal	*	-	.1	-	-	-	*	-	.1
Neoplasms	.5	.9	.2	-	-	-	.5	.9	.2
Musculoskeletal	5.8	5.9	5.7	32.8	28.9	46.4	5.3	5.3	5.4
Feet	2.4	1.8	3.0	.8	1.0	-	2.4	1.9	3.0
Endocrine	.4	.5	.3	1.6	2.1	-	.4	.5	.4
Mental disease	30.8	38.1	23.0	8.8	10.3	3.6	31.2	38.9	23.2
Mental deficiency	.8	.3	1.3	4.0	4.1	3.6	.7	.2	1.2
Minimum intelligence tests 3/	28.2	18.4	38.6	.8	1.0	-	28.7	18.9	38.9
Neurological	3.9	3.3	4.5	14.4	15.5	10.7	3.7	2.9	4.5
Skin	.7	1.0	.4	.8	1.0	-	.7	1.0	.4
Infectious and parasitic	.1	.1	.1	-	-	-	.1	.1	.1
Acute conditions	.3	.3	.3	2.4	3.1	-	.3	.3	.3
Underweight and overweight	1.4	2.4	.4	2.4	3.1	-	1.4	2.4	.4
Other medical	1.0	1.7	.2	4.0	1.0	14.3	.9	1.7	.1
Nonmedical	1.6	2.5	.8	-	-	-	1.7	2.5	.8

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 15

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

IDAHO

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	4.9	6.0	4.8
Ears	5.0	5.2	5.0
Nose and sinus	1.5	-	1.7
Throat	.3	-	.4
Teeth	-	-	-
Mouth and gums	.2	1.7	.1
Tuberculosis	1.7	2.6	1.5
Lungs and pleura	1.2	1.7	1.2
Cardiovascular	6.7	6.9	6.7
Varicose veins	.7	.9	.6
Abdominal viscera	4.6	1.7	5.0
Kidney and urinary	1.7	.8	1.8
Blood & blood-forming	.1	-	.1
Hernia	6.4	.9	7.2
Hemorrhoids	.1	-	.1
Genitalia	2.5	-	2.8
Syphilis	.4	.9	.4
Gonorrhea and other venereal	-	-	-
Neoplasms	.3	-	.4
Musculoskeletal	17.3	25.0	16.2
Feet	1.9	-	2.2
Endocrine	.9	3.4	.5
Mental disease	22.7	5.2	25.3
Mental deficiency	1.0	2.6	.8
Minimum intelligence tests 2/	2.1	-	2.4
Neurological	7.0	22.4	4.7
Skin	.8	.9	.8
Infectious and parasitic	-	-	-
Acute conditions	1.9	6.9	1.2
Underweight and overweight	2.9	-	3.3
Other medical	1.5	4.3	1.0
Nonmedical	1.6	-	1.8

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

2532

1454

Table 16

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

ILLINOIS

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.7	3.8	2.6	2.0	1.8	7.2	3.8	3.9	2.5
Ears	7.3	8.0	.8	1.4	1.5	-	7.5	8.3	.8
Nose and sinus	.8	.8	.8	.6	.6	-	.8	.8	.8
Throat	.1	.1	.2	-	-	-	.1	.1	.2
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	-	-	-	-	.1	.1	-
Tuberculosis	5.3	5.4	4.4	7.0	7.0	7.1	5.2	5.3	4.4
Lungs and pleura	2.8	2.9	2.3	2.5	2.6	-	2.8	2.9	2.3
Cardiovascular	10.0	10.2	8.4	4.8	5.0	-	10.2	10.4	8.6
Varicose veins	2.1	2.3	.3	.6	.6	-	2.1	2.3	.3
Abdominal viscera	2.8	3.0	1.1	4.5	4.7	-	2.8	2.9	1.1
Kidney and urinary	1.3	1.3	.5	.5	.6	-	1.3	1.4	.5
Blood & blood-forming	.1	.1	-	.3	.3	-	.1	.1	-
Hernia	2.5	2.5	2.2	3.1	3.2	-	2.5	2.5	2.2
Hemorrhoids	1.0	.9	1.3	.6	.6	-	1.0	.9	1.3
Genitalia	.5	.5	.5	-	-	-	.5	.5	.5
Syphilis	.9	.5	4.7	.6	.6	-	.9	.5	4.7
Gonorrhea and other venereal	-	-	-	-	-	-	-	-	-
Neoplasms	2.4	2.7	.3	1.4	1.5	-	2.5	2.7	.3
Musculoskeletal	12.4	12.9	8.3	29.6	29.6	28.6	11.7	12.1	8.0
Feet	.9	.8	1.7	-	-	-	.9	.9	1.8
Endocrine	1.1	1.2	-	2.0	2.0	-	1.1	1.2	-
Mental disease	23.9	24.2	21.6	7.6	7.3	14.3	24.6	24.9	21.7
Mental deficiency	1.1	.7	4.5	6.7	6.7	7.1	.8	.4	4.5
Minimum intelligence tests 3/	4.9	2.8	24.6	-	-	-	5.1	2.9	25.0
Neurological	2.8	2.9	1.5	16.6	15.8	35.7	2.3	2.4	1.0
Skin	1.1	1.1	.4	1.1	1.2	-	1.1	1.1	.4
Infectious and parasitic	.2	.2	-	-	-	-	.2	.3	-
Acute conditions	.8	.8	.5	1.7	1.8	-	.8	.8	.5
Underweight and overweight	3.7	3.9	1.7	.6	.6	-	3.8	4.0	1.8
Other medical	1.5	1.6	1.3	4.2	4.4	-	1.4	1.5	1.3
Nonmedical	1.9	1.8	3.5	-	-	-	2.0	1.9	3.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 17
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

INDIANA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.6	5.6	6.6	4.6	4.6	-	5.7	5.6	6.7
Ears	3.1	3.2	-	2.8	2.9	-	3.2	3.3	-
Nose and sinus	.3	.3	-	.6	.6	-	.3	.3	-
Throat	*	-	.5	-	-	-	*	-	.5
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and gums	.1	.1	-	-	-	-	.1	.1	-
Tuberculosis	6.1	6.0	7.1	11.4	11.6	-	5.9	5.8	7.2
Lungs and pleura	2.3	2.2	2.7	4.0	4.1	-	2.2	2.2	2.8
Cardiovascular	14.1	14.0	18.0	2.8	2.9	-	14.5	14.3	18.3
Varicose veins	.8	.8	.6	1.7	1.7	-	.8	.8	.6
Abdominal viscera	1.9	1.9	1.1	4.5	4.6	-	1.8	1.8	1.1
Kidney and urinary	1.1	1.1	1.6	-	-	-	1.2	1.1	1.7
Blood & blood-forming	*	*	-	-	-	-	*	*	-
Hernia	5.0	5.0	3.8	4.5	4.6	-	5.0	5.0	3.9
Hemorrhoids	.2	.2	.6	-	-	-	.2	.2	.5
Genitalia	1.1	1.0	1.6	-	-	-	1.1	1.1	1.7
Syphilis	.6	.5	3.8	-	-	-	.6	.5	3.9
Gonorrhea and other venereal	.1	.1	-	-	-	-	.1	.1	-
Neoplasms	1.1	1.1	.6	2.3	2.3	-	1.0	1.0	.5
Musculoskeletal	8.9	9.0	8.8	29.6	28.9	66.7	8.2	8.3	7.8
Feet	1.2	1.2	1.6	-	-	-	1.2	1.2	1.7
Endocrine	.5	.6	-	1.1	1.2	-	.5	.5	-
Mental disease	33.3	33.7	20.2	6.8	6.9	-	34.2	34.7	20.5
Mental deficiency	.8	.8	.6	4.5	4.6	-	.7	.7	.6
Minimum intelligence tests 3/	2.8	2.6	10.9	.6	.6	-	2.9	2.6	11.1
Neurological	3.8	3.8	3.3	11.9	11.6	33.3	3.5	3.6	2.8
Skin	1.2	1.1	3.3	.6	.6	-	1.2	1.1	3.3
Infectious and parasitic	.3	.3	-	-	-	-	.3	.4	-
Acute conditions	.8	.9	-	1.7	1.7	-	.8	.8	-
Underweight and overweight	.6	.6	-	-	-	-	.6	.7	-
Other medical	1.6	1.6	1.1	4.0	4.0	-	1.5	1.5	1.1
Nonmedical	.6	.5	1.6	-	-	-	.6	.6	1.7

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 18
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

IOWA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	5.0	2.2	5.2
Ears	4.9	4.0	5.0
Nose and sinus	2.2	-	2.4
Throat	.1	.4	*
Teeth	.1	-	.1
Mouth and gums	.3	.9	.2
Tuberculosis	3.5	3.9	3.5
Lungs and pleura	2.3	2.2	2.3
Cardiovascular	9.0	5.3	9.3
Varicose veins	1.7	.9	1.7
Abdominal viscera	2.4	2.6	2.4
Kidney and urinary	1.3	.4	1.3
Blood & blood-forming	.1	.9	*
Hernia	5.7	5.7	5.7
Hemorrhoids	.4	-	.5
Genitalia	1.0	.4	1.0
Syphilis	.3	-	.4
Gonorrhea and other venereal	.1	-	.1
Neoplasms	1.4	.9	1.4
Musculoskeletal	12.8	28.5	11.7
Feet	3.6	-	3.9
Endocrine	1.2	4.0	1.0
Mental disease	23.6	4.0	25.1
Mental deficiency	4.0	7.0	3.8
Minimum intelligence tests 2/	2.8	.4	3.0
Neurological	4.7	16.2	3.8
Skin	1.0	1.3	1.0
Infectious and parasitic	.2	-	.2
Acute conditions	1.0	2.2	.9
Underweight and overweight	1.4	1.8	1.4
Other medical	1.5	3.9	1.3
Nonmedical	.4	-	.4

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 19

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

KANSAS

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.7	3.6	5.1	3.9	4.0	-	3.7	3.6	5.2
Ears	3.7	3.8	.7	1.9	2.0	-	3.7	3.9	.8
Nose and sinus	.9	.9	-	1.9	2.0	-	.8	.9	-
Throat	-	-	-	-	-	-	-	-	-
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and gums	.1	.1	-	-	-	-	.1	.1	-
Tuberculosis	3.5	3.7	.7	1.0	1.0	-	3.6	3.8	.8
Lungs and pleura	2.1	2.0	3.6	3.9	4.0	-	2.0	1.9	3.7
Cardiovascular	11.7	12.0	6.6	1.9	2.0	-	12.1	12.4	6.7
Varicose veins	1.0	1.1	-	-	-	-	1.0	1.1	-
Abdominal viscera	2.5	2.7	-	2.9	3.0	-	2.5	2.7	-
Kidney and urinary	.8	.9	-	1.0	1.0	-	.8	.9	-
Blood & blood-forming	.2	.2	-	-	-	-	.2	.2	-
Hernia	6.1	5.9	8.8	5.8	5.0	33.4	6.1	6.0	8.2
Hemorrhoids	.6	.7	-	-	-	-	.7	.7	-
Genitalia	1.6	1.7	1.5	-	-	-	1.7	1.7	1.5
Syphilis	.3	.3	.7	2.0	2.0	-	.2	.2	.7
Gonorrhea and other venereal	-	-	-	-	-	-	-	-	-
Neoplasms	.8	.9	-	1.9	2.0	-	.8	.9	-
Musculoskeletal	15.7	16.0	10.2	30.1	31.0	-	15.1	15.3	10.5
Feet	4.8	4.4	11.0	-	-	-	5.0	4.6	11.2
Endocrine	1.4	1.5	.7	2.9	3.0	-	1.4	1.4	.7
Mental disease	22.1	22.3	17.5	4.9	5.0	-	22.8	23.1	17.9
Mental deficiency	4.1	3.8	8.8	2.9	3.0	-	4.1	3.8	9.0
Minimum intelligence tests 3/	2.9	2.2	13.1	-	-	-	3.0	2.4	13.4
Neurological	4.9	5.0	3.7	24.3	24.0	33.3	4.1	4.2	3.0
Skin	.8	.8	1.5	-	-	-	.9	.8	1.5
Infectious and parasitic	.3	.3	-	-	-	-	.3	.3	-
Acute conditions	.7	.7	.7	3.9	4.0	-	.5	.5	.7
Underweight and overweight	1.4	1.4	1.5	-	-	-	1.5	1.5	1.5
Other medical	.8	.8	.7	2.9	2.0	33.3	.8	.8	-
Nonmedical	.4	.2	2.9	-	-	-	.4	.2	3.0

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 20

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

KENTUCKY

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.3	2.3	2.3	4.6	4.6	-	2.2	2.2	2.4
Ears	3.7	3.9	.3	2.3	2.3	-	3.7	4.0	.3
Nose and sinus	.7	.7	-	-	-	-	.7	.7	-
Throat	-	-	-	-	-	-	-	-	-
Teeth	.4	.3	.6	-	-	-	.4	.4	.6
Mouth and gums	.1	.1	.6	.5	.5	-	.1	.1	.6
Tuberculosis	5.4	5.2	8.2	9.1	9.2	-	5.3	5.1	8.3
Lungs and pleura	1.5	1.5	1.5	3.2	3.2	-	1.5	1.5	1.5
Cardiovascular	4.5	4.4	6.2	2.7	2.8	-	4.5	4.4	6.2
Varicose veins	.7	.8	.6	.5	.5	-	.8	.8	.6
Abdominal viscera	1.2	1.2	.6	2.3	2.3	-	1.1	1.2	.6
Kidney and urinary	1.3	1.4	.6	.5	.5	-	1.4	1.4	.6
Blood & blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	3.8	3.6	6.5	10.9	10.6	33.4	3.5	3.4	6.2
Hemorrhoids	.4	.4	1.5	-	-	-	.5	.4	1.5
Genitalia	.7	.6	1.5	-	-	-	.7	.6	1.5
Syphilis	.7	.5	4.1	-	-	-	.7	.5	4.1
Gonorrhea and other venereal	.1	.1	.6	-	-	-	.1	.1	.6
Neoplasms	.5	.4	.6	-	-	-	.5	.5	.6
Musculoskeletal	8.0	8.1	7.0	38.3	38.9	-	6.9	6.9	7.1
Feet	.9	.8	2.6	-	-	-	.9	.8	2.7
Endocrine	.5	.6	-	1.8	1.9	-	.5	.5	-
Mental disease	31.9	32.5	22.0	3.2	3.2	-	33.0	33.6	22.2
Mental deficiency	3.5	3.5	2.9	11.4	11.1	33.3	3.2	3.2	2.7
Minimum intelligence tests 3/	21.0	21.0	20.6	-	-	-	21.8	21.8	20.8
Neurological	1.2	1.2	1.2	4.1	4.2	-	1.0	1.0	1.2
Skin	.7	.8	.3	.5	.5	-	.7	.8	.3
Infectious and parasitic	.2	.2	-	-	-	-	.2	.2	-
Acute conditions	.4	.4	.6	1.8	1.8	-	.3	.3	.6
Underweight and overweight	1.2	1.2	1.2	.5	.5	-	1.2	1.2	1.2
Other medical	.6	.6	.3	1.8	1.4	33.3	.6	.6	-
Nonmedical	1.8	1.6	5.0	-	-	-	1.9	1.7	5.0

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 21

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

LOUISIANA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	1.7	2.4	1.0	1.5	2.0	-	1.7	2.4	1.0
Ears	2.0	3.4	.3	1.0	1.3	-	2.0	3.5	.3
Nose and sinus	.4	.7	.1	-	-	-	.5	.8	.1
Throat	*	-	.1	-	-	-	*	-	.1
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.2	-	-	-	-	.1	.2	-
Tuberculosis	2.3	3.1	1.4	5.3	4.7	7.3	2.2	3.0	1.4
Lungs and pleura	1.9	2.8	.8	2.9	3.3	1.8	1.9	2.8	.8
Cardiovascular	5.8	6.7	4.7	1.0	1.3	-	5.9	6.9	4.8
Varicose veins	.7	1.0	.5	1.5	2.0	-	.7	.9	.5
Abdominal viscera	1.1	1.8	.2	3.9	5.3	-	1.0	1.6	.2
Kidney and urinary	1.1	1.4	.8	1.9	2.7	-	1.1	1.4	.8
Blood & blood-forming	*	.1	-	-	-	-	*	.1	-
Hernia	3.6	3.9	3.2	5.3	4.0	9.1	3.5	3.9	3.1
Hemorrhoids	.4	.7	.2	-	-	-	.5	.7	.2
Genitalia	.8	.8	.9	.5	.7	-	.8	.8	.9
Syphilis	.9	.4	1.4	1.0	1.3	-	.9	.4	1.5
Gonorrhea and other venereal	.1	-	.2	-	-	-	.1	-	.2
Neoplasms	1.1	1.7	.3	1.5	2.0	-	1.0	1.7	.3
Musculoskeletal	6.3	8.7	3.4	30.7	31.3	29.1	5.5	7.8	3.0
Feet	1.4	1.5	1.2	-	-	-	1.4	1.6	1.2
Endocrine	.3	.4	.2	1.5	.7	3.6	.3	.4	.1
Mental disease	24.0	33.2	13.4	7.8	7.3	9.1	24.5	34.3	13.4
Mental deficiency	1.1	.7	1.5	4.9	4.7	5.5	1.0	.5	1.4
Minimum intelligence tests 3/	35.8	16.0	58.6	-	-	-	36.9	16.7	59.6
Neurological	3.0	4.0	1.8	20.0	18.0	25.4	2.5	3.4	1.4
Skin	.8	.9	.7	1.5	2.0	-	.8	.8	.7
Infectious and parasitic	.1	.2	.1	-	-	-	.1	.2	.1
Acute conditions	1.0	1.2	.8	3.9	2.7	7.3	.9	1.1	.6
Underweight and overweight	.9	1.3	.4	-	-	-	.9	1.3	.4
Other medical	.5	.5	.5	2.4	2.7	1.8	.5	.4	.5
Nonmedical	.8	.3	1.3	-	-	-	.8	.4	1.4

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 30

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

NEBRASKA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	3.3	4.1	3.2
Ears	5.4	2.7	5.5
Nose and sinus	1.5	-	1.6
Throat	-	-	-
Teeth	.2	-	.3
Mouth and gums	.2	-	.2
Tuberculosis	1.9	2.7	1.8
Lungs and pleura	2.3	-	2.4
Cardiovascular	10.8	4.0	11.2
Varicose veins	.5	1.4	.5
Abdominal viscera	2.4	-	2.5
Kidney and urinary	1.6	-	1.7
Blood & blood-forming	.1	-	.1
Hernia	6.1	9.4	5.9
Hemorrhoids	-	-	-
Genitalia	1.3	-	1.4
Syphilis	.2	-	.2
Gonorrhea and other venereal	.1	-	.1
Neoplasms	.8	-	.8
Musculoskeletal	13.8	14.9	13.7
Feet	3.0	-	3.1
Endocrine	.8	2.7	.8
Mental disease	29.8	21.6	30.2
Mental deficiency	3.5	13.5	3.0
Minimum intelligence tests 2/	1.9	-	2.0
Neurological	4.8	23.0	4.0
Skin	.6	-	.6
Infectious and parasitic	.4	-	.4
Acute conditions	.6	-	.6
Underweight and overweight	1.1	-	1.2
Other medical	1.0	-	1.0
Nonmedical	-	-	-

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 31
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

NEVADA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	7.7	15.4	6.9
Ears	14.7	-	16.4
Nose and sinus	2.3	-	2.6
Throat	-	-	-
Teeth	5.4	-	6.0
Mouth and gums	-	-	-
Tuberculosis	3.9	-	4.3
Lungs and pleura	1.6	-	1.7
Cardiovascular	7.7	7.7	7.8
Varicose veins	-	-	-
Abdominal viscera	5.4	-	6.0
Kidney and urinary	.8	-	.9
Blood & blood-forming	-	-	-
Hernia	4.7	-	5.2
Hemorrhoids	-	-	-
Genitalia	-	-	-
Syphilis	-	-	-
Gonorrhea and other venereal	-	-	-
Neoplasms	1.6	15.3	.-
Musculoskeletal	10.1	7.7	10.4
Feet	4.6	7.7	4.3
Endocrine	-	-	-
Mental disease	14.7	15.4	14.7
Mental deficiency	1.6	-	1.7
Minimum intelligence tests 2/	1.6	-	1.7
Neurological	3.1	-	3.4
Skin	4.6	15.4	3.4
Infectious and parasitic	-	-	-
Acute conditions	-	-	-
Underweight and overweight	-	-	-
Other medical	3.9	15.4	2.6
Nonmedical	-	-	-

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 22

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

MAINE

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	6.0	-	6.3
Ears	7.3	-	7.7
Nose and sinus	1.5	-	1.6
Throat	.1	1.9	-
Teeth	.2	3.7	-
Mouth and gums	.3	1.9	.2
Tuberculosis	2.3	1.9	2.3
Lungs and pleura	2.7	3.7	2.7
Cardiovascular	8.3	5.5	8.4
Varicose veins	1.1	3.7	.9
Abdominal viscera	4.4	7.4	4.2
Kidney and urinary	2.2	-	2.3
Blood & blood-forming	-	-	-
Hernia	3.9	3.7	3.9
Hemorrhoids	.1	-	.1
Genitalia	.9	-	.9
Syphilis	.5	-	.5
Gonorrhea and other venereal	-	-	-
Neoplasms	1.0	-	1.1
Musculoskeletal	9.7	25.9	8.9
Feet	1.5	-	1.6
Endocrine	1.2	-	1.3
Mental disease	25.2	3.7	26.2
Mental deficiency	1.1	16.7	.4
Minimum intelligence tests 2/	6.9	-	7.3
Neurological	7.2	9.2	7.1
Skin	.7	3.7	.6
Infectious and parasitic	-	-	-
Acute conditions	.6	3.7	.5
Underweight and overweight	.8	-	.8
Other medical	1.9	3.7	1.8
Nonmedical	.4	-	.4

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 23
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

MARYLAND

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.8	2.9	2.8	4.8	5.4	-	2.8	2.8	2.9
Ears	3.9	5.1	.5	3.6	2.7	10.0	3.9	5.2	.4
Nose and sinus	.8	1.1	.1	-	-	-	.9	1.1	.1
Throat	.1	.1	.2	-	-	-	.1	.1	.2
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	-	-	-	-	.1	.2	-
Tuberculosis	2.9	3.0	2.5	10.7	9.4	20.0	2.7	2.8	2.3
Lungs and pleura	1.5	1.4	2.0	2.4	2.7	-	1.5	1.3	2.0
Cardiovascular	5.8	6.4	4.3	1.2	1.4	-	5.9	6.5	4.4
Varicose veins	.6	.7	.1	-	-	-	.6	.8	.1
Abdominal viscera	1.1	1.3	.4	4.7	5.4	-	1.0	1.2	.4
Kidney and urinary	1.2	1.3	1.0	4.7	5.4	-	1.2	1.2	1.0
Blood & blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	3.3	3.6	2.5	10.7	10.8	10.0	3.1	3.4	2.4
Hemorrhoids	.8	1.0	.3	1.2	1.4	-	.8	.9	.3
Genitalia	.6	.7	.4	-	-	-	.7	.8	.4
Syphilis	1.3	.4	4.0	1.2	-	10.0	1.4	.4	4.0
Gonorrhea and other venereal	.1	.1	.1	-	-	-	.1	.1	.1
Neoplasms	.8	.9	.4	2.4	2.7	-	.7	.9	.4
Musculoskeletal	5.7	6.5	3.5	26.2	28.4	10.0	5.2	5.8	3.5
Feet	.6	.5	.9	-	-	-	.6	.5	.9
Endocrine	.3	.4	-	-	-	-	.3	.5	-
Mental disease	45.0	50.1	31.3	7.1	6.7	10.0	45.9	51.3	31.5
Mental deficiency	.5	.2	1.2	3.6	2.7	10.0	.4	.1	1.1
Minimum intelligence tests 3/	13.3	4.9	36.1	-	-	-	13.5	5.0	36.4
Neurological	3.1	3.7	1.5	10.7	12.2	-	2.9	3.5	1.5
Skin	.7	.8	.3	1.2	1.4	-	.7	.8	.3
Infectious and parasitic	.4	.4	.3	1.2	1.3	-	.4	.4	.3
Acute conditions	.8	1.0	.4	-	-	-	.8	1.0	.4
Underweight and overweight	.4	.4	.3	-	-	-	.4	.4	.3
Other medical	.6	.4	1.0	2.4	-	20.0	.5	.4	.8
Nonmedical	.8	.5	1.6	-	-	-	.8	.5	1.6

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 24

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

MASSACHUSETTS

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.7	3.7	-	2.7	2.7	-	3.7	3.8	-
Ears	8.0	8.1	1.6	1.6	1.6	-	8.3	8.4	1.7
Nose and sinus	.7	.7	1.6	-	-	-	.7	.7	1.7
Throat	*	*	-	-	-	-	*	*	-
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	-	-	-	-	-	-	-	-	-
Tuberculosis	2.2	2.1	4.8	7.4	7.0	33.3	2.0	2.0	3.4
Lungs and pleura	3.2	3.2	8.1	1.1	1.1	-	3.3	3.2	8.5
Cardiovascular	7.0	7.0	9.7	5.3	5.4	-	7.1	7.1	10.1
Varicose veins	1.2	1.2	-	2.1	2.2	-	1.2	1.2	-
Abdominal viscera	3.3	3.4	-	5.8	5.9	-	3.2	3.3	-
Kidney and urinary	3.0	3.0	3.2	1.6	1.6	-	3.1	3.1	3.4
Blood & blood-forming	.1	.1	-	2.1	2.2	-	*	*	-
Hernia	2.5	2.5	1.6	-	-	-	2.6	2.6	1.7
Hemorrhoids	.1	.1	-	-	-	-	.1	.1	-
Genitalia	.9	1.0	-	-	-	-	1.0	1.0	-
Syphilis	.2	.2	-	.5	.5	-	.1	.1	-
Gonorrhea and other venereal	-	-	-	-	-	-	-	-	-
Neoplasms	1.0	1.0	-	.5	.5	-	1.0	1.0	-
Musculoskeletal	6.7	6.7	6.5	22.2	22.6	-	6.1	6.1	6.8
Feet	1.9	1.8	8.1	1.1	1.1	-	1.9	1.8	8.5
Endocrine	1.4	1.4	-	3.2	3.2	-	1.3	1.3	-
Mental disease	33.4	33.4	32.2	11.1	11.3	-	34.2	34.2	33.9
Mental deficiency	.4	.4	-	4.8	4.8	-	.3	.3	-
Minimum intelligence tests 3/	6.8	6.8	9.7	-	-	-	7.1	7.0	10.1
Neurological	6.5	6.5	8.1	16.9	16.1	66.7	6.1	6.1	5.1
Skin	1.1	1.0	3.2	1.6	1.6	-	1.0	1.0	3.4
Infectious and parasitic	.1	.1	-	-	-	-	.1	.1	-
Acute conditions	1.2	1.2	-	2.6	2.7	-	1.2	1.2	-
Underweight and overweight	1.2	1.2	-	-	-	-	1.2	1.2	-
Other medical	1.7	1.7	1.6	5.8	5.9	-	1.6	1.6	1.7
Nonmedical	.5	.5	-	-	-	-	.5	.5	-

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 25
Percent Distribution of Principal Causes for Rejections at Local Boards and Induction Stations 1/
February 1944 through December 1944.

MICHIGAN

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.0	3.2	1.6	.4	.4	-	3.1	3.2	1.6
Ears	5.6	5.9	.9	4.8	4.8	-	5.6	5.9	.9
Nose and sinus	1.3	1.4	-	.4	.4	-	1.3	1.4	-
Throat	.1	.1	-	-	-	-	.1	.1	-
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	-	-	-	-	.1	.1	-
Tuberculosis	2.5	2.5	2.4	5.6	5.7	-	2.4	2.4	2.4
Lungs and pleura	1.4	1.5	.5	2.2	2.2	-	1.4	1.5	.5
Cardiovascular	6.5	6.5	5.7	2.2	2.2	-	6.6	6.6	5.7
Varicose veins	.9	1.0	.6	2.6	2.6	-	.9	.9	.6
Abdominal viscera	1.7	1.8	.5	2.2	2.2	-	1.7	1.8	.5
Kidney and urinary	1.2	1.3	.2	1.3	1.3	-	1.2	1.3	.2
Blood & blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	5.6	5.8	2.7	16.1	16.2	-	5.4	5.6	2.7
Hemorrhoids	.2	.2	.3	-	-	-	.2	.2	.3
Genitalia	1.0	1.0	-	-	-	-	1.0	1.1	-
Syphilis	.2	.2	.8	.9	.9	-	.2	.2	.8
Gonorrhea and other venereal	*	*	-	-	-	-	*	*	-
Neoplasms	1.7	1.7	.9	3.0	3.1	-	1.6	1.7	.9
Musculoskeletal	8.1	8.2	6.3	25.2	25.0	50.0	7.7	7.8	6.2
Feet	1.5	1.3	4.0	-	-	-	1.5	1.3	4.0
Endocrine	.6	.6	.2	2.2	2.2	-	.5	.5	.2
Mental disease	36.2	36.2	35.8	6.5	6.2	50.0	36.9	37.0	35.8
Mental deficiency	.6	.4	2.4	6.5	6.6	-	.4	.3	2.4
Minimum intelligence tests 3/	5.7	4.3	25.5	1.3	1.3	-	5.8	4.4	25.6
Neurological	3.3	3.3	3.3	9.6	9.7	-	3.2	3.1	3.3
Skin	.9	1.0	-	.4	.4	-	.9	1.0	-
Infectious and parasitic	.2	.2	.3	-	-	-	.2	.2	.3
Acute conditions	.7	.8	-	3.5	3.5	-	.7	.7	-
Underweight and overweight	1.7	1.8	.5	.9	.9	-	1.7	1.8	.5
Other medical	1.4	1.4	.8	2.2	2.2	-	1.4	1.4	.8
Nonmedical	6.0	6.2	3.8	-	-	-	6.2	6.4	3.8

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 26

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

MINNESOTA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	3.1	.5	3.3
Ears	5.2	1.5	5.4
Nose and sinus	.7	-	.7
Throat	-	-	-
Teeth	.3	-	.3
Mouth and gums	.2	-	.2
Tuberculosis	2.8	4.4	2.7
Lungs and pleura	2.8	5.9	2.7
Cardiovascular	5.8	2.0	6.0
Varicose veins	1.2	-	1.3
Abdominal viscera	5.2	2.9	5.4
Kidney and urinary	1.7	1.0	1.7
Blood & blood-forming	.1	-	*
Hernia	6.8	16.7	6.2
Hemorrhoids	.6	-	.6
Genitalia	1.6	-	1.7
Syphilis	.3	-	.3
Gonorrhea and other venereal	*	-	*
Neoplasms	1.2	-	1.3
Musculoskeletal	11.9	26.1	11.1
Feet	2.3	2.0	2.3
Endocrine	1.3	6.4	1.0
Mental disease	30.9	4.4	32.4
Mental deficiency	.3	2.0	.2
Minimum intelligence tests 2/	1.7	-	1.8
Neurological	4.7	16.7	4.0
Skin	1.2	1.0	1.3
Infectious and parasitic	.4	1.0	.3
Acute conditions	1.3	1.5	1.3
Underweight and overweight	.7	1.0	.7
Other medical	3.0	3.0	3.0
Nonmedical	.7	-	.8

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 27

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944

MISSISSIPPI

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	6.2	6.4	6.1	3.5	1.9	5.1	6.4	6.8	6.1
Ears	1.1	2.8	.2	.6	-	1.3	1.1	3.0	.2
Nose and sinus	.2	.3	.1	.3	.6	-	.2	.3	.1
Throat	*	*	*	-	-	-	*	.1	.1
Teeth	-	-	-	-	-	-	-	-	-
Mouth and gums	.1	.2	.1	.9	1.9	-	.1	.1	.1
Tuberculosis	1.5	1.1	1.7	7.6	3.1	12.2	1.2	1.0	1.2
Lungs and pleura	1.5	2.7	.9	1.3	1.2	1.3	1.5	2.8	.9
Cardiovascular	5.8	5.5	5.9	3.8	4.3	3.2	5.9	5.6	6.0
Varicose veins	.8	1.5	.5	-	-	-	.9	1.6	.5
Abdominal viscera	.8	1.9	.3	.3	.6	-	.9	2.0	.3
Kidney and urinary	.5	1.1	.1	1.3	2.5	-	.4	1.0	.2
Blood and blood-forming	*	*	-	-	-	-	*	.1	-
Hernia	6.0	7.1	5.5	.9	.6	1.3	6.3	7.6	5.6
Hemorrhoids	.5	1.0	.2	-	-	-	.5	1.1	.2
Genitalia	1.1	1.5	1.0	.6	.6	.7	1.2	1.5	1.0
Syphilis	1.5	.3	2.1	11.9	1.9	20.5	.9	.1	1.3
Gonorrhea and other venereal	.2	*	.2	.6	.6	.6	.1	-	.2
Neoplasms	.5	1.2	.2	.6	1.2	-	.5	1.2	.2
Musculoskeletal	7.2	10.8	5.4	24.9	25.3	24.4	6.3	9.6	4.7
Feet	.3	.5	.2	-	-	-	.3	.5	.2
Endocrine	.3	.8	.1	1.9	3.1	.6	.2	.5	.1
Mental disease	18.9	32.2	12.1	6.9	9.3	4.5	19.5	34.1	12.4
Mental deficiency	1.3	1.3	1.3	10.7	15.4	5.8	.8	.2	1.1
Minimum intelligence tests 3/	35.0	9.0	48.1	.6	-	1.3	36.8	9.7	49.9
Neurological	3.5	5.2	2.7	18.6	22.9	14.1	2.7	3.7	2.2
Skin	.4	.4	.4	.6	.6	.6	.4	.4	.4
Infectious and parasitic	.2	.5	.1	-	-	-	.2	.5	.1
Acute conditions	.3	.2	.3	.9	1.2	.6	.2	.1	.3
Underweight and overweight	.5	.8	.4	-	-	-	.6	.8	.5
Other medical	1.2	1.8	.9	1.6	1.2	1.9	1.2	1.9	.9
Nonmedical	2.6	1.9	2.9	-	-	-	2.7	2.1	3.0

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 28

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

MISSOURI

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.0	5.1	3.7	3.3	3.6	-	5.1	5.3	3.9
Ears	4.2	4.5	1.2	1.5	1.7	-	4.4	4.7	1.2
Nose and sinus	1.6	1.6	1.2	.5	.5	-	1.6	1.7	1.2
Throat	.1	.1	-	-	-	-	.1	.1	-
Teeth	.4	.5	-	-	-	-	.4	.5	-
Mouth and gums	.2	.2	-	.5	.5	-	.1	.2	-
Tuberculosis	6.9	7.3	3.1	5.1	5.5	-	7.0	7.4	3.2
Lungs and pleura	2.4	2.5	1.6	3.1	3.0	3.4	2.4	2.5	1.5
Cardiovascular	9.6	10.0	6.2	5.3	5.8	-	9.9	10.2	6.5
Varicose veins	1.3	1.3	1.2	1.0	1.1	-	1.3	1.3	1.2
Abdominal viscera	1.3	1.4	.8	1.5	1.1	6.9	1.3	1.4	.5
Kidney and urinary	2.3	2.4	1.5	.8	.8	-	2.4	2.4	1.6
Blood & blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	12.8	13.2	8.7	11.4	11.5	10.4	12.8	13.3	8.6
Hemorrhoids	1.1	1.1	1.3	.5	-	6.9	1.1	1.1	1.1
Genitalia	1.4	1.5	1.3	1.0	.8	3.4	1.5	1.5	1.2
Syphilis	.7	.5	2.3	1.3	.8	6.9	.6	.5	2.1
Gonorrhea and other venereal	.1	*	.3	-	-	-	.1	*	.3
Neoplasms	1.4	1.5	.6	1.8	1.9	-	1.4	1.5	.7
Musculoskeletal	10.1	10.3	8.2	26.9	26.0	37.9	9.2	9.5	7.0
Feet	2.7	2.7	3.0	.5	.6	-	2.8	2.8	3.1
Endocrine	.8	.9	.4	1.3	1.4	-	.8	.9	.4
Mental disease	15.0	14.4	20.5	6.9	6.6	10.4	15.4	14.8	20.9
Mental deficiency	1.9	1.9	2.3	4.3	4.1	6.9	1.8	1.8	2.1
Minimum intelligence tests 3/	6.8	5.1	21.8	.5	.5	-	7.1	5.4	22.6
Neurological	4.5	4.6	3.5	15.2	15.9	6.9	4.0	4.0	3.4
Skin	.8	.9	.6	.5	.6	-	.9	.9	.7
Infectious and parasitic	.6	.6	.3	.5	.5	-	.6	.6	.3
Acute conditions	1.0	1.0	.5	2.0	2.2	-	.9	.9	.5
Underweight and overweight	1.1	1.1	.6	.5	.5	-	1.1	1.1	.7
Other medical	.7	.7	.6	2.3	2.5	-	.6	.6	.7
Nonmedical	1.1	1.0	2.7	-	-	-	1.2	1.0	2.8

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 29

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

MONTANA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	9.1	5.3	9.3
Ears	7.7	10.5	7.6
Nose and sinus	2.5	-	2.6
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	1.4	-	1.5
Lungs and pleura	1.5	-	1.6
Cardiovascular	8.6	2.6	8.9
Varicose veins	1.0	-	1.1
Abdominal viscera	6.1	5.3	6.1
Kidney and urinary	1.3	-	1.4
Blood & blood-forming	-	-	-
Hernia	4.5	5.3	4.5
Hemorrhoids	.3	-	.3
Genitalia	.5	-	.5
Syphilis	.5	-	.5
Gonorrhea and other venereal	-	-	-
Neoplasms	1.5	-	1.6
Musculoskeletal	15.1	36.9	13.9
Feet	.9	-	.9
Endocrine	1.3	2.6	1.2
Mental disease	21.2	2.6	22.2
Mental deficiency	.4	-	.4
Minimum intelligence tests 2/	3.1	-	3.3
Neurological	5.9	18.4	5.3
Skin	1.0	5.3	.8
Infectious and parasitic	.4	-	.4
Acute conditions	.9	2.6	.8
Underweight and overweight	1.7	-	1.8
Other medical	1.2	2.6	1.1
Nonmedical	.4	-	.4

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 32

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

NEW HAMPSHIRE

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	3.8	-	3.9
Ears	5.8	-	6.0
Nose and sinus	1.2	-	1.2
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	.1	-	.1
Tuberculosis	1.6	-	1.7
Lungs and pleura	3.4	-	3.5
Cardiovascular	4.5	3.3	4.6
Varicose veins	3.4	-	3.5
Abdominal viscera	2.1	-	2.1
Kidney and urinary	1.6	-	1.7
Blood & blood-forming	-	-	-
Hernia	3.3	-	3.4
Hemorrhoids	.4	-	.4
Genitalia	.8	-	.8
Syphilis	.1	-	.1
Gonorrhea and other venereal	.1	-	.1
Neoplasms	1.1	-	1.1
Musculoskeletal	10.4	40.0	9.4
Feet	1.0	-	1.0
Endocrine	1.8	13.3	1.5
Mental disease	37.0	3.3	38.2
Mental deficiency	.7	13.4	.2
Minimum intelligence tests 2/	5.0	-	5.2
Neurological	4.5	23.4	3.9
Skin	1.0	-	1.0
Infectious and parasitic	.3	-	.3
Acute conditions	.8	-	.8
Underweight and overweight	.8	-	.8
Other medical	1.8	3.3	1.8
Nonmedical	1.6	-	1.7

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 33

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

NEW JERSEY

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.2	4.1	4.7	1.6	1.6	-	4.2	4.2	4.7
Ears	7.2	7.8	1.8	4.0	4.1	-	7.3	8.0	1.8
Nose and sinus	.4	.4	.7	-	-	-	.4	.4	.7
Throat	.1	.1	-	-	-	-	.1	.1	-
Teeth	.1	.1	.2	-	-	-	.1	.1	.2
Mouth and gums	.1	.1	-	-	-	-	.1	.1	-
Tuberculosis	2.9	3.0	2.0	7.1	7.4	-	2.8	2.9	2.0
Lungs and pleura	2.0	2.2	.9	.8	.8	-	2.1	2.2	.9
Cardiovascular	7.5	7.9	4.7	7.1	7.4	-	7.5	7.9	4.7
Varicose veins	1.2	1.3	.7	-	-	-	1.3	1.3	.7
Abdominal viscera	2.1	2.2	1.3	4.8	4.9	-	2.0	2.1	1.4
Kidney and urinary	1.7	1.7	1.3	-	-	-	1.7	1.8	1.4
Blood & blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	8.9	9.2	6.2	9.5	9.0	25.0	8.9	9.3	6.1
Hemorrhoids	.7	.8	-	-	-	-	.7	.8	-
Genitalia	1.5	1.7	.2	1.6	1.6	-	1.5	1.7	.2
Syphilis	.4	.2	2.0	.8	.8	-	.4	.1	2.0
Gonorrhea and other venereal	*	-	.2	-	-	-	*	-	.2
Neoplasms	2.2	2.4	.7	1.6	1.6	-	2.3	2.5	.7
Musculoskeletal	7.0	7.4	3.6	22.2	23.0	-	6.5	6.9	3.6
Feet	1.4	1.3	2.0	.8	.8	-	1.4	1.3	2.0
Endocrine	1.4	1.6	-	1.6	1.6	-	1.4	1.6	-
Mental disease	28.8	28.8	28.5	6.3	6.6	-	29.5	29.6	28.7
Mental deficiency	.5	.4	1.3	6.3	6.6	-	.3	.2	1.4
Minimum intelligence tests 3/	6.6	4.2	26.0	.8	.8	-	6.8	4.3	26.2
Neurological	5.8	6.0	4.7	19.1	18.9	25.0	5.4	5.5	4.5
Skin	.8	.7	1.3	-	-	-	.8	.7	1.3
Infectious and parasitic	.1	.1	.2	-	-	-	.1	.1	.2
Acute conditions	.6	.6	.7	.8	-	25.0	.6	.6	.4
Underweight and overweight	1.2	1.2	.4	-	-	-	1.2	1.3	.4
Other medical	1.3	1.4	.4	3.2	2.5	25.0	1.2	1.3	.2
Nonmedical	1.2	1.0	3.3	-	-	-	1.3	1.0	3.4

* Less than .05 percent.

1/. Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 34
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

NEW MEXICO

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	5.0	7.7	4.9
Ears	6.4	1.9	6.6
Nose and sinus	.3	-	.3
Throat	.3	-	.3
Teeth	-	-	-
Mouth and gums	.1	-	.1
Tuberculosis	7.3	3.8	7.4
Lungs and pleura	1.2	1.9	1.1
Cardiovascular	5.5	9.6	5.3
Varicose veins	1.3	-	1.4
Abdominal viscera	-	-	-
Kidney and urinary	1.1	-	1.1
Blood and blood-forming	-	-	-
Hernia	4.3	13.5	3.8
Hemorrhoids	.4	-	.5
Genitalia	1.5	-	1.6
Syphilis	.5	3.9	.4
Gonorrhea and other venereal	-	-	-
Neoplasms	.7	-	.7
Musculoskeletal	8.9	19.2	8.3
Feet	3.3	-	3.5
Endocrine	.3	-	.3
Mental disease	25.9	5.8	26.9
Mental deficiency	.9	9.6	.5
Minimum intelligence tests 2/	15.8	-	16.6
Neurological	3.8	13.5	3.4
Skin	.3	-	.3
Infectious and parasitic	-	-	-
Acute conditions	.4	3.8	.3
Underweight and overweight	2.0	-	2.1
Other medical	1.2	5.8	.9
Nonmedical	1.3	-	1.4

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 35
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

NEW YORK CITY

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	8.6	8.8	6.0	.4	.4	-	8.8	9.0	6.2
Ears	7.8	8.4	1.2	.7	.8	-	8.0	8.6	1.3
Nose and sinus	.9	.9	-	-	-	-	.9	1.0	-
Throat	.1	.2	-	-	-	-	.1	.2	-
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and jaws	.1	.1	.4	.7	.8	-	.1	.1	.4
Tuberculosis	4.6	4.5	5.4	10.0	7.7	38.1	4.5	4.4	4.5
Lungs and pleura	3.1	3.1	3.3	3.2	3.5	-	3.1	3.1	3.4
Cardiovascular	10.9	10.9	10.3	3.9	3.8	4.7	11.1	11.1	10.4
Varicose veins	1.7	1.7	.7	.4	.4	-	1.7	1.8	.8
Abdominal viscera	3.5	3.8	1.0	5.3	5.8	-	3.5	3.7	1.0
Kidney and urinary	1.5	1.5	1.5	.4	.4	-	1.6	1.6	1.5
Blood and blood-forming	.1	.1	-	.4	.4	-	.1	.1	-
Hernia	5.7	5.8	3.5	5.7	5.8	4.8	5.6	5.8	3.4
Hemorrhoids	.7	.7	1.1	.7	.8	-	.7	.7	1.1
Genitalia	1.7	1.7	1.6	-	-	-	1.8	1.8	1.6
Syphilis	.8	.4	5.9	.4	.4	-	.8	.4	5.0
Gonorrhea and other venereal	-	-	-	-	-	-	-	-	-
Neoplasms	1.4	1.4	.6	2.5	2.7	-	1.3	1.4	.6
Musculoskeletal	7.6	7.7	6.1	25.7	27.6	14.3	7.1	7.2	5.9
Feet	1.7	1.7	2.8	-	-	-	1.8	1.7	2.9
Endocrine	1.0	1.1	.7	1.1	1.1	-	1.0	1.1	.8
Mental disease	22.2	21.9	25.3	12.1	10.8	28.6	22.5	22.2	25.2
Mental deficiency	.3	.3	.6	5.7	6.2	-	.2	.1	.6
Minimum intelligence tests 3/	3.1	2.2	13.1	-	-	-	3.2	2.3	13.5
Neurological	5.9	6.0	4.4	17.5	18.9	-	5.6	5.6	4.5
Skin	1.1	1.1	.6	.7	-	9.5	1.1	1.1	.4
Infectious and parasitic	.1	.1	.1	-	-	-	.1	.1	.1
Adult conditions	.3	.3	.5	-	-	-	.3	.3	.5
Underweight and overweight	1.6	1.7	.6	.7	.8	-	1.6	1.7	.6
Other medical	1.2	1.2	1.2	1.8	1.9	-	1.1	1.1	1.3
Miscellaneous	.6	.6	1.5	-	-	-	.6	.6	1.5

1/ 10 percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 36
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

NEW YORK (Excl. N.Y.C.)

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.3	5.3	2.9	2.0	2.0	-	5.4	5.5	3.0
Ears	5.2	5.4	1.0	2.5	2.5	-	5.4	5.5	1.0
Nose and sinus	.8	.8	-	-	-	-	.9	.9	-
Throat	.2	.2	-	-	-	-	.2	.2	-
Teeth	.2	.2	-	-	-	-	.2	.2	-
Mouth and gums	.1	.1	-	.5	.5	-	.1	.1	-
Tuberculosis	3.5	3.5	3.4	7.3	7.4	-	3.3	3.3	3.5
Lungs and pleura	3.1	3.1	3.9	2.5	2.5	-	3.1	3.1	4.0
Cardiovascular	11.0	11.1	6.4	7.3	7.1	25.0	11.1	11.3	6.0
Varicose veins	.1	.1	-	.3	.3	-	.1	.1	-
Abdominal viscera	2.9	3.0	.5	3.3	3.3	-	2.9	3.0	.5
Kidney and urinary	2.8	2.8	.5	-	-	-	2.9	3.0	.5
Blood and blood-forming	.2	.2	-	.7	.8	-	.1	.1	-
Hernia	4.6	4.6	4.4	5.3	5.3	-	4.6	4.6	4.5
Hemorrhoids	.3	.3	-	1.5	1.5	-	.2	.2	-
Genitalia	1.3	1.3	.5	.5	.5	-	1.3	1.3	.5
Syphilis	.6	.4	10.3	-	-	-	.7	.4	10.5
Gonorrhea and other venereal	*	*	.5	-	-	-	*	*	.5
Neoplasms	1.1	1.1	.5	.3	.3	-	1.1	1.2	.5
Musculoskeletal	10.4	10.5	7.8	26.6	26.4	50.0	9.6	9.7	7.0
Feet	1.8	1.8	4.9	-	-	-	1.9	1.9	5.0
Endocrine	1.9	1.9	1.0	3.3	3.3	-	1.8	1.9	1.0
Mental disease	26.8	26.9	24.0	6.8	6.8	-	27.8	27.9	24.5
Mental deficiency	.4	.3	2.4	6.0	5.8	25.0	.1	*	2.0
Minimum intelligence tests 3/	4.6	4.3	14.7	.5	.5	-	4.8	4.5	15.0
Neurological	6.2	6.2	5.4	16.8	17.0	-	5.6	5.6	5.5
Skin	.8	.8	1.0	.5	.5	-	.8	.8	1.0
Infectious and parasitic	.2	.2	.5	.5	.5	-	.2	.2	.5
Acute conditions	1.0	1.0	-	.7	.8	-	1.0	1.0	-
Underweight and overweight	.9	.9	.5	.8	.8	-	.9	.9	.5
Other medical	1.3	1.3	1.5	3.5	3.6	-	1.2	1.2	1.5
Nonmedical	.4	.4	1.5	-	-	-	.4	.4	1.5

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 37

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

NORTH CAROLINA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.1	3.9	1.8	2.3	1.7	4.8	3.1	4.0	1.7
Ears	1.8	2.6	.6	3.6	3.6	3.8	1.8	2.5	.5
Nose and sinus	.2	.3	.1	-	-	-	.2	.3	.1
Throat	*	*	*	-	-	-	*	*	*
Teeth	.2	.2	.1	-	-	-	.2	.2	.1
Mouth and gums	*	*	-	-	-	-	*	*	-
Tuberculosis	.7	.8	.5	5.1	4.7	6.7	.6	.6	.5
Lungs and pleura	1.5	1.9	.7	4.6	5.0	2.9	1.4	1.8	.7
Cardiovascular	6.5	6.3	6.8	6.5	5.9	8.6	6.5	6.3	6.7
Varicose veins	1.2	1.6	.4	2.1	2.4	1.0	1.1	1.6	.4
Abdominal viscera	.9	1.4	.2	4.9	5.9	1.0	.8	1.2	.2
Kidney and urinary	2.6	3.6	1.1	1.3	1.7	-	2.7	3.9	1.1
Blood & blood-forming	*	.1	-	-	-	-	*	.1	-
Hernia	2.8	3.1	2.4	7.2	7.3	6.7	2.7	3.2	2.3
Hemorrhoids	.4	.4	.3	.8	.5	1.9	.4	.4	.3
Genitalia	.5	.6	.3	.4	.2	1.0	.5	.6	.3
Syphilis	.9	.2	2.0	2.5	1.2	7.7	.8	.2	1.9
Gonorrhea and other venereal	.2	.1	.5	.2	.2	-	.2	.1	.5
Neoplasms	.6	.8	.3	1.1	1.4	-	.6	.8	.3
Musculoskeletal	6.5	8.2	3.9	24.8	24.7	25.0	5.9	7.4	3.5
Feet	3.1	2.8	3.6	.4	.2	1.0	3.2	3.0	3.7
Endocrine	.5	.7	.1	1.9	2.4	-	.4	.6	.1
Mental disease	28.8	33.8	20.7	5.0	5.0	4.8	29.7	35.1	21.0
Mental deficiency	19.5	9.0	36.4	5.3	4.3	9.6	20.0	9.2	36.9
Minimum intelligence tests 3/	8.8	7.6	10.9	.4	.5	-	9.1	7.9	11.1
Neurological	3.1	3.6	2.4	12.6	13.8	7.7	2.8	3.1	2.3
Skin	.9	1.0	.6	1.5	1.9	-	.8	1.0	.6
Infectious and parasitic	*	*	*	-	-	-	*	*	*
Acute conditions	.4	.5	.2	1.9	2.1	1.0	.3	.4	.2
Underweight and overweight	2.0	2.7	.9	1.3	1.7	-	2.0	2.8	.9
Other medical	.7	.6	.7	2.3	1.7	4.8	.6	.6	.6
Nonmedical	1.6	1.0	1.5	-	-	-	1.6	1.7	1.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 38

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

NORTH DAKOTA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	2.0	8.1	1.7
Ears	4.9	2.7	5.0
Nose and sinus	.7	-	.8
Throat	.2	-	.2
Teeth	.2	-	.3
Mouth and gums	-	-	-
Tuberculosis	3.1	2.7	3.1
Lungs and pleura	2.3	5.4	2.2
Cardiovascular	5.8	2.7	5.9
Varicose veins	.9	-	.9
Abdominal viscera	4.1	2.7	4.1
Kidney and urinary	1.2	8.1	.9
Blood & blood-forming	-	-	-
Hernia	7.3	21.6	6.6
Hemorrhoids	.6	-	.6
Genitalia	2.5	-	2.6
Syphilis	.2	-	.2
Gonorrhea and other venereal	-	-	-
Neoplasms	.7	-	.8
Musculoskeletal	9.6	21.7	9.0
Feet	2.8	-	3.0
Endocrine	.2	2.7	.1
Mental disease	37.2	-	39.0
Mental deficiency	.4	2.7	.3
Minimum intelligence tests 2/	3.6	-	3.7
Neurological	4.1	18.9	3.3
Skin	1.7	-	1.8
Infectious and parasitic	-	-	-
Acute conditions	.9	-	.9
Underweight and overweight	.5	-	.5
Other medical	1.6	-	1.7
Nonmedical	.7	-	.8

1/ Based on a 20 percent sample of Forms 221 for registrants inducted or rejected during February 1944 thr[illegible] December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 39

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

OHIO

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.3	4.4	3.1	2.9	3.0	-	4.3	4.4	3.2
Ears	4.4	4.7	1.1	4.2	4.3	-	4.5	4.7	1.1
Nose and sinus	1.0	1.0	.3	.8	.8	-	1.0	1.0	.3
Throat	*	.1	-	-	-	-	.1	.1	-
Teeth	.4	.4	.5	-	-	-	.4	.4	.5
Mouth and gums	.2	.2	.2	.5	.5	-	.2	.2	.2
Tuberculosis	5.7	5.6	8.2	6.1	6.2	-	5.7	5.5	8.3
Lungs and pleura	2.7	2.8	1.3	2.4	2.4	-	2.7	2.8	1.3
Cardiovascular	11.3	11.2	11.3	5.8	5.4	25.0	11.5	11.5	11.2
Varicose veins	1.3	1.3	1.6	.8	.5	12.5	1.3	1.3	1.4
Abdominal viscera	1.8	1.8	1.4	1.1	1.1	-	1.8	1.9	1.4
Kidney and urinary	1.4	1.4	.9	.8	.8	-	1.4	1.4	.9
Blood & blood-forming	.1	.1	-	1.1	1.1	-	.1	.1	-
Hernia	5.6	5.6	6.4	6.6	6.8	-	5.6	5.5	6.5
Hemorrhoids	.6	.6	1.3	-	-	-	.6	.6	1.3
Genitalia	1.2	1.2	.9	.5	.5	-	1.2	1.2	.9
Syphilis	.8	.7	2.8	.5	.3	12.5	.8	.7	2.7
Gonorrhea and other venereal	*	*	.2	-	-	-	*	*	.2
Neoplasms	1.0	1.0	.5	.5	.5	-	1.0	1.1	.5
Musculoskeletal	9.3	9.4	6.6	23.5	24.1	-	8.7	8.8	6.7
Feet	2.2	2.1	3.3	-	-	-	2.3	2.2	3.3
Endocrine	1.0	1.0	-	3.2	3.3	-	.9	.9	-
Mental disease	31.1	31.1	31.5	5.6	4.9	37.5	32.1	32.1	31.4
Mental deficiency	.7	.6	1.1	6.3	6.2	12.5	.4	.4	1.0
Minimum intelligence tests 3/	2.5	2.2	7.4	-	-	-	2.6	2.3	7.5
Neurological	4.6	4.7	3.0	21.2	21.6	-	4.0	4.1	3.0
Skin	1.3	1.4	.8	1.1	1.1	-	1.3	1.4	.8
Infectious and parasitic	.2	.2	.2	.3	.3	-	.2	.2	.2
Acute conditions	.5	.5	.5	.5	.5	-	.5	.5	.5
Underweight and overweight	.8	.8	.9	1.1	1.1	-	.8	.8	1.0
Other medical	.8	.8	.2	2.6	2.7	-	.7	.7	.2
Nonmedical	1.2	1.1	2.5	-	-	-	1.3	1.2	2.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Form 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 40

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

OKLAHOMA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.9	4.1	1.4	3.5	3.7	-	3.9	4.1	1.5
Ears	4.4	4.7	1.7	1.7	1.8	-	4.6	4.8	1.7
Nose and sinus	.8	.8	-	-	-	-	.8	.9	-
Throat	*	*	-	.6	.6	-	*	*	-
Teeth	-	-	-	-	-	-	-	-	-
Mouth and gums	.1	.1	-	.6	.6	-	.1	.1	-
Tuberculosis	4.8	4.8	4.0	7.6	7.3	16.6	4.7	4.7	3.8
Lungs and pleura	2.8	2.9	1.2	2.3	2.4	-	2.8	2.9	1.2
Cardiovascular	7.7	7.6	9.2	1.2	1.2	-	7.9	7.8	9.4
Varicose veins	1.3	1.4	1.2	-	-	-	1.4	1.4	1.2
Abdominal viscera	1.5	1.7	.3	1.2	1.2	-	1.6	1.7	.3
Kidney and urinary	1.2	1.2	.9	.6	.6	-	1.2	1.3	.9
Blood and blood-forming	.1	.1	-	-	-	-	.1	.1	-
Hernia	4.7	4.8	3.7	2.9	3.0	-	4.8	4.9	3.8
Hemorrhoids	.8	.9	.3	1.2	1.2	-	.8	.8	.3
Genitalia	1.0	1.0	.6	1.2	1.2	-	1.0	1.0	.6
Syphilis	.7	.6	1.7	1.2	1.2	-	.7	.6	1.7
Gonorrhea and other venereal	*	*	-	-	-	-	*	*	-
Neoplasms	.8	.8	-	2.3	2.4	-	.7	.8	-
Musculoskeletal	11.8	12.5	3.7	35.7	36.4	16.7	10.9	11.5	3.5
Feet	2.0	2.1	2.0	-	-	-	2.1	2.1	2.0
Endocrine	1.2	1.2	.6	1.2	1.2	-	1.2	1.2	.6
Mental disease	28.1	28.7	20.5	9.3	9.1	16.7	28.8	29.5	20.5
Mental deficiency	.9	.8	1.4	4.7	4.9	-	.7	.7	1.5
Minimum intelligence tests 3/	9.9	7.9	35.4	.6	.6	-	10.3	8.2	36.1
Neurological	3.9	3.8	5.5	15.8	14.6	50.0	3.4	3.3	4.7
Skin	1.1	1.1	.6	-	-	-	1.1	1.2	.6
Infectious and parasitic	*	*	-	-	-	-	*	*	-
Acute conditions	.7	.7	-	2.3	2.4	-	.6	.7	-
Underweight and overweight	.6	.6	.6	-	-	-	.6	.6	.6
Other medical	.6	.6	.3	2.3	2.4	-	.5	.5	.3
Nonmedical	2.6	2.5	3.2	-	-	-	2.7	2.6	3.2

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 4...

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 19... through December 19...

OREGON

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	5.1	3.	5.1
Ears	6.0	3.0	6.1
Nose and sinus	1.0	-	1.1
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	1.2	-	..
Lungs and pleura	1.8	1.1	1..
Cardiovascular	2..	-	.8
Varicose veins	-	-	-
Abdominal viscera	2.0	6.1	-
Kidney and urinary	1.9	-	-
Blood & blood-forming	.1	-	-
Hernia	3.4	-	-
Hemorrhoids	.1	-	-
Genitalia	1.0	-	-
Syphilis	.2	-	-
Gonorrhea and other venereal	-	-	-
Neoplasms	-	-	-
Musculoskeletal	1..	..	-
Feet	3.4	-	-
Endocrine	2..	-	-
Mental disease	3..1	3..1	3..8
Mental deficiency	1.0	1.0	...
Minimum intelligence tests 2/	.8	-	.8
Neurological	6.7	2.1	6.6
Skin	1.0	-	1.1
Infectious and parasitic	.2	-	.2
Acute conditions	2.0	6.1	1.9
Underweight and overweight	.8	-	.8
Other medical	1..	6.1	1.5
Nonmedical	.1	-	.1

1/ Based on a 20-percent sample of Forms 301 for registrants inducted or rejected during February 19.. through December 19..

2/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 42

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

PENNSYLVANIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	5.8	5.9	4.1	2.8	2.9	-	5.9	6.1	4.2
Ears	7.9	8.4	2.5	2.6	2.7	-	8.1	8.7	2.5
Nose and sinus	.5	.5	.6	-	-	-	.6	.6	.6
Throat	*	*	.1	-	-	-	*	*	.1
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and gums	.1	.1	-	.2	.2	-	.1	.1	-
Tuberculosis	4.2	4.2	4.9	5.5	5.4	10.0	4.2	4.1	4.8
Lungs and pleura	2.5	2.6	2.2	1.9	1.8	5.0	2.6	2.6	2.1
Cardiovascular	12.8	12.9	11.8	8.5	8.8	-	13.0	13.1	12.0
Varicose veins	1.2	1.2	1.1	1.4	1.4	-	1.2	1.2	1.2
Abdominal viscera	2.8	3.0	1.1	1.9	2.0	-	2.9	3.0	1.1
Kidney and urinary	4.3	4.3	4.3	.7	.7	-	4.5	4.5	4.4
Blood & blood-forming	*	*	.1	.2	.2	-	*	*	.1
Hernia	5.6	5.9	2.9	6.8	6.8	5.0	5.6	5.8	2.8
Hemorrhoids	.4	.3	.7	.5	.5	-	.3	.3	.7
Genitalia	1.2	1.2	1.1	1.2	1.3	-	1.2	1.2	1.2
Syphilis	1.5	1.0	6.1	.2	.2	-	1.5	1.1	6.3
Gonorrhea and other venereal	.1	*	.8	-	-	-	.1	*	.8
Neoplasms	1.0	1.0	.6	.7	.5	5.0	1.0	1.0	.5
Musculoskeletal	11.3	11.6	8.5	28.1	28.7	10.0	10.5	10.7	8.5
Feet	.8	.8	1.0	-	-	-	.8	.8	1.0
Endocrine	1.4	1.4	1.1	2.6	2.7	-	1.3	1.3	1.1
Mental disease	17.5	18.2	10.2	7.4	6.7	30.0	18.0	18.8	9.8
Mental deficiency	.8	.8	1.3	4.7	4.8	-	.6	.6	1.4
Minimum intelligence tests 3/	4.3	2.8	20.5	-	-	-	4.4	2.9	20.8
Neurological	5.6	5.6	5.2	16.6	16.9	10.0	5.1	5.1	5.1
Skin	1.3	1.3	1.0	1.4	1.4	-	1.2	1.3	1.1
Infectious and parasitic	.4	.4	.2	-	-	-	.4	.4	.2
Acute conditions	.9	.9	.8	1.4	1.1	10.0	.9	.9	.6
Underweight and overweight	1.6	1.7	1.2	1.0	.7	10.0	1.7	1.7	1.1
Other medical	1.0	1.0	.9	1.7	1.6	5.0	1.0	1.0	.8
Nonmedical	1.1	.9	3.1	-	-	-	1.2	1.0	3.1

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 43
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

RHODE ISLAND

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	2.0	-	2.0
Ears	8.1	25.0	7.9
Nose and sinus	.1	-	.1
Throat	.3	-	.3
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	3.7	12.5	3.6
Lungs and pleura	3.7	-	3.7
Cardiovascular	7.4	-	7.4
Varicose veins	1.1	-	1.1
Abdominal viscera	5.7	-	5.7
Kidney and urinary	1.1	-	1.2
Blood & blood-forming	-	-	-
Hernia	3.7	-	3.7
Hemorrhoids	1.4	-	1.4
Genitalia	.4	-	.4
Syphilis	.4	-	.4
Gonorrhea and other venereal	-	-	-
Neoplasms	1.0	-	1.0
Musculoskeletal	8.5	37.5	8.2
Feet	2.5	-	2.6
Endocrine	1.6	-	1.6
Mental disease	28.4	-	28.8
Mental deficiency	.8	-	.9
Minimum intelligence tests 2/	6.7	-	6.7
Neurological	6.2	25.0	6.0
Skin	.8	-	.9
Infectious and parasitic	-	-	-
Acute conditions	.1	-	.1
Underweight and overweight	1.4	-	1.4
Other medical	1.6	-	1.6
Nonmedical	1.3	-	1.3

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 44
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

SOUTH CAROLINA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.0	3.1	1.0	1.2	2.0	-	2.0	3.1	1.0
Ears	1.8	3.1	.7	2.5	4.0	-	1.8	3.1	.7
Nose and sinus	.3	.5	.2	-	-	-	.3	.5	.2
Throat	-	-	-	-	-	-	-	-	-
Teeth	.1	.1	-	-	-	-	.1	.1	-
Mouth and gums	*	.1	-	-	-	-	*	.1	-
Tuberculosis	.5	.5	.4	2.4	2.0	3.1	.4	.5	.4
Lungs and pleura	1.6	2.4	.9	.6	1.0	-	1.6	2.4	.9
Cardiovascular	7.0	5.8	8.1	6.1	4.0	9.4	7.1	5.9	8.1
Varicose veins	1.7	2.8	.7	.6	1.0	-	1.7	2.9	.7
Abdominal viscera	1.0	2.0	.2	3.1	2.0	4.7	1.0	2.0	.1
Kidney and urinary	1.0	1.5	.6	-	-	-	1.0	1.6	.6
Blood & blood-forming	*	-	.1	1.2	-	3.1	-	-	-
Hernia	4.2	5.3	3.3	8.6	12.0	3.1	4.1	5.1	3.3
Hemorrhoids	.4	.7	.1	1.2	2.0	-	.4	.7	.1
Genitalia	.7	.7	.6	1.8	3.0	-	.6	.6	.6
Syphilis	1.1	.3	1.8	1.2	-	3.1	1.1	.3	1.8
Gonorrhea and other venereal	.3	-	.5	-	-	-	.3	-	.5
Neoplasms	1.0	1.7	.3	-	-	-	1.0	1.8	.3
Musculoskeletal	6.1	8.4	4.1	37.8	39.0	35.9	5.3	7.4	3.5
Feet	1.1	1.1	1.0	-	-	-	1.1	1.2	1.1
Endocrine	.3	.6	.1	.6	1.0	-	.4	.6	.1
Mental disease	23.9	35.7	13.6	4.9	4.0	6.3	24.4	36.7	13.8
Mental deficiency	8.8	1.0	15.7	5.5	3.0	9.4	8.9	.9	15.8
Minimum intelligence tests 3/	28.2	13.1	41.3	-	-	-	28.9	13.5	42.0
Neurological	3.4	4.8	2.2	17.7	17.0	18.7	3.1	4.4	1.9
Skin	.4	.6	.2	-	-	-	.4	.6	.2
Infectious and parasitic	*	-	*	-	-	-	*	-	*
Acute conditions	.2	.1	.2	1.2	1.0	1.6	.1	.1	.2
Underweight and overweight	1.0	2.0	.2	-	-	-	1.0	2.0	.2
Other medical	.4	.5	.4	1.8	2.0	1.6	.4	.4	.4
Nonmedical	1.5	1.5	1.5	-	-	-	1.5	1.5	1.5

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 45
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

SOUTH DAKOTA

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	1.9	3.0	1.9
Ears	3.1	3.0	3.1
Nose and sinus	2.4	-	2.6
Throat	-	-	-
Teeth	.2	-	.2
Mouth and gums	.2	-	.2
Tuberculosis	4.4	-	4.6
Lungs and pleura	2.9	9.1	2.6
Cardiovascular	4.2	-	4.4
Varicose veins	1.0	6.0	.7
Abdominal viscera	4.4	9.1	4.1
Kidney and urinary	1.5	-	1.5
Blood & blood-forming	.2	-	.2
Hernia	9.9	6.1	10.1
Hemorrhoids	.3	-	.3
Genitalia	2.1	3.0	2.1
Syphilis	.2	-	.2
Gonorrhea and other venereal	-	-	-
Neoplasms	-	-	-
Musculoskeletal	8.4	21.2	7.7
Feet	2.8	-	2.9
Endocrine	.6	6.1	.3
Mental disease	33.0	9.1	34.3
Mental deficiency	.6	6.1	.3
Minimum intelligence tests 2/	1.8	-	1.9
Neurological	4.4	18.2	3.6
Skin	2.4	-	2.6
Infectious and parasitic	.2	-	.2
Acute conditions	1.1	-	1.2
Underweight and overweight	1.1	-	1.2
Other medical	3.4	-	3.6
Nonmedical	1.2	-	1.4

1/ Based on a 20 percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 46

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

TENNESSEE

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	4.8	5.0	3.8	3.7	3.9	2.3	4.8	5.0	3.9
Ears	3.5	4.2	.7	3.5	3.9	-	3.5	4.2	.8
Nose and sinus	.5	.7	-	.5	.5	-	.5	.7	-
Throat	*	*	-	.2	.2	-	*	*	-
Teeth	*	*	-	-	-	-	*	*	-
Mouth and gums	.1	.1	.1	.2	.3	-	.1	.1	.1
Tuberculosis	3.9	4.1	2.9	7.9	8.5	2.3	3.7	3.8	2.9
Lungs and pleura	1.8	2.0	.7	4.0	3.9	4.7	1.6	1.9	.6
Cardiovascular	7.1	6.6	8.9	3.5	3.9	-	7.3	6.8	9.2
Varicose veins	1.8	1.8	1.7	1.2	1.3	-	1.8	1.9	1.7
Abdominal viscera	1.9	2.2	.5	1.6	1.5	2.3	1.9	2.2	.5
Kidney and urinary	1.5	1.6	1.3	1.4	1.3	2.3	1.6	1.6	1.3
Blood & blood-forming	*	*	-	-	-	-	.1	.1	-
Hernia	4.1	4.1	3.9	11.6	10.3	23.3	3.6	3.7	3.3
Hemorrhoids	.6	.7	.5	.5	.5	-	.6	.7	.5
Genitalia	.8	.8	.7	.2	-	2.3	.8	.9	.6
Syphilis	.8	.6	1.8	2.3	1.3	11.6	.7	.6	1.5
Gonorrhea and other venereal	.1	*	.2	-	-	-	.1	.1	.2
Neoplasms	.5	.6	.2	.7	.8	-	.5	.5	.2
Musculoskeletal	9.0	9.1	8.8	24.4	25.1	18.6	8.1	8.0	8.5
Feet	3.9	3.0	7.4	.9	1.0	-	4.0	3.2	7.6
Endocrine	.4	.5	.1	4.4	4.9	-	.2	.2	.1
Mental disease	22.5	24.7	12.8	4.9	3.9	14.0	23.5	26.1	12.7
Mental deficiency	7.7	9.4	.7	3.5	3.1	7.0	8.0	9.8	.5
Minimum intelligence tests 3/	13.6	8.3	36.5	-	-	-	14.5	8.8	37.6
Neurological	3.8	4.4	1.4	14.9	15.8	7.0	3.2	3.6	1.2
Skin	.9	.9	.7	1.3	1.3	-	.8	.8	.8
Infectious and parasitic	.1	.1	-	-	-	-	.1	.1	-
Acute conditions	.4	.4	.4	.5	.5	-	.4	.4	.4
Underweight and overweight	.8	1.0	-	.7	.8	-	.8	1.0	-
Other medical	1.0	1.0	.8	1.6	1.5	2.3	.9	1.0	.8
Nonmedical	2.1	2.1	2.5	-	-	-	2.3	2.2	2.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 47
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

TEXAS

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.2	3.0	3.6	2.2	2.0	5.3	3.2	3.1	3.6
Ears	3.0	3.4	.3	1.8	2.0	-	3.0	3.5	.4
Nose and sinus	.2	.2	.2	.1	.1	-	.2	.2	.2
Throat	*	*	-	-	-	-	*	*	-
Teeth	.1	.1	.1	-	-	-	.1	.1	.1
Mouth and gums	.1	.1	*	-	-	-	.1	.1	*
Tuberculosis	3.1	3.3	2.0	8.7	8.8	7.0	2.8	3.0	1.9
Lungs and pleura	1.9	1.9	2.2	4.1	4.1	3.5	1.8	1.8	2.1
Cardiovascular	7.0	7.0	7.1	2.6	2.7	1.8	7.2	7.2	7.2
Varicose veins	.8	.8	.4	1.2	1.3	-	.8	.8	.4
Abdominal viscera	1.3	1.5	.3	.7	.7	-	1.3	1.5	.3
Kidney and urinary	1.1	1.2	.6	.9	1.0	-	1.1	1.2	.6
Blood and blood-forming	*	.1	-	.3	.3	-	*	*	-
Hernia	2.8	2.8	2.3	4.6	4.4	7.0	2.7	2.8	2.2
Hemorrhoids	.4	.4	.3	.1	.2	-	.4	.4	.3
Genitalia	.7	.7	.7	.4	.4	-	.7	.7	.7
Syphilis	.7	.4	2.3	.3	.3	-	.8	.4	2.4
Gonorrhea and other venereal	*	*	.1	-	-	-	*	*	.1
Neoplasms	.9	1.0	.7	.4	.4	-	1.0	1.0	.7
Musculoskeletal	8.6	9.0	6.5	29.4	30.1	21.0	7.6	7.8	6.2
Feet	3.8	3.9	3.3	.5	.6	-	3.9	4.1	3.4
Endocrine	.7	.9	.1	1.5	1.6	-	.7	.8	.1
Mental disease	24.6	23.3	31.3	7.9	7.7	10.5	25.4	24.1	31.7
Mental deficiency	2.9	3.1	1.9	7.4	7.5	5.3	2.7	2.9	1.8
Minimum intelligence tests 3/	24.5	24.0	26.8	-	-	-	25.7	25.3	27.3
Neurological	3.2	3.4	2.4	18.9	18.2	28.1	2.4	2.6	1.9
Skin	.9	.9	.7	1.4	1.3	3.5	.9	.9	.7
Infectious and parasitic	.1	.1	.1	-	-	-	.1	.2	.1
Acute conditions	.6	.7	.3	1.1	1.1	-	.6	.7	.3
Underweight and overweight	.7	.8	.3	.1	.1	-	.7	.8	.3
Other medical	.9	1.0	.7	3.4	3.1	7.0	.8	.9	.5
Nonmedical	1.2	1.0	2.4	-	-	-	1.3	1.1	2.5

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

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Table 48
Percent Distribution of Principal causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

UTAH

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	3.4	1.5	3.6
Ears	7.4	3.0	7.9
Nose and sinus	1.2	-	1.4
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	2.5	4.4	2.2
Lungs and pleura	3.1	-	3.4
Cardiovascular	12.4	13.2	12.3
Varicose veins	1.2	-	1.4
Abdominal viscera	5.5	13.2	4.6
Kidney and urinary	1.7	1.5	1.7
Blood and blood-forming	-	-	-
Hernia	6.0	-	6.7
Hemorrhoids	.2	1.5	-
Genitalia	1.2	2.9	1.0
Syphilis	.3	-	.3
Gonorrhea and other venereal	-	-	-
Neoplasms	.6	-	.7
Musculoskeletal	17.8	14.7	18.1
Feet	1.4	-	1.5
Endocrine	1.2	-	1.4
Mental disease	13.8	11.8	14.0
Mental deficiency	1.7	4.4	1.4
Minimum intelligence tests 2/	3.2	-	3.6
Neurological	5.2	19.1	3.6
Skin	1.2	4.4	.9
Infectious and parasitic	-	-	-
Acute conditions	2.2	2.9	2.1
Underweight and overweight	2.9	-	2.3
Other medical	.6	1.5	.5
Nonmedical	2.1	-	2.4

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 49
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

VERMONT

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	6.6	-	6.9
Ears	3.6	-	3.7
Nose and sinus	1.1	-	1.2
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	-	-	-
Tuberculosis	2.0	-	2.1
Lungs and pleura	4.0	3.0	4.0
Cardiovascular	2.6	6.1	2.4
Varicose veins	2.7	-	2.8
Abdominal viscera	1.6	6.1	1.3
Kidney and urinary	.9	-	.9
Blood and blood-forming	.1	-	.2
Hernia	4.0	3.0	4.0
Hemorrhoids	.4	-	.5
Genitalia	1.0	-	1.0
Syphilis	.4	-	.5
Gonorrhea and other venereal	-	-	-
Neoplasms	.4	-	.5
Musculoskeletal	10.7	24.2	10.1
Feet	2.9	-	3.0
Endocrine	.1	-	.2
Mental disease	40.1	12.1	41.4
Mental deficiency	.9	15.2	.2
Minimum intelligence tests 2/	5.2	-	5.4
Neurological	4.9	18.2	4.2
Skin	1.1	-	1.2
Infectious and parasitic	.1	3.0	-
Acute conditions	.7	6.1	.5
Underweight and overweight	.7	3.0	.6
Other medical	.6	-	.6
Nonmedical	.6	-	.6

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 50
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

VIRGINIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	2.9	3.2	2.2	1.4	1.7	-	3.0	3.2	2.2
Ears	3.5	4.5	.9	.9	1.1	-	3.6	4.7	.9
Nose and sinus	.5	.6	.2	-	-	-	.5	.6	.2
Throat	.1	.1	.1	-	-	-	.1	.1	.1
Teeth	.1	.1	-	.9	1.1	-	.1	.1	-
Mouth and gums	.1	.1	.1	.5	-	3.0	.1	.1	.1
Tuberculosis	2.9	3.1	2.4	4.7	3.9	9.1	2.8	3.0	2.2
Lungs and pleura	2.3	2.7	1.2	2.8	3.3	-	2.3	2.7	1.3
Cardiovascular	7.4	7.4	7.5	3.3	3.3	3.0	7.6	7.6	7.6
Varicose veins	.7	.9	.2	2.3	2.8	-	.6	.8	.2
Abdominal viscera	2.9	3.7	.9	6.1	6.7	3.0	2.8	3.5	.8
Kidney and urinary	2.8	2.9	2.5	3.3	1.7	12.1	2.8	3.0	2.2
Blood and blood-forming	*	.1	-	-	-	-	*	.1	-
Hernia	3.1	3.1	3.2	4.2	3.3	9.1	3.0	3.0	3.0
Hemorrhoids	.3	.4	-	.5	.6	-	.3	.4	-
Genitalia	.9	.8	1.2	-	-	-	1.0	.9	1.2
Syphilis	1.8	.8	4.6	1.9	-	12.1	1.8	.9	4.5
Gonorrhea and other venereal	.1	*	.4	-	-	-	.1	*	.4
Neoplasms	.5	.6	.2	.5	.6	-	.5	.6	.2
Musculoskeletal	7.6	8.9	3.7	31.4	32.8	24.3	6.5	7.7	3.2
Feet	.5	.4	.9	.5	.6	-	.5	.4	.9
Endocrine	.8	1.0	-	2.8	3.3	-	-	.9	-
Mental disease	17.6	20.6	9.3	4.7	5.6	-	18.1	21.3	9.5
Mental deficiency	.7	.5	1.2	8.0	6.1	18.2	.4	.3	.8
Minimum intelligence tests 3/	29.7	22.7	48.6	-	-	-	30.9	23.8	49.9
Neurological	5.3	5.7	4.1	15.0	17.2	3.1	4.9	5.2	4.2
Skin	.5	.6	.2	-	-	-	.5	.6	.2
Infectious and parasitic	.3	.3	.3	.5	.5	-	.3	.3	.3
Acute conditions	.6	.7	.3	1.9	1.7	3.0	.5	.7	.2
Underweight and overweight	.8	.8	.5	-	-	-	.8	.8	.5
Other medical	1.0	1.2	.5	1.9	2.2	-	1.0	1.1	.5
Nonmedical	1.8	1.5	2.6	-	-	-	1.9	1.6	2.7

* Less than .05 percent.
1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.
2/ Includes all races other than Negro.
3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 51

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

WASHINGTON

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	5.4	2.6	5.5
Ears	4.1	2.6	4.1
Nose and sinus	.7	-	.7
Throat	*	-	*
Teeth	*	-	*
Mouth and gums	.2	-	.2
Tuberculosis	3.2	6.6	3.1
Lungs and pleura	2.1	2.6	2.1
Cardiovascular	7.0	2.6	7.2
Varicose veins	1.8	-	1.8
Abdominal viscera	2.4	6.6	2.3
Kidney and urinary	2.1	7.9	1.9
Blood and blood-forming	-	-	-
Hernia	2.2	-	2.3
Hemorrhoids	.2	-	.2
Genitalia	1.1	-	1.2
Syphilis	.4	-	.4
Gonorrhea and other venereal	-	-	-
Neoplasms	1.2	-	1.2
Musculoskeletal	12.0	30.3	11.4
Feet	1.5	-	1.5
Endocrine	.9	3.9	.7
Mental disease	40.6	5.3	41.9
Mental deficiency	1.4	7.9	1.2
Minimum intelligence tests 2/	.3	-	.3
Neurological	5.1	21.1	4.6
Skin	1.1	-	1.2
Infectious and parasitic	.1	-	.1
Acute conditions	.2	-	.2
Underweight and overweight	1.0	-	1.0
Other medical	1.2	-	1.2
Nonmedical	.5	-	.5

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 52

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

WEST VIRGINIA

Principal Cause for Rejection	Local Board and Induction Station			Local Board			Induction Station		
	All Races	White 2/	Negro	All Races	White 2/	Negro	All Races	White 2/	Negro
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Eyes	3.2	3.1	4.2	2.7	2.8	-	3.2	3.1	4.3
Ears	3.5	3.7	-	1.2	1.2	-	3.6	3.8	-
Nose and sinus	.8	.8	.4	-	-	-	.9	.9	.4
Throat	.1	.1	-	-	-	-	.1	.1	-
Teeth	1.2	1.2	-	.4	.4	-	1.2	1.3	-
Mouth and gums	.1	*	.4	-	-	-	.1	.1	.4
Tuberculosis	3.4	3.5	1.7	10.5	9.9	40.0	2.9	3.0	.9
Lungs and pleura	3.0	3.1	1.3	4.7	4.8	-	2.9	3.0	1.3
Cardiovascular	3.6	3.4	6.3	2.3	2.4	-	3.6	3.5	6.5
Varicose veins	1.6	1.7	-	.8	.8	-	1.6	1.7	-
Abdominal viscera	1.2	1.3	-	1.6	1.6	-	1.2	1.3	-
Kidney and urinary	1.1	1.2	-	2.0	2.0	-	1.1	1.1	-
Blood and blood-forming	.1	.1	-	.4	.4	-	.1	.1	-
Hernia	3.8	3.9	2.5	7.0	7.2	-	3.6	3.7	2.6
Hemorrhoids	.3	.3	-	.8	.8	-	.2	.2	-
Genitalia	1.0	1.1	-	1.2	1.2	-	1.0	1.0	-
Syphilis	1.5	1.2	7.6	1.2	1.2	-	1.5	1.1	7.8
Gonorrhea and other venereal	*	-	.4	-	-	-	*	-	.4
Neoplasms	.5	.6	-	1.6	1.6	-	.5	.5	-
Musculoskeletal	10.9	10.8	12.7	30.5	30.2	40.0	9.6	9.5	12.1
Feet	.7	.6	2.1	-	-	-	.7	.7	2.2
Endocrine	.6	.7	-	3.5	3.6	-	.5	.5	-
Mental disease	32.6	32.9	26.6	3.9	4.0	-	34.4	34.8	27.1
Mental deficiency	.8	.8	.9	3.1	2.8	20.0	.7	.7	.4
Minimum intelligence tests 3/	15.8	15.1	27.4	-	-	-	16.8	16.1	28.0
Neurological	3.8	3.9	2.1	12.5	12.7	-	3.3	3.3	2.2
Skin	.9	.9	.4	2.7	2.8	-	.8	.8	.4
Infectious and parasitic	.1	.1	-	-	-	-	.1	.2	-
Acute conditions	.4	.4	.4	2.3	2.4	-	.3	.3	.4
Underweight and overweight	1.2	1.2	1.3	.8	.8	-	1.3	1.3	1.3
Other medical	.8	.9	-	2.3	2.4	-	.7	.8	-
Nonmedical	1.4	1.4	1.3	-	-	-	1.5	1.5	1.3

* Less than .05 percent.

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Includes all races other than Negro.

3/ Registrants rejected for failure to meet minimum intelligence standards.

Table 53

Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/ February 1944 through December 1944.

WISCONSIN

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	4.6	1.7	4.9
Ears	5.5	1.2	5.8
Nose and sinus	.5	-	.5
Throat	.1	.4	.1
Teeth	-	-	-
Mouth and gums	.1	-	.1
Tuberculosis	2.5	5.8	2.3
Lungs and pleura	3.8	4.1	3.8
Cardiovascular	7.6	3.7	7.9
Varicose veins	2.4	.4	2.5
Abdominal viscera	3.4	4.1	3.4
Kidney and urinary	1.6	1.6	1.6
Blood and blood-forming	.2	.8	.1
Hernia	7.1	9.9	6.9
Hemorrhoids	.4	.8	.4
Genitalia	1.4	-	1.5
Syphilis	.2	-	.2
Gonorrhea and other venereal	-	-	-
Neoplasms	.6	.4	.6
Musculoskeletal	8.4	21.7	7.3
Feet	1.3	-	1.4
Endocrine	.8	1.2	.8
Mental disease	30.0	4.9	31.9
Mental deficiency	1.6	17.2	.3
Minimum intelligence tests 2/	5.9	-	6.4
Neurological	3.9	14.8	3.1
Skin	1.2	.8	1.3
Infectious and parasitic	.1	-	.1
Acute conditions	.8	2.9	.7
Underweight and overweight	1.1	-	1.2
Other medical	.9	1.6	.8
Nonmedical	2.0	-	2.1

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

Table 54
Percent Distribution of Principal Causes for Rejection at Local Boards and Induction Stations 1/
February 1944 through December 1944.

WYOMING

Principal Cause for Rejection	Local Board and Induction Station	Local Board	Induction Station
Total	100.0	100.0	100.0
Eyes	3.6	-	3.6
Ears	4.1	-	4.2
Nose and sinus	1.4	-	1.4
Throat	-	-	-
Teeth	-	-	-
Mouth and gums	.3	-	.3
Tuberculosis	3.3	-	3.4
Lungs and pleura	1.6	-	1.7
Cardiovascular	9.8	-	10.1
Varicose veins	1.6	25.0	1.1
Abdominal viscera	3.0	-	3.1
Kidney and urinary	1.4	-	1.4
Blood and blood-forming	-	-	-
Hernia	5.5	-	5.6
Hemorrhoids	-	-	-
Genitalia	1.1	-	1.1
Syphilis	-	-	-
Gonorrhea and other venereal	-	-	-
Neoplasms	-	-	-
Musculoskeletal	8.5	37.5	7.8
Feet	2.7	-	2.8
Endocrine	1.6	25.0	1.1
Mental disease	39.1	-	39.9
Mental deficiency	1.1	12.5	.8
Minimum intelligence tests 2/	3.6	-	3.6
Neurological	3.8	-	3.9
Skin	.8	-	.8
Infectious and parasitic	-	-	-
Acute conditions	-	-	-
Underweight and overweight	1.1	-	1.1
Other medical	.5	-	.6
Nonmedical	.5	-	.6

1/ Based on a 20-percent sample of Forms 221 for registrants inducted or rejected during February 1944 through December 1944.

2/ Registrants rejected for failure to meet minimum intelligence standards.

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[2574-2575] Title omitted

Index omitted

2576 DEFENDANT'S EXHIBIT 21

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER AND CASSELBERRY, INC., A California corporation,
Plaintiff,

v.

OSCAR R. EWING, Administrator, Federal Security Agency, et al.,
Defendants.

Washington, D. C., Friday, April 15, 1949.

Deposition of Dr. Elmer M. Nelson, a witness of lawful age, called for examination by counsel for the Plaintiff, pursuant to notice, copy of which is attached to the Court copy of this deposition, and subsequent stipulation of counsel set for the day and date herein indicated, in Room 4801, South Building, Department of Agriculture, Washington, D. C., beginning at 2:05 p.m., before Ida Z. Watson, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

Charles S. Rhyne, Esq., and Eugene J. Bradley, Esq., Attorneys for Plaintiff.

2577 Vincent A. Kleinfeld, Esq., and William W. Goodrich, Esq., Attorneys for Defendants.

PROCEEDINGS

Mr. RHYNE: For the record, I have given the reporter the notice under which we are taking this deposition, but by stipulation of counsel we are not taking this deposition on the 21st in accordance with the notice, but are taking it today, because Dr. Nelson must go to Europe and will not return until the day of the trial.

I believed that is agreed to, isn't it, Mr. Kleinfeld?

Mr. KLEINFELD: That is right.

Mr. RHYNE: So we are waiving the provisions of notice on that.

Whereupon—ELMER M. NELSON, a witness of lawful age, was called for examination by counsel for the Plaintiff, and after having been sworn by the Notary was examined and testified as follows:

Examination by Mr. Rhyne:

Q. Will you state your name and address?

A. Elmer M. Nelson, 1830 Jackson Street, Washington, D. C.

2578 Q. What is your official position?

A. I am Chief of the Division of Vitamins of the Food and Drug Administration.

Q. Have you ever heard of the product Nutrilite Food Supplement?

A. I have.

Q. When did it first come to your attention?

A. I have no definite recollection of that. I have to deal with so many products that the name probably didn't impress me the first time I saw it; but I do recall that I have seen the name at least six months ago.

Q. Doctor, can you recall why it first came to your attention?

A. Samples of the product, Nutrilite, were submitted to this Division for examination to determine whether or not the vitamin content was in accordance with that claimed; and that was more than six months ago. I don't recall the date. I recall having seen a record of that recently.

Q. I notice, Dr. Nelson, in the affidavit which has been filed in this case, which you will recall you gave on January 17, 1949, that you say that your Division "is charged with the responsibility of offering opinions with respect to the propriety of statements
2579 pertaining to nutrition, including vitamins, and the labeling of products that come within the purview of the Food, Drug and Cosmetic Act." You recall that statement; do you not?

A. Yes, I do.

Q. And that is the function of your office?

A. That is a part of the function of this office.

Q. Have you had occasion to examine the booklet, "How To Get Well and Stay Well," that is used in the sale of Nutrilite Food Supplement?

A. Yes, I read that pamphlet at one time.

Q. Do you recall when you read it, Doctor?

A. All I can say is it was months ago. I don't recall. It was within the past year, but just when, I do not recall.

Q. Did you render an opinion on whether that particular booklet complies with the Food, Drug and Cosmetic Act?

A. I don't believe I was asked to offer an opinion on that.

Q. If you had been asked to render an opinion on that, Doctor, how would you go about making that decision?

Mr. GOODRICH: Object on the ground that the question is speculative, calling for a speculative answer.

Mr. KLEINFELD: And is irrelevant.

Mr. RHYNE: Off the record.

2580 (Discussion off the record.)

Mr. RHYNE: On the record.

THE WITNESS: Well, the procedure for determining whether or not the statements made therein are misleading, in terms of the Food, Drug and Cosmetic Act, would be no different from that of any other piece of literature, pamphlet or labeling.

We read what the statements are and attempt to see what impression they would create in the minds of the readers; and see if there is anything of a misleading nature about them or any false statement in the literature.

By Mr. Rhyne:

Q. In determining whether or not a statement is misleading, or false, do you consider official Government publications and medical books and literature in the field with respect to a particular representation?

A. Yes, I do.

Q. Do you consider anything else?

A. Consider all the knowledge that is at my command, I might say, anything I may have read, anything of my own personal experience in conducting investigations, the opinions of various authorities in the field whom I have consulted on the subject and discussed it with them.

Q. You have been Director of this Division for quite a
2581 while, haven't you, Doctor?

A. I have been Chief of this Division since 1935.

Q. In considering these publications and this knowledge of which you speak, do you strive to arrive at what I have seen referred to as the "consensus of medical opinion"?

A. It wouldn't necessarily be the consensus of medical opinion. It would be the best opinion that I could find in medicine that relates to that particular subject.

Q. What do you understand by the term "consensus of medical opinion"?

A. Well, what most men in the field of medicine would agree to.

Q. That is, the majority of them?

A. Yes, I should think that would be the consensus of opinion.

Mr. RHYNE: I have noticed the use of the term and I was wondering just what your office considered that it meant. That is the reason for my question.

By Mr. Rhyne:

Q. Now, are you called upon to determine whether particular literature is false, as distinguished from misleading?

A. Yes, I am.

Q. How would you make such a distinction?

2582 A. It would depend entirely upon the statements made. In a statement dealing with scientific facts, it is quite obvious in certain cases whether a statement is one that conforms with the facts that are established or not. A statement may be misleading when it is not false.

There are many examples that can be given of that. One that I have used in discussing labels would be a statement such as a person saying, "One of your parents is white," implying that the other one is not. Well, that statement is a statement of fact, but it is still misleading.

Q. I see. Now, are you called upon to distinguish misleading statements and fraudulent statements; and if so, how do you distinguish between the two?

A. Well, I don't know that I am called on particularly to determine whether a statement is fraudulent or not.

Q. Well, if that is not within your duties, you don't render opinions on it, I won't press the question.

A. I may have occasion to review a record that deals with something fraudulent, but whether or not it is fraudulent is more a legal matter than it is a scientific matter.

Q. And you are not a lawyer, are you?

A. No, sir.

Q. Now, in arriving at these opinions which it is the

2583 function of our office to render, you are always measuring particular literature or labeling against the established medical facts in a particular field, say, in the field of vitamins? With respect to Nutrilite, in measuring Nutrilite's literature, you read that literature and determine the claims that you think are made for it, and then you measure those claims against this consensus of medical opinion, so to speak, in the field, to determine whether the claims are correct?

A. Or the conclusions that I have arrived at as to what I believe to be the correct statement.

Q. I mean, you would think that there is some way of establishing whether your conclusions are correct with reference to the literature in the field, for example?

A. Yes, to some extent, but without a certain amount of fundamental knowledge, you are not able to judge whether the literature that is available to you is expressing the facts correctly or not; and

I do not hesitate to impose my own judgment on anything that I have occasion to review.

Q. But you don't think you have to be a medical doctor in order to review this literature and determine the consensus of medical opinion with respect to a particular vitamin?

Mr. KLEINFELD: We object to that on the ground it is irrelevant.

2584 Mr. RHYNE: Will you read the question?

(Whereupon the question was read by the reporter.)

THE WITNESS: I do review the literature and consider when it is available, what the consensus of medical opinion is, but I do not necessarily rest my opinion on any particular piece of literature or statement by any group of individuals.

By Mr. Rhyne:

Q. My question is, in your opinion, you don't have to be a medical doctor in order to review this literature and arrive at such an opinion?

A. No, sir.

Q. Now, Doctor, in the course of your duties, do you have to determine whether particular labeling is misleading in a material respect to the injury or damage to a purchaser or consumer?

Mr. KLEINFELD: We will object to that on the ground it is irrelevant and not involved in the issues in this case.

THE WITNESS: Shall I proceed?

Mr. KLEINFELD: Yes.

By Mr. Rhyne:

Q. Yes.

A. My job is primarily to state what I believe the scientific
2585 facts are, so our administrative officers can reach a conclusion with respect to that.

Q. But you do determine whether particular literature is misleading?

A. I offer an opinion, yes, sir.

Q. And misleading in a material respect?

A. I have never given any consideration to that particular language, "in a material respect." I have never been asked to answer in that particular language.

Q. Have you considered the language "in a material respect to the injury of a purchaser"?

Mr. KLEINFELD: Again I object on the ground that it is irrelevant and not Dr. Nelson's function to make such determinations under the statute.

THE WITNESS: I don't recall that I have been asked to offer such an opinion.

By Mr. Rhyne:

Q. You don't consider injury to the purchaser?

A. I do consider injury to the purchaser, but not in the terms of whether it is in a material respect or not.

Q. Well, when you are considering injury to the purchaser, for example, with respect to labeling such as that in the booklet, "How To Get Well and Stay Well," how would you go about arriving at an opinion as to whether or not such a booklet is or is not injurious to a purchaser or consumer?

2586

A. First of all, I would consider whether the product, itself, if taken in accordance with the recommendations for use, would be likely to produce any injurious effect. I would consider also whether the recommendations or representations for the product are such that a person might rely on such a product to ameliorate a disease or cure it, and whether or not that product would be capable of doing anything for such disease.

Q. And considering those factors you have just named, you would determine whether or not there was injury to the purchaser or consumer?

A. Whether there may be injury, yes.

Q. Would you consider whether the injury is direct or indirect?

A. That is right.

Q. Now, do you consider whether or not your office—and when I refer to "your office," I mean the Food and Drug Administration—has received complaints from purchasers or consumers? Is that a factor in your judgment?

MR. KLEINFELD: I object to that question on the ground that it is not relevant.

THE WITNESS: Certainly I would give consideration to any complaints and try to learn the basis for such complaints, if I was considering a question of injury from the product.

2587

By Mr. Rhyne:

Q. That would be one of the factors that you would certainly take into consideration?

A. Well, I certainly would not ignore any complaint about a product being injurious.

Q. Doctor, have you discussed Nutrilite with Mr. Ewing?

A. No, sir.

Q. Have you discussed it with Mr. Kingsley?

A. No, sir.

Q. Have you discussed it with Dr. Dunbar?
A. No, sir.
Q. Have you discussed it with Mr. Larrick?
A. No, sir.
Q. Have you discussed it with Dr. Butz?
A. No, sir.
Q. Could you recall the persons whom you have discussed Nutrilite with?
A. I have discussed it with Mr. Kneeland, K-n-e-e-l-a-n-d.
Q. Who is Mr. Kneeland?
A. He is in the office of the Administrator of the Federal Security Agency.

2588 Q. Can you recall what you told Mr. Kneeland about Nutrilite?
A. No, I wouldn't be able to recall what I have said. I have had many telephone conversations with him with respect to that product.
Q. Can you recall the substance of the telephone conversations?
A. I think the discussion that is pertinent here was primarily questions that he posed to me that related to the representations made in a pamphlet dealing with the product, Nutrilite, and I gave him my opinion with respect to the representations made therein and to various other questions that he asked me to provide a basis for his consideration of the product.
Q. When you said a few moments ago, then, that you had never really been called upon to render an opinion on the labeling of Nutrilite, you meant that you had not been called upon to render an opinion on the pamphlet as a whole?
A. That is right.
Q. You were asked by him about specific passages of the pamphlet?
A. Yes.

2589 Q. Did you have the entire pamphlet before you at the time?
A. No, not at that time, not in my discussions with him. It is possible that I may have had the pamphlet at some time, but if so, it is quite a long time ago, and I just do not recall the circumstances.
Q. Doctor, I am going to hand you a pamphlet which I will have marked as Exhibit A.

Mr. RHYNE: I would like to have the consent of counsel to replace it later, because it appears to be a marked copy that I brought by mistake, Mr. Kleinfeld, rather than the copy I intended to bring. It is the 42-page pamphlet that we are all familiar with.

(Whereupon the said pamphlet was marked Exhibit A.)

Mr. KLEINFELD: Is that the Exhibit A that was attached to Plaintiff's original complaint?

Mr. RHYNE: Yes; it is identical. I would like to replace it with one that is not marked up.

Mr. KLEINFELD: Fine.

By Mr. Rhyne:

Q. I will ask you whether or not that is the pamphlet you had occasion to review?

A. Yes, this appears to be the pamphlet. I am not sure that I have read all of this, but I was requested by someone
2590 outside of the Food and Drug Administration to look at certain passages and offer an opinion on it.

Q. Can you advise me the name of the person who made that request of you?

A. The name is Mr. Field.

Q. And can you identify him further as to who he is employed by?

A. Employed by the American Medical Association.

Q. Mr. Field submitted a copy of this to you and asked your whether or not it was misleading in violation of the Food, Drug and Cosmetic Act; did he?

A. No, sir.

Q. What did he ask you, Doctor?

A. He asked me to review certain parts of this, something like the first ten pages, and then another part that dealt with vitamins specifically and offer my opinion with respect to the statements made therein.

Q. Did you give your opinion?

A. I did.

Q. What was your opinion, Dr. Nelson?

A. Well, I would have to review this material again.

Q. You didn't do it in writing?

A. Yes, I did it in writing?

2591 Q. Could I have a copy of it?

Mr. GOODRICH: I object to the production of any records on the ground that they are records of the Food and Drug Administration and not under the control of this witness. He is prohibited by Regulation 21, Code of Federal Regulations, Section 196.1, from revealing this information otherwise than with the permission of the Administrator of the Federal Security Agency.

Mr. RHYNE: I ask Mr. Kleinfeld and yourself, as attorneys for the Administrator, to waive that regulation at this time.

Mr. KLEINFELD: We have no authority to waive that regulation.

Mr. RHYNE: I also call your attention to the fact that this witness appears under a subpoena that requires him to produce the records in his possession that relate to Nutrilite Food Supplement.

By Mr. Rhyne:

Q. I ask you, Dr. Nelson, whether this communication is in your possession?

Mr. GOODRICH: We have stated that the records are not in the possession of Dr. Nelson; they are in the possession of the Federal Security Agency. They are official Government records and
2592 are not in the control of any person. For that reason, we object to his giving them.

Mr. RHYNE: I will have to have an answer as to whether or not these records are in his possession or in the possession of his Division.

Mr. GOODRICH: He can answer the question. You may answer.

THE WITNESS: This particular letter is a part of the correspondence with the Council on Pharmacy and Chemistry of the American Medical Association. I don't know whether I have that letter here or whether I have it at home.

By Mr. Rhyne:

Q. And the name of that counsel is Mr. Field?

A. No, sir.

Q. Could you give me his name?

A. When I was speaking of a Council on Pharmacy and Chemistry, that is the name for a group of men; and Mr. Field is one of the men in the office of that organization.

Q. To whom would the particular communication have been addressed, Doctor?

Mr. KLEINFELD: The Government objects to all this line of questioning on the ground that it is entirely irrelevant; that the issue in this case, as phrased in pre-trial conference, is whether the labeling
2593 of this product is misleading in a material respect; and that all these questions addressed to Dr. Nelson have no relevancy with respect to that issue.

Mr. RHYNE: I reply, of course, that this particular opinion was addressed directly to that specific issue, and ask that Dr. Nelson answer my question as to whom the particular communication was addressed.

THE WITNESS: Shall I answer that question?

Mr. KLEINFELD: Surely.

THE WITNESS: The communication was addressed to a Mr. Field, who is in the offices of the Council on Pharmacy and Chemistry of the American Medical Association.

By Mr. Rhyne:

Q. Can you recall approximately the date of the communication, Doctor?

A. I believe it was in January of this year.

Q. Would you say that the communication indicated that this particular 42-page pamphlet was or was not misleading?

A. Oh, that it was misleading. There were misleading statements in it; the general impression that you gain from reading it is rather misleading.

Q. Did you point out any particular injury or damage to any purchaser or consumer in that communication?

A. No, sir.

2594 Q. Did you determine whether it was misleading in a material respect in that communication?

A. I don't know how to answer that question, sir. I don't know what you mean by "material respect."

Q. In other words, you can't understand the term, "misleading in a material respect"?

Mr. KLEINFELD: I object to that question as entirely irrelevant.

THE WITNESS: I do not know what you mean by the difference between "misleading" and "misleading in a material respect."

By Mr. Rhyne:

Q. Doctor, can private companies submit to you their labeling and get your stamp of approval on that labeling to the effect that it doesn't violate the Food, Drug and Cosmetic Act?

Mr. KLEINFELD: I object, Dr. Nelson isn't qualified to answer that question. He is not the head of the Food and Drug Administration; and it is irrelevant to the issue here.

Mr. RHYNE: In reply, I say he signed an affidavit on the 17th of January, 1949, stating that he is charged "with the responsibility of offering opinions with respect to the propriety of statements pertaining to nutrition, including vitamins, and the labeling of products that come within the purview of the Food, Drug and Cosmetic Act."

2595 Mr. KLEINFELD: Well, why don't you ask him that question instead of the question you asked him?

Mr. RHYNE: Will you read the question I asked?

(Whereupon the question was read by the reporter.)

Mr. KLEINFELD: I will object to that.

Mr. RHYNE: No, I will not amend it; I would like an answer.

Mr. KLEINFELD: Go ahead.

THE WITNESS: Labels are not submitted to me directly. They may be submitted to the Food and Drug Administration, and in the course of consideration, I may have occasion to comment on

them; but one on the staff of the Food and Drug Administration will offer an opinion to the firm whether or not the label conforms with the requirements of the Food, Drug and Cosmetic Act.

By Mr. Rhyne

Q. Does the same thing apply to labeling, that is, advertising, as well as labels?

A. Not advertising, but what is considered label or labeling in terms of the Food, Drug and Cosmetic Act will be commented on.

Q. Are those approvals binding in any way?

Mr. KLEINFELD: I object. It calls for a legal conclusion
2596 of the witness and is irrelevant.

By Mr. Rhyne:

Q. I will change the question. Do you know of any instance where labeling has been approved by the Food and Drug Administration and later disapproved?

A. Labeling is never approved by the Food and Drug Administration. We have no such authority under the law.

Q. Doctor, do you think that actual experience with the product, as reported by doctors in medical journals, is one of the best ways to arrive at its value, say, in the field of nutrition?

Mr. KLEINFELD: That is objected to as irrelevant.

THE WITNESS: No, sir.

By Mr. Rhyne:

Q. You don't think that experience with the product is the best way to arrive at its value?

A. No, sir.

Q. What do you think is the best way?

A. If you are trying to ascertain the value of a product for a particular condition, what is needed is carefully controlled clinical studies where you can have groups of patients to compare, so that you can establish definitely whether the product is of any value.

2597 Observations of patients at random is of relative little value.

Q. You don't think, then, that if 30,000 people used a particular product and reported beneficial results from it that that would prove that the product was beneficial for the things they reported?

Mr. KLEINFELD: I object to that as being irrelevant and calling for a conclusion of the witness which he isn't qualified or supposed to answer. Go ahead.

THE WITNESS: Certainly not.

By Mr. Rhyne:

Q. In other words, you give no value whatever to actual experience with a product?

Mr. KLEINFELD: I object on the same ground, that it is leading, and not phrased correctly. Would you mind stating the question again, subject to that objection?

Mr. RHYNE: Read the question.

(Whereupon the question was read by the reporter.)

THE WITNESS: I do not agree to what is implied in that question. I would give consideration to experience gained with a product, but experience may be obtained under such conditions that the people who use a product may be entirely misled with respect to
2598 what value may accrue from the use of the product; and I have seen instances of that.

By Mr. Rhyne:

Q. Do you believe, Doctor, that such a thing as deficiency diseases exist?

A. Yes, sir. It isn't a matter of belief; I know they exist.

Q. I have marked as Exhibit B a page from a volume known as "Modern Home Medical Adviser," by Dr. Fishbein, of the American Medical Association, whom I am sure you know. It is Page 504, relating to deficiency diseases. I ask that you examine this page and state whether or not you agree to the facts set forth thereon?

(Whereupon the said document was marked Exhibit B.)

Mr. KLEINFELD: I wish to object to this unless the entire document from which this is taken is submitted to Dr. Nelson.

Mr. RHYNE: All right, I submit the document.

Mr. GOODRICH: We also object on the ground that this is improper direct examination, to present to a witness a medical book on which he has not stated that he relied, and ask for an opinion on that.

Mr. KLEINFELD: Go ahead.

THE WITNESS: May I have the question read again?

2599 (Whereupon the question was read by the reporter.)

Mr. GOODRICH: We object further on the ground that this question asks this witness, who is not an M.D., for a medical opinion, which he has not been qualified to express.

Mr. RHYNE: I say, I am not asking him to express an opinion as an M. D., merely as head of the Vitamin Division of the Food and Drug Administration.

Mr. KLEINFELD: Well, we repeat that objection in that he is well qualified to head the Vitamin Division, but he is not an M. D. and, therefore, isn't qualified to discuss diseases.

THE WITNESS: Shall I go ahead?

Mr. GOODRICH: Yes.

THE WITNESS: I do not agree with a number of the statements made under the headings, "Excellent Purposes," and "Deficiency Leads To."

Under the heading, "Excellent Purposes" is the representation, "Promotes growth and vigor."

By Mr. Rhyne:

Q. Do you say that statement is either false or misleading?

A. It is misleading.

Q. Why?

2600 A. Because it leaves the impression that if a person shows lack of vigor or lack of growth, if he will take this vitamin, it will promote growth and vigor; and it will not necessarily do so.

In the absence of Vitamin A in the diet or in the case of Vitamin A deficiency, there is depression of growth and there may be loss of vigor.

Q. Are there any other statements in there that you say are misleading or false?

A. Yes. In the column headed, "Deficiency Leads To," and this refers to Vitamin A, also, are the statements, "Loss of vigor," and "Failure of growth of children."

I am sorry, I did not regard that in terms of the heading. It is proper to make those statements under that heading.

Under the heading, "Excellent Purposes," and relating to Vitamin B, is the statement, "Promotes appetite and digestion."

I see there are two headings; one is Vitamin B and the other one B-1. This refers specifically to Vitamin B-1. The taking of Vitamin B-1 will not necessarily promote the appetite or promote digestion. It is true that with a deficiency of Vitamin B-1 appetite may be depressed and digestion may not be proper; but there are many cases in which there is lack of appetite or poor digestion

2601 which will not be relieved by injection of Vitamin B-1.

Following the statement, "Promotes appetite and digestion," is "Stimulates body activity." The same type of criticism is applicable to that statement as to the statement, "Promotes appetite and digesion," and "Promotes growth and vigor," that I referred to before.

Q. Well, Doctor, do you think that those statements in that book are materially misleading?

Mr. KLEINFELD: That is objected to as being irrelevant.

THE WITNESS: They are misleading to the extent that a person reading this—and this is directed to people in the home—would definitely be misled by such a statement.

By Mr. Rhyne:

Q. Do you think they would be misled to their injury or damage?

A. They may be. The statement is also made, "Overcomes some forms of neuritis." An individual may consider various aches or pains that he may have as being neuritis, and neuritis may, in some instances, be due to Vitamin B-1 deficiency, but more frequently due to other causes.

Q. On what do you base that conclusion, Doctor, your reading of medical and other journals?

A. Yes, sir.

2602 Q. All right. Is there anything else in there that you object to?

A. Yes, sir. Under Vitamin B-2, or Riboflavin, in the column headed, "Excellent Purposes," is the statement, "Extrinsic factor in pernicious anemia (Castle)." That is not true.

Q. You say the statement is false?

A. Yes.

Q. You again base that upon writings in medical journals and your own experience in this field?

A. Yes, sir. In the reference to Vitamin E, under the column "Excellent Purposes," is the statement, "Necessary for reproduction in animals and man," with a question mark. There is absolutely no evidence that Vitamin E is necesary for reproduction in man, and it is not necessary for reproduction in some animals.

Q. Is there not a conflict of opinion on that, Doctor, in the medical journals and scientific writings?

A. Well, there may be some difference of opinion in certain writings; but in the best literature, I don't believe there is any difference of opinion with respect to what I have stated. The evidence with respect to cattle is certainly to the effect that Vitamin E is not needed.

2603 Q. When you refer to "the best literature," what literature do you have particularly in mind?

A. Well, I was referring to scientific journals such as the "Journal of Nutrition," the "Journal of Biological Chemistry," the "Biochemical Journal" that is published in England, and similar scientific journals.

Q. "The American Medical Association Journal," would you classify that in the same category?

A. Not in the same category, because that journal publishes articles of findings, recognizing that what may be published in there may readily be disproven in later articles. Things that are more or less experimental in nature, rather than critical investigations such as those that are published, for example, in the "Journal of Nutrition."

In the last section of the table, the bottom of the page, relating to Vitamin B Complex is the statement, "Pantothenic acid (filtrate factor) is related to graying of hair in human beings." I do not agree with that statement, because all of the critical studies with which I am familiar have demonstrated that pantothenic acid is of no value in preventing the graying of hair or restoring the color of gray hair in man.

Q. You say that statement, because you don't agree with it, is misleading?

2604 A. Yes.

Q. There could be others who would think it is not misleading, like the authors of that volume.

A. There could be, yes.

Q. I mean, you don't say that they put the statements in there to mislead anyone?

Mr. KLEINFELD: I object; that is entirely irrelevant.

THE WITNESS: The statement I quoted is followed by the statement, "Vitamin B-6 (pyridoxine) is related to some chronic nervous disturbances." I do not agree with that statement.

By Mr. Rhyne:

Q. Other than that, you think that the facts set forth on the page are true and accurate?

A. I have only given this a rather cursory review and I am not sure that there are not other statements in here that I do not agree with; but I think those are the principal ones.

Q. Do you know the authors of the particular article, Doctor?

A. Yes, sir.

Q. Are they well-known persons in the field of nutrition, vitamins?

A. Not particularly well known in the field of nutrition.

2605 The senior author is Dr. Russell M. Wilder, whose specialty is internal medicine at the Mayo Clinic. He has been interested in nutrition in recent years; but I am not sure that he has made a thorough study of all of the available literature with respect to vitamins.

Q. What about the other author, Dr. Butz?

A. The work of Dr. Butz that relates to nutrition, so far as I know, relates only to Vitamin K.

Q. You don't think he is particularly well qualified, then, to write an article and come to the conclusions that are set forth there?

A. I don't think that either one of the authors is well qualified to make statements of this kind on the basis of their own experience and observations; but they should be well qualified to make a survey of the literature.

Q. Is it your opinion that they have read the literature wrong and come to the wrong conclusions?

Mr. KLEINFELD: I object to that line of questioning as being entirely irrelevant, calling for conclusions which have no bearing on this case. Go ahead.

THE WITNESS: I can reach no other conclusion, sir.

By Mr. Rhyne:

2606 Q. Dr. Nelson, have you read any literature of Mytinger and Casselberry or any literature relating to Nutrilite Food Supplement other than this pamphlet, "How to Get Well And Stay Well," which has been marked Exhibit A?

A. Not according to my present recollection, sir.

Q. Do you have any employes under your direction who have been investigating Nutrilite or the labeling of Nutrilite?

A. Not investigating the labeling, but men who have made analyses of samples of Nutrilite.

Q. That is to determine whether or not it actually contains the contents set forth on its label?

A. Yes, sir.

Q. Have you seen any complaint from any user or purchaser of Nutrilite to the effect that he has been injured by it in any way?

Mr. KLEINFELD: Objected to as being irrelevant.

THE WITNESS: I do not recall seeing any.

By Mr. Rhyne:

Q. Have any of these employes under your direction made any field investigations of Nutrilite?

A. No, sir.

Q. None of the inspectors of the Food and Drug Administration are under your direction?

A. No, sir.

2607 Q. Do you have any facts or have any facts been submitted to you at any time showing injury or damage to any person from the labeling of Nutrilite?

Mr. KLEINFELD: Objected to as being irrelevant and incompetent.

THE WITNESS: No, sir.

By Mr. Rhyne:

Q. Are you familiar, Doctor, with the vitamins and minerals that are contained in Nutrilite Food Supplement?

A. I have read the label.

Q. They are set forth in your affidavit?

A. Yes, sir.

Q. Of January 17, 1949.

A. Yes, sir.

Q. Are there not vitamins and minerals in Nutrilite which could aid in curing or preventing or assisting in the cure of deficiency diseases, certain deficiency diseases?

A. There are.

Q. Could you name the deficiency diseases specifically that you think it could aid in curing or preventing or assisting in the cure of?

A. Cases of Vitamin A deficiency, Vitamine B-1 deficiency, Vitamin B-2 deficiency, Vitamin C deficiency, Vitamin D
2608 deficiency, possibly in the case of Vitamin K deficiency there is sufficient niacinamide to be of value in the prevention of a niacinamide deficiency; but the amount would probably be of little or no value in the cure of pellagra, which is due to a deficiency of that vitamin.

Q. How about the minerals in Nutrilite, Doctor?

A. The quantities of iron and calcium are of about the order of the daily requirement for the adult; the phosphorous is a little less than that; and the amount of iodine in the recommended daily intake is considerably in excess of the established daily requirement.

Q. Doctor, did you help prepare any affidavits for Dr. Dunbar or Mr. Larrick with reference to Nutrilite for use in Court?

A. No, sir.

Q. I believe you have said that there is no one in your Division who worked on the Nutrilite labeling as distinguished from its label?

A. That is right?

Q. Just on the label. Doctor, isn't it true that the literature, scientific literature indicates that a material proporion of our popu-
lation suffers from one or more vitamin or mineral deficiencies?

2609 A. May I have that question read?

(Whereupon the question was read by the reporter.)

THE WITNESS: In the literature, we find various statements indicating widely different opinions with respect to the extent of vitamin and mineral deficiencies.

If one looks at the literature that appeared ten to fifteen years ago, there are indications that vitamin or mineral deficiencies would be quite widespread. The opinions that are expressed on the basis of recent surveys are to the effect that vitamin and mineral deficiencies are much less common than they were ten years ago.

The evidence from medical literature with respect to the actual occurrence of deficiency diseases is to the effect that there are very few cases of deficiency diseases.

By Mr. Rhyne:

Q. Doctor, I have had called to my attention a Technical Bulletin No. 963, entitled, "Efficient Use of Food Resources in the United States," dated October 1948, by Raymond P. Christensen, Agricultural Economist, Bureau of Agricultural Economics, United States Department of Agriculture, in which I noted this statement:

Mr. GOODRICH: I object to examination with this pamphlet on the ground it is not a recognized medical treatise. This
2610 man is not an M.D. who is being examined; and this is improper direct examination in that it is an effort to place into the record here statements from an Agriculture Department publication.

By Mr. Rhyne:

Q. Doctor, the statement made in this Technical Bulletin No. 963 is this:

> "Estimates made from the 1942 study indicate that one-half of all families did not have diets that met recommended allowances for riboflavin, one-third did not meet the allowances for calcium, one-fourth for thiamin, and about one-tenth for ascorbic acid, Vitamin A, iron and protein."

I take it from what you just said, you disagree with that?

A. Disagree with the opinion?

Q. Yes.

A. I do disagree with that opinion, because that is based on a survey made in 1942. Recent surveys have shown quite different results.

The recommended dietary allowance for riboflavin for the adult to which the author probably refers is a figure given by the Food and Nutrition Board of the National Research Council of 3 milligrams of riboflavin a day; and it is now very well agreed that
2611 such an amount of riboflavin is not required or not necessary; and the recommended dietary allowance has been reduced to less than 2 milligrams a day, I believe, for the adult. It is either 2 or 1.8, which would make a considerable difference in estimating the frequency with which diets failed to meet such a standard.

Also, the statement with respect to Vitamin C, only one-tenth of the diets meeting that standard, means nothing with respect to the frequency of deficiency of Vitamin C and the incidence of scurvy, because the actual requirement for Vitamin C has been demonstrated by very thorough researches on man in England to be of the order of 10 to 15 milligrams a day, whereas the recommended dietary allowance of the Food and Nutrition Board of the National Research Council is 75 milligrams a day.

So it makes no difference, makes relatively little difference that only one-tenth of the diets may meet the standard of 75 milligrams a day if the actual requirement is less than 15 milligrams a day.

Q. I take it you are familiar with that study to which I referred there, but it was not cleared through your Administration before it was released?

A. I am not familiar with the publication to which you
2612 refer. I am familiar with surveys that were made by the Department of Agriculture in 1935 to 1939, and then a rather limited survey that was made in, I believe, the spring of 1942; and I think that is the survey to which the author refers.

Q. Now, Doctor, I am going to ask you certain questions about the affidavit that you made on the 17th of January, 1949. Do you have a copy of that?

A. Yes, sir.

Q. You might follow these questions better if you have it in front of you. First of all, calling your attention to Paragraph 4 in the affidavit, in which you set forth a chart comparing Nutrilite with two other vitamin products, how did you procure the figures which you list in that chart which apply to Nutrilite?

A. That figure was given to me as a figure by Mr. Kneeland, I believe, with respect to what it cost to obtain a year's supply of Nutrilite.

Q. That is Mr. Kneeland of the Administrator's office?

A. Yes, sir.

Q. Was that chart represented to you as containing all the vitamins and minerals in Nutrilite?

A. Well, no. I had before me the label for Nutrilite.

Q. So you knew it did not contain all the vitamins and
2613 minerals which are contained in Nutrilite?

A. This is not a complete list of all of the vitamins and minerals that are in Nutrilite.

Q. For example, I notice that you omit Vitamin B-6, Vitamin E, Vitamin K, pantothenic acid, inositol, and paramino-benzoic acid. Those that I have just mentioned are omitted from the chart, Dr. Nelson?

A. Yes, sir.

Q. Now, the product that you have listed there as Unicaps does not contain any minerals; does it, Doctor?

A. Well, not in any quantity that should be regarded. There is calcium present in here as calcium pantothenic, but that should not be regarded as a source of minerals.

Q. Can you compare two products, one of which, like Nutrilite, does contain minerals, and the other one containing no mineral substance at all?

A. No; and I would like to say in that connection, you can't make an accurate comparison between two products that are not of the same composition. That applies to vitamins, as well; but in making this comparison, I disregarded the vitamins that are not known to be needed in human nutrition; and the heading of the chart is, "Comparison of Vitamin Content and Cost of Vita-
2614 min preparations." It really refers to vitamin content rather than mineral content.

Q. Is it your statement that Vitamin B-6, Vitamin E, Vitamin K, pantothenic acid, inositol, and para-amino-benzoic acid were not listed because they have no value?

A. Yes. That is referred to later in Paragraph 9, on Page 3 of the affidavit.

Q. Now, is it not true, Doctor, that the National Research Council figures in your chart are the daily recommended average in-take of vitamins?

A. No, sir.

Q. Could you explain what they are; what the figures really represent?

A. They are amounts that are recognized to be considerably in excess of actual requirements for the vitamins, and they are recognized as quantities that are readily obtainable from ordinary diets. That is the basis for them.

Q. Well, as compared to Nutrilite's figures in the same chart, is it not true that the Nutrilite figures are more of a therapeutic in-take recommendation rather than average?

A. That is true.

Q. The National Research Council recommendation is not of that character; is it?

A. It is not.

2615 Q. Do you think it is valid to compare two sets of figures that apply to different circumstances?

A. Well, not if you do it in such a way as to mislead anyone; but I didn't think I was misleading anyone. I certainly didn't intend to in the way I expressed these figures. I give the source of the information; and the figures of the recommended dietary allowance are very widely used and very well known in the field of nutrition.

Q. But you do recognize the difference in the two?

A. Oh, yes.

Q. Can you tell me how old the National Research Council figures are? When was this recommendation made?

A. These figures conform with the current recommended dietary allowances and were adopted in a meeting in the spring of last year; published first about August of last year.

Q. Referring to Paragraph 9 that you mentioned a few moments ago, you say:

"The above-listed vitamins and minerals are recognized by the Food and Nutrition Board of the National Research Council as essential in human nutrition."

The chart also shows that this Vi Syneral contains fewer units of Vitamin C than that recommended by the National Research Council, and is lacking in elements of calcium and
2616 phosphorous. How can you compare these products with Nutrilite which contains amounts of vitamins and minerals in excess of those recommended by the National Research Council? Do you think that is a reasonable comparison?

A. These figures were intended to show the actual cost of a preparation as it is available on the market. The differences between the recommended dietary allowances and the composition of these three products that are mentioned, it seems to me, are obviously apparent by just examination of the table, that they are not of uniform composition.

Q. So you do recognize, then, it is not an exact comparison at all?

A. I never intended it to be an exact comparison. I do not so intend it to be now.

Q. Now, calling your attention to Paragraph 5 of your affidavit, Dr. Nelson, you refer to a "well-balanced diet." Can you define what you mean by that term?

A. A diet that will provide all of the other essential nutrients can be expected to furnish all of the Vitamin A that is required.

In fact, the most recent surveys that have been made indicate that the average in-take for the whole population of this country
2617 is 9,000 units a day; and it isn't difficult to get enough Vitamin A from foods that are readily available to us.

Q. Well, isn't it true that the recommended dietary allowances of the National Research Council with respect to vitamins which are set forth in Paragraph 4 of your affidavit are merely recommendations of what a normal, healthy individual would require to supply his body with an adequate quantity of those particular vitamins?

A. They do not. A normal healthy individual will not require as much of the vitamins as listed, with the possible exception of Vitamin D. That comes the closest to being the actual requirement of any of the vitamins listed here.

As I explained before the actual Vitamin C requirement is way below the recommended dietary allowance.

Q. You mean that these recommended dietary allowances are for people below average rather than normal?

A. No; they represent rather generous in-takes of vitamins.

Q. They are not therapeutic recommendations to meet deficiency diseases?

A. No.

Q. Or deficiencies in diets?

A. No.

2618 Q. So they are not really comparable, then, to the recommendations made for Nutrilite?

A. No, they are not.

Q. Doctor, do you know whether or not physicians ever prescribe 25,000 or more USP Units of Vitamin A in cases of deficiency of that vitamin?

Mr. GOODRICH: I object to that question on the ground it is entirely irrelevant and calls for a speculative answer, in addition.

THE WITNESS: There are products that are labeled in which such dosages are recommended; and I presume that doctors may use them, although there are very few cases of Vitamin A deficiency; and to what extent they may be used, I don't know.

Mr. RHYNE: The reason for my question was that I noticed a statement in the American Medical Association work entitled, "New and Non-Official Remedies," on Page 545, which makes the statement that:

"Doses of 25,000 are often prescribed in cases of deficiency."

Mr. KLEINFELD: I would like to have you ask the question, if you are asking one.

Mr. RHYNE: I have finished.

Mr. KLEINFELD: It is a question?

2619 Mr. RHYNE: Yes.

Mr. KLEINFELD: Will you read it?

(Whereupon the question was read by the reporter.)

Mr. RHYNE: I have not finished my question.

By Mr. Rhyne:

Q. You have seen such statements made, I take it from your previous answer, Doctor, in the literature, scientific literature of that character?

A. There have been recommendations of that kind to which the Council on Pharmacy and Chemistry has been definitely opposed: It can see no need for recommendations in excess of 25,000 units a day in cases of Vitamin A deficiency.

Q. Doctor, what is that Council; what is it composed of?

A. It is the Council that prepares the book to which you just referred, "New and Non-Official Remedies."

Q. Doctor, are you familiar with the "United States Dispensator"?

Mr. GOODRICH: I object on the ground that this witness is not a medical man.

THE WITNESS: Yes. I am not particularly familiar with it because I have no use for it in my work particularly. I know there is such a book.

Mr. RHYNE: If it is not required in your work, I won't
2620 ask you any question about it.

By Mr. Rhyne:

Q. Are you aware, Dr. Nelson, that 1,000 to 3,000 USP Units daily are recommended for infants and children in case of deficiencies in Vitamin D?

A. Yes, sir.

Q. Is it not true that in many cases where deficiencies of Vitamin A or Vitamin D exist, physicians recommend a greater in-take of those vitamins than the amounts recommended by the National Research Council?

A. That is true.

Q. Dr. Nelson, in Paragraph 6 of your affidavit, you state that Nutrilite contains 20 milligrams of Vitamin B-1. You further state that the generally accepted in-take of Vitamin B-1 is 5 to 10 milligrams daily; and you further state that the amount of Vitamin B-1 in Nutrilite is 13 times the recommended amount. I was wondering about your mathematics.

A. You didn't read all of the statement that refers to "generally accepted." "It is generally accepted that 5 to 10 milligrams of thiamin is sufficient as a therapeutic dose." And the therapeutic dose is considerably in excess of the daily requirement that is referred to in the previous sentence.

Q. I see. That qualifies the National Research Council
2621 reference?

A. Yes, sir.

Q. Again referring to this volume on "New and Non-Official Remedies" of the American Medical Association, which you have before you, I noted a statement on Page 549——

Mr. GOODRICH: Again I object to this line of inquiry on the same ground as stated previously.

By Mr. Rhyne:

Q. On Page 549 it states, with respect to B-1:

> "Evidence on which to base dosages in the treatment of acute deficiencies is meager. There are indications that doses to the order of 10 to 50 milligrams may be advantageous in specific instances."

Do you agree with that statement?

Mr. KLEINFELD: I object to that on the ground it is irrelevant.

THE WITNESS: Yes; there may be cases in which a patient is near the point of death because of a heart condition that has developed Vitamin B-1 deficiency where dosages of that size, 10 to 50 milligrams, may be useful; but there is very little evidence to indicate that a dose in excess of 10 milligrams a day will do anything more than a dose of 10 milligrams a day.

2622 By Mr. Rhyne:

Q. In connection with your latest statement, Doctor, I have another note here from this "United States Dispensator," Page 1211, where it states, and I quote:

"For mild deficiency, 10 milligrams may suffice, but in severe deficiencies, 2 to 4 times of this dose may be required."

I take it you agree with that statement?

A. Yes, essentially.

Q. In Paragraph 7 of your affidavit, you state that Nutrilite contains riboflavin, Vitamin B-2, five times in excess of the National Research Council figures.

Are you aware of the statement which the "United States Dispensator" makes with reference to the daily dose of this vitamin?

A. I am not.

Q. I can tell you that on Page 986 it says:

"Two to 15 milligrams is the daily dose."

Would you agree or disagree with that?

Mr. GOODRICH: I object to that on the ground that the witness has stated he is not familiar with the "Dispensator"; he doesn't use it in his work; and for that reason, the question is improper.

THE WITNESS: I have no basis for disagreement.

2623 By Mr. Rhyne:

Q. Doctor, in this volume that you have right before you now, this "New and Non-Official Remedies," directing your attention to Page 559, don't you find that it recommends about twice as much Vitamin C, that is, 100 to 150 milligrams daily, as that recommended by the National Research Council?

A. This is recommended by the Council on Pharmacy and Chemistry of the American Medical Association.

Q. Yes.

A. Yes, they recommend 100 or 150 milligrams.

Q. So that is, roughly, about twice what the National Research Council figures are contained in your affidavit?

A. It does go as high as twice, yes.

Q. Doctor, referring to Paragraph 9 of your affidavit, where you say:

"The need for Vitamin B-6, pantothenic acid, Vitamin E, Vitamin K, inositol and para-amino-benzoic acid in human nutrition has not been established."

By that statement, do you mean that those vitamins and food factors are of no value in human nutrition?

A. Vitamin K is known to be of value in human nutrition, and in some cases provision must be made for taking it orally. But
2624 it appears that most of the Vitamin K needs of the body are obtained through synthesis of the vitamin by micro-organisms in the intestinal tract.

Q. What about Vitamin E?

A. There is no established need for Vitamin E in human nutrition.

Q. There is some dispute in the scientific writings on that; is there not?

A. There is dispute.

Q. Is the same true of pantothenic acid?

A. I am not familiar with any evidence that pantothenic acid plays a role in human nutrition. The only dispute that has arisen with respect to pantothenic acid which has come to my attention is the claim at one time by a group of investigators that pantothenic acid was of value in restoring the color of gray hair. That claim has been disproven by very careful and extensive studies.

Q. What about Vitamin B-6?

A. There is no evidence as yet, that is, direct evidence that any deficiency in man responds to treatment with Vitamin B-6. There are certain conditions where it is claimed that beneficial results are obtained, such as in sickness that occurs with X-ray treatment.

A number of investigators have indicated that they
2625 believe Vitamin B-6 is of value in relieving that condition.

But as far as any deficiency disease in man, I don't believe there is any evidence that there is such a disease that will respond to treatment with Vitamin B-6.

Q. Well, isn't there some conflict in the medical journals and scientific writings on that very point?

A. No, no. There has been no report of any disease in man that has responded to treatment with Vitamin B-6.

Q. As a deficiency disease?

A. A deficiency disease; that is right.

Q. How about inositol?

A. There is no evidence whatever with respect to its need in human nutrition. There is very little evidence with respect to its need in animals.

The in-take of inositol in ordinary diets is fairly high. The average in-take is of the order of a gram a day; as compared to 20 milligrams of inositol in the daily recommended in-take of Nutrilite; and that is only 1/50 of what the average daily in-take is.

Q. What of para-amino-benzoic acid? What about that?

A. There is no evidence that that substance plays any role in human nutrition. It is of value in the treatment of certain
2626 diseases called rachitial diseases when taken in very large amounts, but that has no relation to what is needed for normal nutrition.

Q. Of course, I note that the label of Nutrilite states that "The need for Vitamin B-6, pantothenic acid, inositol and para-amino-benzoic acid in human nutrition has not been established." So that label would conform to what you have just stated?

A. Yes. That statement is required in regulations under the Food, Drug and Cosmetic Act.

Q. Now, Dr. Nelson, I do have a note here that in 1939, on Page 2414, Volume 112, of the Journal of the American Medical Association, it was reported that:

> "Vitamin B-6 was beneficial to a group of patients suffering from extreme nervousness, insomnia, abdominal pain, weakness, difficulty in walking, irritability."

Have you heard or seen that writing or similar writings in any of the scientific journals?

A. What was the date of that publication?

Q. 1939.

A. I do not recall that particular publication at the moment, but there have been several recent reviews published with respect to the role of Vitamin B-6 in human nutrition; and they are all in
2627 agreement to the effect that there is as yet no evidence that Vitamin B-6 is needed in human nutrition, so far as observations on man are concerned.

Q. Do you know approximately when the Vitamin B-6 was isolated and chemically identified?

A. Well, it was about 1939 or 1940. I don't recall the year at the moment. I recall that an award was made to the men who made that discovery by the American Institute of Nutrition; and I think it was about 1939.

Q. Have you read in the medical journals about any investigations that indicate that Vitamin B-6 might be of value in controlling certain types of paralysis?

A. Yes, I have. There were reports of that kind, and that subject was studied carefully by medical men in the Food and Drug Administration. Subsequent study showed that the observations that had been reported that Vitamin B-6 was of value in the treatment

of paralysis agitans and similar nervous disorders were not well founded. They were disproven.

Q. Was the same true with respect to acne?

A. I didn't know that any claim had ever been made for its value in the treatment of acne. Practically everything else has been proposed for that.

Q. You have never heard of that?

A. No.

2628 Q. Dr. Nelson, are you familiar with a volume entitled, "Diatherapy," by M. G. Wohl, M. D.?

A. No, sir.

Q. If you have not seen that, I will not ask a question about it. Doctor, isn't it true that clinical tests have disclosed that a deficiency in Vitamin E is sometimes related to habitual abortion, muscular dystrophy, primary fibrosis?

Mr. KLEINFELD: I object to that, Mr. Rhyne. I think you are asking medical questions now—not diseases.

Mr. RHYNE: From his testimony to date, it seems while Dr. Nelson has been head of this Division for many years, that he acquires a lot of his knowledge from medical journals and scientific writings; so I am just asking him if, in acquiring that knowledge, he has read that Vitamin E is useful under those conditions or for those conditions?

THE WITNESS: Yes, I have read such a paper.

By Mr. Rhyne:

Q. I am trying to shorten this rather than read a lot. Have you also, from the same sources, read that a deficiency in Vitamin K results in defective coagulation of the blood?

A. I am not familiar with any evidence that such condition is due to an inadequate in-take of Vitamin K. The prolongation of

2629 the coagulation of the blood may be due to an insufficient amount of Vitamin K being absorbed if there is obstruction of the bile, because the fat soluble vitamins such as Vitamin K are not absorbed if there is bile obstruction. In such cases you may have prolonged clotting time of the blood.

In certain instances, too, the injection of mineral oil apparently either interferes with the production of Vitamin K in the intestinal tract or removes all the Vitamin K that comes into the intestinal tract, so that it is not absorbed; and in those cases, you get prolongation of the blood clotting time. But I know of no cases that have been reported where it has been shown that there has been an actual prolongation of the blood clotting time due to an inadequate in-take of Vitamin K without any disorder or abnormal condition.

Q. Doctor, have you heard that Vitamin K is found chiefly in alfalfa?

A. I wouldn't say it is found chiefly in alfalfa. It is found in all green, leafy material, and vegetable oils are fairly rich in Vitamin K.

Q. You do know that it is found in alfalfa; do you not?

A. It is found in alfalfa, yes.

Q. Now, with reference to para-amino-benzoic acid, haven't you learned from the scientific journals and from your
2630 own experience that it has proved valuable in the treatment of skin and hair disorders?

A. Treatment of skin——

Q. And hair disorders?

A. No.

Q. Have you heard it?

A. No.

Q. What about with sterile conditions in women. Have you read of studies that proved that it was beneficial in those instances?

A. No, sir.

Q. Referring again to the cost factor which is emphasized in your affidavit, isn't it true that the vitamins and minerals that are not listed in your cost chart represent a substantial cost of the product?

A. The cost of the minerals would be very small indeed. It would not modify the figure much. The cost of the other vitamins would not be a particularly big item. Vitamin K would probably be the greatest. But pantothenic acid and inositol and para-amino-benzoic acid are present in such small amounts that the actual cost of the material would be very low indeed. Next to Vitamin K would be the cost of Vitamin E.

2631 Q. Doctor, hasn't it been your conclusion that the need of vitamins and minerals in the human diet has been clearly established?

A. Yes, the need for certain vitamins and minerals has been clearly established.

Q. And isn't it also true that much progress is constantly being made in the direction of determining the actual value of vitamins and minerals in the human diet and that the entire field of vitaminology is relatively new?

A. You have more than one question there; but it is true that a great deal of progress is now being made in learning how the vitamins function. They have really relatively little knowledge of how the vitamins actually function in the body. We know that certain changes take place in deficiency of vitamins, and that you can correct those conditions by taking vitamins, but the actual physiological changes that take place in the body are not understood at the present time or understood very little.

Now, so far as the field of vitaminology being new, the name "vitamin" was coined in 1911, and we have dealt with vitamins

since that time. It would be new in terms of geology, certainly, but whether it is new in the field of biochemistry, I wouldn't be so certain. It isn't particularly new.

2632 Q. Doctor, going back to this cost factor again, isn't it true that in addition to the six items that Nutrilite contains that are not listed in your affidavit, you have not made any evaluation of this base of alfalfa, water cress and parsley that Nutrilite contains, and its value in human nutrition, in making this comparison?

A. Well, so far as the vitamins and minerals are contained in those products, they are all taken care of in the quantities of those listed on the labeling.

Q. Yes.

A. Whatever vitamins or minerals they provide.

Q. It is the base that I am referring to of parsley, water cress and alfalfa that add something in addition to the vitamins.

A. Well, what they may actually cost, I have no knowledge of that.

Q. Have you made any laboratory test or any evaluation of the value of that base?

A No, sir.

Q. Do you think there is anything harmful in taking amounts in excess of the amounts recommended by this National Research Council?

A. Yes, if you place no limit on the amount that you

2633 might take.

Q. Say the amounts recommended by Nutrilite?

A. No, I have no information that would indicate that taking those quantities would produce injury.

Q. Doctor, does your experience indicate that vitamins and minerals such as those found in Nutrilite are helpful in the case of low vitality of a person where they are absent in his diet? If he receives those through the taking of Nutrilite, couldn't that have some effect on his low vitality?

A. If a person was actually suffering from a deficiency of any of the essential vitamins or minerals, undoubtedly, a condition may develop in which an individual would have a lack of vigor. He would be sick, in other words.

Q. And in those instances, the vitamins and minerals contained in Nutrilite would be helpful?

A. Yes.

Q. Now, when you rendered this opinion to the American Medical Association, did you call that to the attention of the manufacturers or distributors of Nutrilite in any way?

A. No, sir

Q. Isn't it true, Doctor, that new vitamins are being identified every few years?

A. That has been true during the last two decades.

2634 There have been several vitamins that have been identified.

Q. Is it possible that this base of alfalfa, parsley and water cress, which Nutrilite has and which is not contained in the other two products which you list in your affidavit, could mean that Nutrilite is more valuable in human nutrition than those other two products?

Mr. KLEINFELD: I object to that question on the ground that it is irrelevant and calling for a conclusion of the witness.

THE WITNESS: I don't know. It may be a possibility.

By Mr. Rhyne:

Q. You just haven't tested Nutrilite to discover what value this base might contain?

A. No, sir.

Mr. RHYNE: Doctor, I believe those are all the questions that I have to ask you now. I understand that you will return from Europe about the 7th of May and that, if necessary, we can ask you a few more questions, either before the trial or during the trial, at some convenient time that counsel can agree upon and that is agreeable to you.

THE WITNESS: Yes, my present plans are to be away for at least three weeks; and I expect to be back in this country by May

2635 7. There may be changes in those plans, however; but those are my present plans.

Mr. RHYNE: With that understanding, those are all the questions I have to ask now. I thank you very much, Dr. Nelson.

Mr. GOODRICH: I have a few questions.

Examination by Mr. Goodrich:

Q. Doctor, does the Food and Drug Administration have another division which passes upon the therapeutic value of drug preparations?

A. It has.

Q. What is that division?

A. Medical Division.

Q. In so far as you have stated opinions, are those opinions based upon your guess or upon your training and experience as a nutritionist?

A. They are based upon all of my knowledge and experience, what I have read, what I have obtained, what information I have obtained from various people in the field whom I have consulted.

I have plenty of opportunity to consult leaders in the field of nutrition.

Q. State briefly your educational and professional experience for the record?

Mr. Rhyne: I will concede that he is qualified.

2636 Mr. Goodrich: I would like for it to be stated in the record to show exactly what his field of specialty is.

The Witness: I graduated from the University of Wisconsin in 1918, and majored in agricultural chemistry. That is a department that is now called the Department of Biochemistry. I received my Master's degree in 1919 from that same institution, and a Doctor of Philosophy degree in 1923.

From 1920 to 1925 I was on the staff of the Department of Agricultural Chemistry at the University of Wisconsin. I was engaged in research on problems that related to vitamins.

From July 1925 to April 1926, I held the position of Director of Chemistry and Nutrition with the Soft Wheat Millers Association, with headquarters at Nashville, Tennessee.

Since April 1926, I have been with the organization that has been responsible for the enforcement of the Food and Drugs Act of 1906, and subsequently, the Food, Drug and Cosmetic Act, which replaced it in 1938.

For a period from 1926 until 1935, half of my time was spent in dealing with problems relating to the enforcement of the Food, Drug and Cosmetic Act, and the other half of my time in studying problems directly related to nutrition and vitamins particularly. Many of these studies dealt with the effect of commercial processes on the stability of vitamins.

2637 Since 1935, I have been Chief of the Division of Vitamins in the Food and Drug Administration.

I am a member of the American Institute of Nutrition, an organization whose members are all qualified to conduct research in the field of nutrition. I am president of that Institute the current year. I have served two terms of four years each on the Board of Editors of the "Journal of Nutrition," which is the official publication of the American Institute of Nutrition.

I am a member of the American Society of Biological Chemists. That organization is similar to the American Institute of Nutrition in its requirements for membership.

I am a member of the Food and Nutrition Board of the National Research Council; have been since January 1941, which was a few months after the organization was created.

I am a member of the Vitamin Advisory Board of the United States Pharmacopoeia. I am a member of the Council on Pharmacy and Chemistry of the American Medical Association, and have been since about 1935.

In 1934, I was a delegate from this country to the International Conference on Vitamins that was held in London, to consider standards for vitamins. This conference was sponsored by the Health Organization of the League of Nations.

2638 By Mr. Goodrich:

Q. I think that is enough to indicate your qualifications. Do you regard the book that has been shown you, "The Modern Home Physician," as an authoritative medical treatise?

A. I have never read the book.

Mr. RHYNE: It is called "Modern Home Medical Adviser," by Morris Fishbein, M. D.

By Mr. Goodrich:

Q. Would you regard it as an authoritative work in the field of nutrition?

A. From what I have seen of the table, I would not so regard it.

Q. I ask you to look at the column on Pages 504 and 505, the photostat of which has been marked Exhibit B, the column headed, "Deficiency Leads To," and to state whether, in your opinion, the symptoms there listed occur more frequently in conditions other than vitamin deficiencies than in Vitamin deficiency diseases?

A. Most of the conditions that are listed in that column are more frequently due to causes other than vitamin deficiency. Under Vitamin A, it is quite probable that night blindness may occur more frequently due to Vitamin A deficiency than to other
2639 causes; but the other conditions listed are more likely to be due to other causes than to vitamin A deficiency.

Q. Do you regard a layman as competent to diagnose a clinical case of deficiency diseases that would require a therapeutic dose of vitamin preparation?

A. Oh, he certainly would not be qualified to diagnose such diseases.

Q. What is the approximate caloric value of the water cress, alfalfa and parsley contained in three capsules of Nutrilite, which I understand is the daily recommended dose?

Mr. RHYNE: Two.

By Mr. Goodrich:

Q. Two capsules; I will amend it to two capsules.

A. From the appearance of the capsule and the weight of it, which I judge by holding it in my hand, two capsules would not contain more than possibly a gram or two, and caloric value could

not possibly be more than 5 or 10 grams at the most. A very small fraction of the total caloric requirements.

Q. What is the average daily caloric in-take in the American dietary?

A. It is of the order of 3,000 calories per day.

Q. What proportion of that would be contributed by two capsules of Nutrilite per day?

A. A very small fraction of one per cent.

2640 Q. Is there any other known nutritional element of water cress, alfalfa and parsley than the vitamin and mineral elements that have been discussed?

A. The plants, themselves, would contain other constituents that would have some nutritive value. All plant material of that kind would contain some protein and some carbohydrate, possibly a very small amount of fat, but the quantities of those would be insignificant in the small quantity of those materials.

Mr. GOODRICH: I have no further questions.

Further examination by Mr. Rhyne:

Q. Doctor, with reference to your last question, of course, this is in concentrated form; so you have no real way to evaluate it in that concentrated form; do you?

A. If we assume that all the material inside of this capsule were a mixture of protein, carbohydrate and fat, the quantity would still be very small in terms of the total daily requirements of those nutrients.

Q. Mr. Goodrich asked you a question, directing your attention again to Page 504 of this volume entitled, "Modern Home Medical Adviser," about Vitamin A; and you stated that Vitamin A is of value possibly for night blindness. Does it have any value for

2641 any other deficiency disease; and if so, could you name some of those diseases?

A. Well, there is no specific name given to the disease which results from Vitamin A deficiency. The disease manifests itself in various ways. Night blindness is one of the earliest symptoms of Vitamin A deficiency; but as the disease progresses, you get inflammation of the lids and infection of the eye; and there will be a loss of the eye entirely if no remedial measures are taken.

Changes also take place in the mucous membranes, the membranes that line the respiratory tract, alimentary tract, the urogenital tract, and produce certain changes, so that infections are more likely to take place in those areas; and when the disease is advanced, you may have other infections take place.

Q. Well, in layman's language, Doctor, does that mean that Vitamin A can help prevent certain diseases, infections, for example?

A. No.

Q. What is it good for, then, in layman's language? What is Vitamin A good for? What conditions can it help or prevent?

A. Rather specific conditions that occur with a deficiency.
2642 The eye condition is the one that is most generally noticed; but when that stage is reached, an individual is in a very poor state of health.

Just how the vitamin functions, we don't know. The indication is that it functions, in part, in the mechanism that is concerned with seeing, but it undoubtedly serves other purposes in the body; but just how it functions is not known. You might say that an individual just goes to pieces in various respects when he doesn't get enough of the vitamin; and the same is true with respect to other diseases that occur with vitamin deficiencies.

Q. Can you give me anything in layman's language that Vitamin B is good for?

A. It is good for the disease beri-beri, and the various manifestations of that disease.

Q. Is it good for anything else?

A. No.

Q. What about Vitamin C? What is it good for?.

A. It will prevent or cure the condition known as scurvy in man. When Vitamin C is deficient in the diet, certain changes take place in the blood vessels of the body, particularly the small ones, so that they are broken more easily and you have hemorrhages underneath the skin. There is also severe pain in the joints and frequently in the teeth and gums.

2643 Q. Is that like arthritis, or is that something different?

A. Arthritis is something quite different from scurvy, but the severe pains are difficult to differentiate from arthritis. It is not only the joints that are sore. An infant that is suffering with scurvy will cry with any movement of the body, or with just a slight touch.

When the disease becomes advanced in the adult, particularly, there is hemorrhage in the mouth around the gums and the teeth, and infections may follow that condition.

But just how the Vitamin C functions to prevent these conditions, or to cure them, has not been revealed through scientific studies.

Q. What about Vitamin D? What is it good for, in layman's language?

A. Vitamin D is important in controlling or aiding in the assimilation of calcium and phosphorous from the intestinal tract. The

disease that occurs from Vitamin D deficiency in infants is called rickets. It leads to improper mineralization of the bones, so they become soft and bend when any weight is put on them, like the legs, so that you have conditions developing which are described as bowed legs or knock-knees. You may have deformities of the chest
2644 and of the backbone, all indicating a certain softness of the bones, so that they become misshapen.

When you get beyond the age of deficiency, you are not likely to have deformities of the bones, but there will be a lack of deposit of the minerals in the bone, and in elderly persons, the condition is developed which the physicians refer to as osteoporosis, meaning that the bone is not properly formed.

Q. This vitamin can help that condition?

A. Vitamin D can prevent or cure that condition, providing sufficient calcium and phosphorous are available in the diet for the formation of the bone.

Q. What about Vitamin E?

A. I do not recognize any function of Vitamin E in the human body. It has been shown in animals, particularly in the rat, that in the absence of Vitamin E, you do not have reproduction. The female will conceive, but the foetus will not grow to maturity and be born. There will be death of the foetus before it reaches maturity. That condition can be very well demonstrated with a rat.

In certain other animals, there is a degeneration of certain muscles and indication of some effect on the nervous system,
2645 and a condition similar to what is called muscular distrophy in children can be produced.

In a growing chick, a rather different picture presents itself in that the changes are primarily in the brain tissue that are observed first.

Q. So far as human nutrition is concerned, nothing definite has been established?

A. Nothing definite has been established.

Q. Then Vitamin K, what is it good for, in layman's language?

A. Well, as I said before, I am unfamiliar with any case on record where a deficiency in the in-take of Vitamin K in man has brought about an abnormal condition; but under certain conditions, Vitamin K may not be absorbed properly from the intestinal tract. When that takes place, you have a prolonged blood clotting time, and in animals it can easily be demonstrated—in chicks particularly—that the animal will bleed to death from very slight injury.

The same condition does not develop in the rat, because in the rat the vitamin apparently is synthesized in the intestinal tract, and it is difficult to produce any Vitamin K deficiency in the rat.

All of the indications are that most of the Vitamin K that
2646 is needed by man is produced in the intestinal tract by bacteria, micro-organisms which grow there, and the Vitamin K which is produced can be utilized by the body.

Q. I notice in going over this I missed Vitamin B-*w*. Is it good for anything in particular, in layman's language?

A. Not in anything that I can put in layman's language. The disease that results from Vitamin B-2 deficiency is called riboflavinosis, the term meaning lack of riboflavin, which is the chemical name of Vitamin B-2.

When there is a deficiency of Vitamin B-2 in man, there are certain changes that take place in the mucous membranes of the mouth, and the tongue will assume a red or magenta color, which is very characteristic. There are usually angular sores at the corners of the mouth, and eruptions of the skin around the nose and possibly on the forehead.

There are also changes that take place in the eye. Capillaries invade the cornea or the white portion of the eye, so that they have a reddish appearance.

If you have a combination of those conditions that I have described, it is probably a pretty accurate indication that the individual is suffering from riboflavin deficiency; the tongue being the most specific symptom that shows up, but the other conditions are not necessarily specific.

Q. Does it have anything to do with nervousness?

2647 A. No.

Mr. RHYNE: That is all.

Mr. KLEINFELD: I would like to ask a few questions.

Examination by Mr. Kleinfeld

Q. Dr. Nelson, from your experience with vitamins and their effect on human beings, in your opinion, would any vitamin or any collection of vitamins, such as that contained in Nutrilite, have any beneficial effect in cancer—vitamins or minerals contained in Nutrilite?

A. No, not from any information that is available at present.

Q. I would like to ask you the same question with respect to heart diseases?

A. With respect to heart disease, it would be true only with respect to Vitamin B-1. There is a very definite change that takes place in the heart with Vitamin B-1 deficiency; and if the condition has not progressed too far, it is reversible and can be properly treated with Vitamin B-1.

Q. How about tuberculosis?

A. There is nothing in such a product that would be of any specific value in the treatment of tuberculosis.

Mr. KLEINFELD: Mr. Goodrich, do you have anything?

2648 Mr. GOODRICH: Is it a fair statement, then, on the basis of what you have said, that if a person buys a product such as Nutrilite on the basis of labeling which recites symptoms comparable in kind to those set forth in Exhibit B, that he would more likely be buying a product which he did not need than a product which he did need?

THE WITNESS: I think that is a fair statement.

Mr. GOODRICH: And why is that so, Doctor?

Mr. RHYNE: When you say Exhibit B, you mean this Exhibit B that is before him here?

Mr. GOODRICH: Yes.

THE WITNESS: Because if he depended upon those symptoms to guide himself, he would be more likely to be suffering from some disease that was not due to a vitamin deficiency than he would be suffering from actual vitamin deficiency.

Mr. GOODRICH: That is all.

Further examination by Mr. Rhyne

Q. Well, Doctor, if he were suffering from a vitamin deficiency, I believe you have already testified that the contents of Nutrilite, its minerals and vitamins, would be of assistance in connection with the various specific things you have mentioned, and the general things you have mentioned?

A. That is true.

2649 Q. Now, you were asked about tuberculosis. Wouldn't Nutrilite help build up resistance to a disease like tuberculosis?

A. No, sir.

Q. You mean no vitamin——

A. Well, you are getting into a field that is rather broad, and it is not within my particular field of competence.

Q. I noticed you said it had no specific value.

A. One of the most important things in tuberculosis is diet, that, together with rest. Now, it depends on how the tubercular individual may be taken care of. If his diet is adequate, something of this kind wouldn't help him. But if his diet wasn't adequate, there might be some advantage accrue to him from taking such a product.

Q. Well, along the same line, how about diabetes? There a diet also is important, is it not, and would not the vitamins and minerals contained in Nutrilite help a person with diabetes?

A. No, sir; would be of no value whatsoever.

Q. Not even in building up his diet, if it is deficient?

A. That would have no bearing on the disease diabetes, itself.

Q. But just as in the case of tuberculosis, it could cer-

tainly help build up his strength and resistance to factors
2650 which would otherwise weaken him because of deficient diet; isn't that right?

A. No, sir. An individual suffering from diabetes is suffering from one specific cause of his disease, and that isn't influenced one way or the other. He has to take insulin or reduce the amount of sugars that he has in his diet, and the quantities of vitamins or minerals he would take would have no bearing on the amount of insulin that he would have to take in order to keep going.

Q. In the case of tuberculosis, certainly the quantity of vitamins and minerals that he would take would have some relation to the other diet he would be required to take; isn't that true?

A. Well, it is most important that he receive an adequate diet and Nutrilite would not have any specific effect on the disease in itself. It is only if an individual should be taking a diet that is not adequate with respect to the vitamins or minerals contained in the product that he would benefit; and that would be equally true of a person who didn't have tuberculosis.

Mr. RHYNE: That is all.

Mr. GOODRICH: No further questions.

2651 Mr. RHYNE: Thank you very much, Dr. Nelson. You have been very patient.

(Whereupon at 4:35 p.m., the deposition was continued to a time hereafter to be fixed.)

2652-2676 Defendant's exhibit 22 omitted. Printed side page. 1015 ante.

2677 DEFENDANT'S EXHIBIT 23

FEDERAL SECURITY AGENCY
OFFICE OF THE ADMINISTRATOR

CERTIFICATE

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code (55 Stat. 184), I hereby certify that the attached

Three copies of Finding of Fact to support multiple seizures of the drug "Nutrilite Food Supplement", signed by Robert C. Butz, M.D., Medical Officer, Food and Drug Administration, dated September 30, 1948, December 2, 1948 and December 9, 1948 and the Conclusion signed by J. Donald Kingsley, Acting Administrator, [illegible] dated January 28, 1949,

are true copies of official documents on file in the Food and Drug Administration of the Federal Security Agency and are part of the official records of said Administration and Agency.

In witness whereof, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed on the day and year first above written.

By direction of the Federal Security Administrator.

L. W. A'Hearn
Acting Executive Assistant (Seal)

2678 FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINSTRATION

Washington 25, D. C.

9-113 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U.S.P. units.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Vitamin B_6, 4 milligrams.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams;

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams;

would not be effective in the treatment of low vitality, over-fatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble mindedness, diabetes, hemorrhage connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, con-

stipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases.

/s/ Robert C. Butz
Robert C. Butz, Medical Officer
Food and Drug Administration

September 30, 1948

2679 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

/s/ J. Donald Kingsley
Acting Administrator

For the Administrator, January 28, 1949.

2680 FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION

Washington 25, D. C.

5-610 K
Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that a product consisting of extracts of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.
Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligram
Vitamin D, 2500 U.S.P. units.
Vitamin B_6, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligrams.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and

pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams

would not be effective in the treatment of the conditions mentioned directly or by implication in the statements quoted in Exhibit "A" attached.

/s/ Robert C. Butz
Robert C. Butz, M. D., Medical Officer
Food and Drug Administration

December 2, 1948

2681 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

/s/ J. Donald Kingsley
Acting Administrator

For the Administrator, January 28, 1949.

2682 EXHIBIT "A"

(Quoted from booklet entitled "How to Get Well and Stay Well")

How to get well and stay well.

If your health problem is the result of dietary deficiencies, and if you want to get well and stay well, be sure to read this book. Even if you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. If your health is good read this book and learn how to stay well.

Published by Mytinger & Casselberry, Inc. Wholesale Distributors Nutrilite Products * * *

* * * What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the

customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.

* * *

Please remember, then, that this book is designed to bring you some little-known or not-often-thought-of facts about your health and the health of your family. * * *

Are you a victim?

Are you suffering from hidden hunger?

Are you slowly starving to death?

* * * Just look around you at the members of your family, at your neighbors, friends and relatives—at yourself. Can you find even three or four who are absolutely and completely well? Are *you* enjoying perfect health?

On the other hand, think of your friends and relatives, one after the other, and note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. Think of your friends and relatives and note how many, in the last six months, have been to doctors or hospitals for treatment. Think of those who *should* be having physical help of some kind, but who are not receiving it. And finally think of people you know, your age and younger, who have *died* in the last year, prematurely.

* * *

* * * The healthy individual *feels* good. He has a constant awareness of his body functioning properly and feeling good. He enjoys getting hungry, he relishes his food, and he enjoys the feeling of well-being which comes with his healthy digestion. He enjoys exercise, likes to get tired occasionally, and appreciates a rest. He never complains of his physical condition, since it is always good.

* * * The healthy person * * * is calm and relaxed, with his abundant energy under control. His thinking is clear, and this, coupled with his energy, and full use of his faculties * * *

Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do *you?* Don't you think the facts point to the need for *something?*

2683 What good health means to your body.

Having seen what good health means to *you*, let's see what good health means to *your body*.

All your senses—sight, taste, touch, hearing, and sense of smell operate *in* your body, and they depend, consequently, on your physical condition for their correct operation. If your sense organs, and your brain and nervous system have been supplied constantly with all essential materials for their growth, maintenance and operation,

and your body chemistry is normal, then, barring accidents, you will be in full possession of your faculties. If your sense organs have been partly starved, you will have difficulty seeing, hearing, or functioning in other ways.

Your brain is one of your most important organs, and it operates in close association with the spinal chord, for the control of muscle movements. When the cells of the brain and nervous system are properly nourished, and the body chemistry is correct, the thought and behavior processes proceed normally. Damage to the brain or nervous system, whether due to accident or to breakdown due to insufficient supply of building material for the cells, usually results in at least a partial inability to move the various parts of the body, (stroke or paralysis) and at least a partial breakdown of the thought processes (confused thinking).

* * * When your heart functions normally and beats regularly and strongly you go along like a $10,000 car running down hill. But when you fail to supply your heart with the necessary materials to keep it constantly rebuilt, and when your body chemistry is bad, your heart breaks down, and you acquire one of the various forms of heart trouble due to dietary deficiencies.

* * * when the body chemistry is bad, or the glands themselves begin to waste away due to failure to keep them supplied with the necessary building material, our personalities do undergo enormous changes, and the whole operation of the body becomes a burden.

* * * Perfect teeth are possible, and decaying teeth are sure signs of a body which is falling apart.

Now it might be interesting to study your family, your relatives, friends and yourself along these lines too, and see how you all check up. Do any of you have difficulty seeing, hearing, or failure of other sense organs? Does anyone have to be careful not to overexert? Any with extreme personality changes? Any with false teeth? Any other evidence of failure of the various organs and glands of the body? Any illness, breakdown, or invalidism? Any weakness or incapacity?

Nobody *wants* to be ill. Nobody chooses to have a body racked with aches and pains. But the fact remains that various deficiency ailments sneak up on us, and unless we take proper precautions now, eventually we may find ourselves bound, and in the power of some deficiency disease, if it has not occurred already.

* * *

Did you know that twenty-two million children in the United States need corrective treatment, ten million of them have bad teeth, six million are suffering from glandular disturbances, four million are improperly nourished in other ways, one million have tuberculosis and one million have spinal curvature—and even the curvatures may originate in deficiencies in protective food values?

Unhealthy, sickly, malnourished children are a thorn in the flesh. Being sickly, they are petulant or sullen. Being malnourished, their nervous systems do not operate correctly, and they learn
2684 with greater difficulty, both in school and at home. In addition there is the bother, trouble and expense occasioned by the constant treatment required, if the child has some definite ailment. And finally, there is the blight put upon the child's whole future, when he gets a wrong start at home.

* * *

* * * if you don't want sickly children, you must see that they are properly nourished, and if you want healthy adults you must see that they are well nourished as children.

Some obvious conclusions.

This little study of the children of America shows that millions of children all over the country, are ill.

Your study of yourself, the members of your family, your relatives and friends has shown you that almost *everyone* is more or less ill.

When you become ill, it costs money and time and trouble to get well again. It robs you of working time. And *it hurts!*

Obviously it is better to *keep* your body in splendid condition. But if your body has already begun to break down, as is the case with most of us, and which you recognize through your aches, pains, inconveniences and doctors' diagnoses, you can still do much toward returning it to it's basic and natural condition of health.

But before we tell you exactly how to do this—let us tell you a story. . . .

* * *

Carl Rehnborg * * *

* * * went into the slums of the great city, where poverty, ignorance, filth and disease had created an appalling death rate among the new-born, and opened a tiny nursery. * * *

* * *

* * * he was convinced that the vitamins, the various minerals, and certain other essential diet factors * * * were present in many raw foods. * * *

* * *

So, with continued feeble health or early death facing his infant patients, Mr. Rehnborg went out and gathered quantities of green grass, alfalfa, and other fresh green plants—scrubbed them thoroughly to rid them of all foreign matter; then carefully dried and ground them to a powder. Mixed into a thin gruel, he fed this powder to the babies, along with their milk.

* * *

* * he grew his own green plants * * *

And when his plants were harvested, processed, and added to the

diet of the babies in his clinic, not one failed to respond as expected!

* * * he had developed a practical formula for more perfect chemical balance for the body, which would help restore normal organic function, increase resistance to infection, and contribute to the upbuilding of the body so that it could throw off symptoms of disease and maintain complete health.

* * * he still further perfected this food supplem... by his own elaborate and ingenious extraction processes, discarding the non-essential cellulose and other parts of the plants, so that much value could be concentrated in small volume * * *

* * *

2685 When Mr. Rehnborn returned to the United States * * * he began a * * * period of intensive study and experimentation, to improve his food supplement. At last, * * * when he considered his formula sufficiently developed to warrant making his food supplement available to the public, he started to manufacture it. * * * This all led to further development and improvement and the creation of the present amazing food supplement * * *

* * *

* * * almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments.

* * *

So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that your illness and the illness of your family is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors. You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, you must put into your body all the food factors required by it.

This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty.

* * *

* * * give a little thought to what you put into the bodies of your wife or husband—into the bodies of your children—into your *own* body?

And remember your reward—a good chance for the relief of deficiency ailments if you have any (and most of our current and common ailments result from deficiencies) and their prevention if you are now lucky enough to be free from them. * * * Remember this . . . the American diet is deficient in protective food factors.

* * *

1945

Decreases in the crude death rates for the major infectious diseases—tuberculosis; pneumonia and influenza—occurred during both 1946 and 1947. The rate for tuberculosis declined from 40.1 in 1945 to 33.5 in 1947, a total decrease of 16 percent for this period; and the rate for pneumonia and influenza declined 17 percent, from 51.8 to 43.1. The crude death rates for these causes in 1947 were the lowest ever reported for the United States.

TABLE B.—DEATH RATES FOR THE 10 LEADING CAUSES: UNITED STATES, 1945-47

(Exclusive of stillbirths and of deaths among armed forces overseas. Rates per 100,000 estimated mid-year population excluding armed forces overseas)

CAUSE OF DEATH	1947	1946	1945
ALL CAUSES	1,007.8	997.6	1,061.8
Diseases of the heart	321.2	306.8	321.4
Cancer and other malignant tumors	132.4	130.1	134.4
Intracranial lesions of vascular origin	91.4	89.8	97.8
Nephritis	56.0	58.4	66.7
Accidents (excluding motor-vehicle accidents)	46.6	46.2	51.4
Pneumonia (all forms) and influenza	43.1	44.5	51.8
Tuberculosis (all forms)	33.5	36.4	40.1
Premature birth	28.6	28.5	23.9
Diabetes mellitus	26.2	24.8	26.6
Motor-vehicle accidents	22.8	23.9	21.3

Substantial reductions in mortality from oth-

The death rate for motor-vehicle accidents rose from 21.3 in 1945 to 23.9 in 1946, but decreased to 22.8 in 1947. The rate for this cause had dropped sharply during the war years, following wartime restrictions on driving, but began to rise steadily beginning with 1944. However, despite the greater use of automobiles in the postwar than the prewar period, the rates for 1946 and 1947 were well below the peak prewar rate of 30.8 in 1937. The crude death rate for other types of accidents was 51.4 in 1945, declined to 46.2 in 1946, and remained approximately the same, 46.6 in 1947.

Increases occurred in both the number of deaths and the crude death rates for premature birth in 1946 and 1947. However, since deaths from premature birth occur only during the first year of life, changes in the crude death rate for the total population of all ages are poor indices of the changes in mortality from this cause. This is particularly true in years in which rapid changes occur in the number of births. These increases in the deaths and death rates for premature birth reflect the sharp increases in the number of births which occurred in both 1946 and 1947 rather than an actual increase in the risk of mortality. The infant mortality rate per 1,000 live births for this cause rose from 11.6 in 1945 to 12.1 in 1946, but decreased to 11.1 in 1947. Similar consideration should be given to other causes of death related to the first year of life and to maternal deaths.

Population data

The rates presented in this report are based on estimates of the midyear population excluding the armed forces overseas, published by the Bureau of the Census in "Population—Special Reports," Series P-47, No. 3 (for 1945 data) and "Current

* * * the protective food factors—those little things that you and I eat, that enable us to convert our ordinary foods into energy, new skin, blood and cells, and which make it possible for the body chemistry to operate correctly. These elements in our food are called, in the text books of the bio-chemists, *nutrilites*. That's a technical word you won't find in your dictionary, but it means all the little food factors—not the fats, minerals, carbohydrates and proteins we hear so much about, but all the factors such as the vitamins, chlorophyll, bios, inositol, and many others.

* * *

* * * no one knows how many vitamins there are. * * * the nutrilites * * * are all the little vital food factors, including the familiar vitamins. * * * if you want to be healthy, you will make sure that your daily diet includes not only all the vitamins, but *all the nutrilites*.

* * *

* * * Diet deficiencies bring on old age. * * *

* * * diet deficiencies bring on aches and pains. * * * Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness * * * and many which are considered incurable, are the result of dietary deficiencies.

2686 * * * simply through changes in diet, you can * * * bring on premature old age, create a wide variety of aches and pains and illnesses, bring about death or, when the person is deficient, *feed* him back to health!

Any food supplement which is right, and which is able to protect you from the ravages and pain of the deficiency diseases, must contain all the vitamins * * * together with all the nutrilites and minerals so often lacking in our diet.

2685 FEDERAL SECURITY AGENCY
FOOD AND DRUG ADMINISTRATION
Washington 25, D. C.

Nutrilite Food Supplement

FINDING OF FACT

It is the consensus of informed medical opinion that most common diseases do not result from dietary deficiencies and that a product consisting of alfalfa, parsley, and water cress fortified with crystalline vitamins and vitamin concentrates which provides in the suggested daily intake the following:

Vitamin A, 25,000 U.S.P. units.
Vitamin B_1, 20 milligrams.

Vitamin B_2, 10 milligrams.
Vitamin C, 200 milligrams.
Vitamin D, 2500 U.S.P. units.
Vitamin B_{12}, 4 milligrams.
Vitamin E, 10 milligrams.
Vitamin K, 0.4 milligram.
Inositol, 20 milligrams.
Para-aminobenzoic acid, 20 milligrams.

together with a product consisting of bone meal, dicalcium phosphate, iron ammonium citrate, potassium iodide, niacin amide, and pantothenic acid which provides in the suggested daily intake the following:

Calcium, 950 milligrams.
Phosphorus, 562 milligrams.
Iron, 10 milligrams.
Iodine, 0.4 milligram.
Niacin amide, 15 milligrams.
Pantothenic acid, 8 milligrams.

would not be effective in preventing or treating most common diseases.

/s/ Robert C. Butz, M.D., Medical Officer
Food and Drug Administration

December 9, 1948.

2688 CONCLUSION

Pursuant to the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration of the Federal Security Agency, that there is probable cause for me to believe and I do believe, that the labeling of this article would be and is in a material respect misleading to the injury or damage of the purchaser or consumer.

/s/ J. Donald Kingsley
Acting Administrator

For the Administrator, January 28, 1949.

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	II.—Cancer and other tumors—Continued						
	Nonmalignant tumors and tumors of unspecified nature (56,57)						
56	Nonmalignant tumors (including dermoid cysts)	3,349	3,487	3,645	2.3	2.5	2.9
	(a) Ovary	496	612	653	0.3	0.4	0.5
	(b) Uterus	1,271	1,439	1,642	0.9	1.0	1.2
	(c) Other female genital organs	44	51	54	0.0	0.0	0.0
	(d) Brain and other parts of the central nervous system	887	815	728	0.6	0.6	0.5
	(e) Other and unspecified organs	651	592	588	0.5	0.4	0.4
57	Tumors of unspecified nature	2,434	2,511	2,477	1.7	1.8	1.9
	(a) Ovary	19	18	30	0.0	0.0	0.0
	(b) Uterus	24	27	22	0.0	0.0	0.0
	(c) Other female genital organs	21	32	18	0.0	0.0	0.0
	(d) Brain and other parts of the central nervous system	1,591	1,656	1,690	1.1	1.2	1.3
	(e) Other and unspecified organs	779	778	717	0.5	0.6	0.5
	III.—Rheumatism, diseases of nutrition and of the endocrine glands, other general diseases and avitaminoses	46,387	45,756	44,942	32.3	31.3	34.0
	Rheumatic diseases (58,59)						
58	Acute rheumatic fever	1,024	1,118	1,341	0.7	0.9	1.0
	(a) Acute rheumatic pericarditis	38	46	58	0.0	0.0	0.0
	(b) Acute rheumatic endocarditis	298	325	410	0.2	0.2	0.3
	(c) Acute rheumatic myocarditis	117	127	130	0.1	0.1	0.1
	(d) Other acute rheumatic heart diseases	194	212	226	0.1	0.2	0.2
	(e) Other forms of acute rheumatic fever	299	354	395	0.2	0.2	0.3
	(f) Rheumatism (not specified as acute or chronic)	78	74	122	0.1	0.1	0.1
59	Chronic rheumatism and other rheumatic						

2689 DEFENDANT'S EXHIBIT 24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER AND CASSELBERRY, INC., Plaintiff,

v.

OSCAR R. EWING, Federal Security Administrator, et al.,
Defendants.

STIPULATION

It is stipulated by the parties that the following are facts that may be taken as proved in the action above only without formal proof:

1. Records of University of South Carolina show that Rehnborg entered Liberal Arts College in September 1914 and stayed one semester. Studied, among other things, inorganic chemistry, grade 91, and qualitative analysis, no grade.

2. The following information has been obtained from application filed by Rehnborg in the Richfield Oil Company of California in 1932:

1915-1916; Accountant, Standard Oil Company, Tientsin, China.
1916-1918; Accountant, China-America Trading Company, Tientsin.
1918-1919; Comptroller, Lone Star Shipbuilding Corporation.
1919-1923; Sales representative in China, American Milk Products Corporation of New York.
1923-1929; Operated own business, Shanghai.
1929-1932; Chief Clerk, American Potash and Chemical Corporation, Trona, California.
Education; Graduated High School, Shelton, Connecticut.

2690 3. Records of the Richfield Oil Company of California show that he entered their employ July 1932—January 1933, and was employed by them from July 1933 through August 1935 in a clerical capacity, Pay Roll Department, Richfield Oil Corporation of California.

4. Plaintiff reserves the right to object to the introduction of any or all of the facts on the grounds of irrelevancy and immateriality.

Charles S. Rhyne, Attorney for Plaintiff.
Vincent A. Kleinfeld, Attorney for Defendants.

1943

DEFENDENT'S EXHIBIT 25

Ct. No. 5207-48

Volume 31. Number 3 May 9, 1949

Vital Statistics – Special Reports
NATIONAL SUMMARIES

FILED
JAN 27 1950
HARRY M. HULL, Clerk

Deaths And Death Rates For Each Cause: United States, 1945-47

FEDERAL SECURITY AGENCY
Public Health Service
National Office of Vital Statistics

Senility, ill-defined and unknown causes, the tenth leading cause of death in 1945, dropped from the group and was replaced by motor-vehicle accidents in 1946 and 1947. The order of several other causes also changed between 1945 and 1946. Pneumonia and influenza, the fifth leading cause of death in 1945, dropped to sixth place in 1946 and was replaced by accidents excluding motor-vehicle accidents. The order in which diabetes mellitus and premature birth ranked in 1945 was also reversed in 1946.

The 10 leading causes of death accounted for almost 80 percent of the deaths from all causes for each of the 3 years shown. In 1947, 899,233 deaths, or 62 percent of the total (1,445,370), resulted from the leading causes of death chiefly associated with advanced age. These were diseases of the heart, cancer and other malignant tumors, intracranial lesions of vascular origin, nephritis, and diabetes mellitus. Diseases of the heart alone accounted

age groups where mortality is normally low, were overseas with the armed forces. In their absence, persons in the older age groups where death rates are high constituted a large proportion of the population. Thus, with no change in the risk of mortality, crude rates for most causes in 1945 would be expected to be higher than those for 1946. Consequently, part of the decline between 1945 and 1946 in the rates for many causes, especially those associated with the older ages, may reflect changes in population rather than in mortality risk.

For diseases of the heart, the crude death rate declined from 321.4 in 1945 to 306.8 in 1946, and rose to 321.2 in 1947. Similarly, the crude death rate for three of the other major causes of death at the older ages—cancer, intracranial lesions of vascular origin, and diabetes—declined in 1946, then rose in 1947. The crude rate for nephritis, however, declined in both years.

TABLE A.—NUMBER OF DEATHS FROM THE 10 LEADING CAUSES AND PERCENTAGE DISTRIBUTION: UNITED STATES, 1945-47

(Exclusive of stillbirths and of deaths among armed forces overseas. Numbers after causes of death are International List numbers, 1938 revision)

CAUSE OF DEATH	NUMBER			PERCENT		
	1947	1946	1945	1947	1946	1945
ALL CAUSES	1,445,370	1,395,617	1,401,719	100.0	100.0	100.0
Diseases of the heart-----90-95	460,580	429,230	424,328	31.9	30.8	30.3
Cancer and other malignant tumors-----45-55	189,811	182,005	177,464	13.1	13.0	12.7
Intracranial lesions of vascular origin---83	131,038	125,646	129,144	9.1	9.0	9.2
Nephritis-----130-132	80,289	81,701	88,078	5.6	5.9	6.3
Accidents (excluding motor-vehicle accidents)-----169,171-195	66,882	64,622	67,842	4.6	4.6	4.8
Pneumonia (all forms) and influenza-----107-109,33	61,836	62,324	68,386	4.3	4.5	4.9
Tuberculosis (all forms)-----13-22	48,064	50,911	52,916	3.3	3.6	3.8
Premature birth-----159	41,053	33,824	31,614	2.8	2.9	2.3
Diabetes mellitus-----61	37,515	34,731	35,160	2.6	2.5	2.5
Motor-vehicle accidents-----170	32,697	33,411	28,078	2.3	2.4	2.0

1544

DEATHS AND DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945-47

This report presents the number of deaths and crude death rates for each cause in the United States for each of the 3 years 1945 to 1947. In this period, the crude death rate for all causes varied from 10.6 per 1,000 estimated population in 1945 to 10.0 in 1946, and 10.1 in 1947. The crude death rates for 1946 and 1947 were the lowest ever recorded for this country in the history of the death-registration area.

Table A shows the number of deaths from the 10 leading causes of death for each year from 1945 to 1947. This group of leading causes remained the same for each of these years with one exception. Senility, ill-defined and unknown causes, the tenth leading cause of death in 1945, dropped from the group and was replaced by motor-vehicle accidents in 1946 and 1947. The order of several other causes also changed between 1945 and 1946. Pneumonia and influenza, the fifth leading cause of death in 1945, dropped to sixth place in 1946 and was replaced by accidents excluding motor-vehicle accidents. The order in which diabetes mellitus and premature birth ranked in 1945 was also reversed in 1946.

The 10 leading causes of death accounted for almost 80 percent of the deaths from all causes for each of the 3 years shown. In 1947, 899,233 deaths, or 62 percent of the total (1,445,370), resulted from the leading causes of death chiefly associated with advanced age. These were diseases of the heart, cancer and other malignant tumors, intracranial lesions of vascular origin, nephritis, and diabetes mellitus. Diseases of the heart alone accounted for 32 percent of all deaths in 1947, or nearly two and a half times as many deaths as cancer, the second leading cause of death.

The crude death rates per 100,000 estimated population for the leading causes of death in the United States are shown in table B for the 3 years 1945 to 1947. These rates are computed for the population present in the country, excluding the armed forces overseas. In comparing rates for 1945 with those for 1946 and 1947, consideration must be given to the effect of changes in population composition during these years. In 1945 a large group of men, selected for physical fitness and in age groups where mortality is normally low, were overseas with the armed forces. In their absence, persons in the older age groups where death rates are high constituted a large proportion of the population. Thus, with no change in the risk of mortality, crude rates for most causes in 1945 would be expected to be higher than those for 1946. Consequently, part of the decline between 1945 and 1946 in the rates for many causes, especially those associated with the older ages, may reflect changes in population rather than in mortality risk.

For diseases of the heart, the crude death rate declined from 311.4 in 1945 to 306.8 in 1946, and rose to 321.2 in 1947. Similarly, the crude death rate for three of the other major causes of death at the older ages—cancer, intracranial lesions of vascular origin, and diabetes—declined in 1946, then rose in 1947. The crude rate for nephritis, however, declined in both years.

Diseases of the heart-----	321.2	306.8	321.4
Cancer and other malignant tumors----------	132.4	130.1	134.4
Intracranial lesions of vascular origin---------	91.4	89.8	97.8
Nephritis----------	56.0	58.4	66.7
Accidents (excluding motor-vehicle accidents)-	46.6	46.2	51.4
Pneumonia (all forms) and influenza----------	43.1	44.5	51.8
Tuberculosis (all forms)--	33.5	36.4	40.1
Premature birth----------	28.6	28.5	23.9
Diabetes mellitus---------	26.2	24.8	26.6
Motor-vehicle accidents---	22.8	23.9	21.3

Substantial reductions in mortality from other infectious diseases also occurred in both 1946 and 1947. The rate for syphilis was 8.8 in 1947 as compared with 10.7 in 1945, a total decrease of 18 percent in this period. The rate for diarrhea, enteritis, and ulceration of the intestines declined from 8.7 in 1945 to 5.6 in 1947, and that for diphtheria from 1.2 to 0.6. These decreases for diarrhea and diphtheria continue the rapid long-term downward trends for these causes. While these diseases were of relatively minor importance as causes of death in 1947, they ranked among the 10 leading causes in 1900.

Considerable fluctuation is found in the crude death rates for certain of the communicable diseases common in childhood. The rate for measles rose from an all time low of 0.2 in 1945 to 0.9 in 1946 and then declined to 0.3 in 1947. The rate for whooping cough declined from 1.3 in 1945 to a record low of 0.9 in 1946 and then rose to 1.4 in 1947. The rates for poliomyelitis and polioencephalitis were 0.9 and 1.3 in 1945 and 1946, respectively, but in 1947 the rate declined to 0.4.

flect the sharp increases in the number of births which occurred in both 1946 and 1947 rather than an actual increase in the risk of mortality. The infant mortality rate per 1,000 live births for this cause rose from 11.6 in 1945 to 12.1 in 1946, but decreased to 11.1 in 1947. Similar consideration should be given to other causes of death related to the first year of life and to maternal deaths.

Population data

The rates presented in this report are based on estimates of the midyear population excluding the armed forces overseas, published by the Bureau of the Census in "Population—Special Reports," Series P-47, No. 3 (for 1945 data) and "Current Population Reports: Population Estimates," Series P-25, No. 22 (for 1946 and 1947 data).

Cause of death

Deaths are classified by cause according to the rubrics of the International List of Causes of Death, 1938 revision, and special coding rules contained in the annual editions of the Vital Statistics Instruction Manual. When two or more morbid conditions are shown on the death certificate, selection of the primary cause to which the death is assigned is made according to the priority listings of the Manual of Joint Causes of Death, fourth edition, and special coding rules as shown in the Instruction Manual.

The ranking of the leading causes of death is based on a list of 57 selected categories of the International List of Causes of Death, which include certain combinations of related rubrics.

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DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47

(Exclusive of stillbirths and of deaths among armed forces overseas. Rates per 100,000 estimated midyear population excluding armed forces overseas. International List numbers are those of the 1938 revision, as adopted for use in the United States. Unnumbered titles are not separately classified in the International List)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	ALL CAUSES	1,445,370	1,395,617	1,401,719	1,007.8	997.6	1,061.8
	I.—Infectious and parasitic diseases	80,155	87,287	92,933	55.9	62.4	70.4
	(Communicable diseases)						
	Diseases due to bacteria (1-26)						
1	Typhoid fever	282	349	471	0.2	0.2	0.4
2	Paratyphoid fever	43	58	63	0.0	0.0	0.0
3	Plague	1	-	-	0.0	0	0
4	Cholera	-	-	-	0	0	0
5	Undulant fever (brucellosis)	58	69	94	0.0	0.0	0.1
6	Cerebrospinal (meningococcus) meningitis	917	1,257	1,728	0.6	0.9	1.3
7	Anthrax (infection by Bacillus anthracis)	3	7	6	0.0	0.0	0.0
8	Scarlet fever	167	198	303	0.1	0.1	0.2
9	Whooping cough	1,954	1,241	1,752	1.4	0.9	1.3
10	Diphtheria (infection by C. diphtheriae)	799	1,159	1,598	0.6	0.9	1.2
11	Erysipelas	82	123	166	0.1	0.1	0.1
12	Tetanus	511	585	653	0.4	0.4	0.5
13–22	Tuberculosis (all forms)	48,064	50,911	52,916	33.5	36.4	40.1
13	Tuberculosis of the respiratory system (including the bronchial and mediastinal lymph nodes)	44,462	46,939	48,879	31.0	33.6	37.0
	(a) With mention of occupational disease of the lungs	667	651	626	0.5	0.5	0.5
	(b) Without mention of occupational disease of the lungs	42,475	44,816	46,551	29.6	32.0	35.3
	(c) Tuberculosis of unspecified site	1,320	1,472	1,702	0.9	1.1	1.3
14	Tuberculosis of the meninges and central						

8	Scarlet fever	107	198	303	0.1	0.1	0.2
9	Whooping cough	1,954	1,241	1,752	1.4	0.9	1.3
10	Diphtheria (infection by C. diphtheriae)	799	1,159	1,598	0.6	0.9	1.2
11	Erysipelas	82	123	166	0.1	0.1	0.1
12	Tetanus	511	585	653	0.4	0.4	0.5
13-22	Tuberculosis (all forms)	48,064	50,911	52,916	33.5	36.4	40.1
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	(b) Without mention of occupational disease of the lungs	42,475	44,816	46,551	29.6	32.0	35.3
	(c) Tuberculosis of unspecified site	1,320	1,472	1,702	0.9	1.1	1.3
14	Tuberculosis of the meninges and central nervous system	977	1,150	1,193	0.7	0.8	0.9
15	Tuberculosis of the intestines and peritoneum	478	578	657	0.3	0.4	0.5
16	Tuberculosis of the vertebral column	433	439	478	0.3	0.3	0.4
17	Tuberculosis of the bones and joints (except vertebral column)	153	137	159	0.1	0.1	0.1
	(a) Bones	78	74	66	0.1	0.1	0.0
	(b) Joints	75	63	93	0.1	0.0	0.1
18	Tuberculosis of the skin and subcutaneous cellular tissue	18	26	30	0.0	0.0	0.0
19	Tuberculosis of the lymphatic system (except bronchial, mediastinal, mesenteric, and retroperitoneal lymph nodes)	75	80	89	0.1	0.1	0.1
20	Tuberculosis of the genito-urinary system	358	367	342	0.2	0.3	0.3
21	Tuberculosis of other organs	93	105	87	0.1	0.1	0.1
	(a) Tuberculosis of the adrenal glands	45	71	42	0.0	0.1	0.0
	(b) Tuberculosis of other organs	48	34	45	0.0	0.0	0.0
22	Disseminated tuberculosis	1,017	1,090	1,002	0.7	0.8	0.8
	(a) Acute (generalized) miliary tuberculosis	914	1,004	891	0.6	0.7	0.7
	(b) Other and unspecified generalized tuberculosis	103	86	111	0.1	0.1	0.1
23	Leprosy	16	16	27	0.0	0.0	0.0
24	Septicemia and purulent infection (nonpuerperal)	520	594	809	0.4	0.4	0.6
	(a) Septicemia	466	536	747	0.3	0.4	0.6
	(b) Pyemia	19	16	20	0.0	0.0	0.0
	(c) Gas bacillus gangrene	32	30	34	0.0	0.0	0.0
	(d) Generalized Bacillus coli infection	3	12	8	0.0	0.0	0.0

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	I.—Infectious and parasitic diseases—Continued						
	Diseases due to bacteria (1–26)—Con.						
25	Gonococcus infection	108	150	212	0.1	0.1	0.2
26	Other diseases due to bacteria (except dysentery)	58	113	122	0.0	0.1	0.1
	(a) Tularemia	58	113	122	0.0	0.1	0.1
	(b) Other diseases due to bacteria	-	-	-	0	0	0
	Glanders	-	-	-	0	0	0
	Other	-	-	-	0	0	0
27	Dysentery	869	952	1,599	0.6	0.7	1.2
	(a) Bacillary	273	309	506	0.2	0.2	0.4
	(b) Amebic	155	182	185	0.1	0.1	0.1
	(c) Other and unspecified forms of dysentery	441	461	908	0.3	0.3	0.7
	Diseases due to protozoa (28, 29)						
28	Malaria	214	341	443	0.1	0.2	0.3
	(a) Benign tertian malaria	12	18	26	0.0	0.0	0.0
	(b) Quartan malaria	3	2	2	0.0	0.0	0.0
	(c) Malignant tertian (estivo-autumnal) malaria	12	13	33	0.0	0.0	0.0
	(d) Malaria (unspecified form)	187	308	382	0.1	0.2	0.3
29	Other diseases due to parasitic protozoa (except spirochetes)	57	19	15	0.0	0.0	0.0
	Coccidiosis	-	-	15	0	0	0.0
	Other	57	19	-	0.0	0.0	0
	Diseases due to spirochetes (30–32)						
30	Syphilis	12,671	12,955	14,062	8.8	9.3	10.7
	(a) Locomotor ataxia (tabes dorsalis)	453	486	507	0.3	0.3	0.4

1948

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnotes on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	I.—Infectious and parasitic diseases—Continued						
	Diseases due to filtrable viruses (33–38)—Continued						
37	Acute infectious encephalitis (lethargic)—	630	642	735	0.4	0.5	0.6
	(a) Acute infectious encephalitis (lethargic)—	199	193	207	0.1	0.1	0.2
	(b) Sequelae of encephalitis lethargica—	213	223	234	0.1	0.2	0.2
	(c) Encephalitis lethargica (unqualified)—	218	236	294	0.2	0.2	0.2
38	Other diseases due to filtrable viruses—	144	145	164	0.1	0.1	0.1
	(a) Yellow fever—	-	-	-	0	0	0
	(b) Rabies—	26	34	45	0.0	0.0	0.0
	(c) Herpes zoster—	18	11	20	0.0	0.0	0.0
	(d) German measles—	9	11	4	0.0	0.0	0.0
	(e) Chickenpox—	88	85	95	0.1	0.1	0.1
	(f) Other diseases ascribed to viruses—	3	4	2	0.0	0.0	0.0
	Dengue fever—	-	1	-	0	0.0	0
	Psittacosis—	1	2	-	0.0	0.0	0
	Other—	2	1	2	0.0	0.0	0.0
	Diseases due to Rickettsia (39)						
39	Typhus fever and typhus-like diseases (due to Rickettsia)—	224	289	377	0.2	0.2	0.3
	(a) Exanthematic typhus (epidemic form)—	-	2	1	0	0.0	0.0
	(b) Endemic typhus fever—	88	128	173	0.1	0.1	0.1
	(c) Rocky Mountain spotted fever—	105	124	128	0.1	0.1	0.1
	(d) Other typhus-like diseases—	31	35	75	0.0	0.0	0.1
	Diseases caused by helminths (40–42)						
40	Ankylostomiasis—	0	8	6	0.0	0.0	0.0

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	II.—Cancer and other tumors—Continued						
	Cancer and other malignant tumors—Con.						
	Cancer of the buccal cavity and pharynx—Con.						
	(b) Tongue	1,361	1,307	1,281	0.9	0.9	1.0
	(c) Mouth	782	760	757	0.5	0.5	0.6
	(d) Jaw bone	896	877	905	0.6	0.6	0.7
	(e) Unspecified parts of the buccal cavity	98	82	87	0.1	0.1	0.1
	(f) Pharynx	1,848	1,799	1,869	1.3	1.3	1.4
46	Cancer of the digestive organs and peritoneum	83,121	80,866	80,204	58.0	57.8	60.8
	(a) Esophagus	3,489	3,307	3,100	2.4	2.4	2.3
	(b) Stomach	25,967	25,625	25,832	18.1	18.3	19.6
	(c) Duodenum	352	348	429	0.2	0.2	0.3
	(d) Rectum and anus	10,428	10,037	9,558	7.3	7.2	7.2
	(e) Intestines (except duodenum and rectum)	22,555	21,854	21,532	15.7	15.6	16.3
	(f) Liver and biliary passages	10,572	10,804	11,207	7.4	7.7	8.5
	(g) Pancreas	7,587	6,820	6,590	5.3	4.9	5.0
	(h) Mesentery and peritoneum	1,319	1,261	1,220	0.9	0.9	0.9
	(m) Other and unspecified sites	852	810	756	0.6	0.6	0.6
47	Cancer of the respiratory system	17,319	15,218	13,822	12.1	10.9	10.5
	(a) Larynx	1,872	1,746	1,692	1.3	1.2	1.3
	(b) Trachea	71	57	64	0.0	0.0	0.0
	(c) Bronchus	5,095	3,842	3,232	3.6	2.7	2.4
	(d) Lung	9,571	8,864	8,162	6.7	6.3	6.2
	(e) Pleura	151	115	114	0.1	0.1	0.1
	(f) Mediastinum and unspecified sites	559	592	558	0.4	0.4	0.4
48	Cancer of the uterus	17,455	17,205	17,255	12.2	12.3	13.1
	(a) Cervix	7,978	7,396	6,858	5.6	5.3	5.2
	(b) Other and unspecified sites	9,477	9,809	10,397	6.6	7.0	7.9
49	Cancer of other female genital organs	5,831	5,441	5,090	4.1	3.9	3.9
	(a) Ovary	5,026	4,669	4,360	3.5	3.3	3.3
	(b) Fallopian tube and parametrium	77	87	80	0.0	0.0	0.0

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	III.—Rheumatism, diseases of nutrition and of the endocrine glands, other general diseases, and avitaminoses—Continued						
	Avitaminoses (67–71)						
67	Scurvy	22	21	18	0.0	0.0	0.0
68	Beriberi	49	49	46	0.0	0.0	0.0
69	Pellagra (except alcoholic)	728	804	914	0.5	0.6	0.7
70	Rickets	55	72	93	0.0	0.1	0.1
71	Other avitaminoses	121	112	108	0.1	0.1	0.1
	IV.—Diseases of the blood and blood-forming organs	11,349	10,754	10,949	7.9	7.7	8.3
72	Hemorrhagic conditions	575	639	626	0.4	0.5	0.5
	(a) Primary purpuras	459	506	491	0.3	0.4	0.4
	(b) Hemophilia	116	123	132	0.1	0.1	0.1
	(c) Other hemorrhagic conditions	–	10	3	0	0.0	0.0
73	Anemias (except splenic anemia)	2,750	2,772	3,237	1.9	2.0	2.5
	(a) Pernicious anemia	1,598	1,636	2,034	1.1	1.2	1.5
	(b) Other hyperchromic anemias	120	111	130	0.1	0.1	0.1
	(c) Hypochromic anemias	22	13	23	0.0	0.0	0.0
	(d) Other and unspecified anemias	1,010	1,012	1,050	0.7	0.7	0.8
74	Leukemias and aleukemias	7,295	6,608	6,304	5.1	4.7	4.8
	(a) Leukemias	6,954	6,304	6,028	4.8	4.5	4.6
	(b) Aleukemias	339	304	276	0.2	0.2	0.2
75	Diseases of the spleen	453	486	515	0.3	0.3	0.4
	(a) Splenic anemia	61	73	76	0.0	0.1	0.1
	(b) Splenomegaly (of undetermined nature)	269	310	327	0.2	0.2	0.2
	(c) Other diseases of the spleen	123	103	112	0.1	0.1	0.1
76	Other diseases of the blood and blood-forming organs	278	249	267	0.2	0.2	0.2
	(a) Agranulocytosis	126	120	151	0.1	0.1	0.1

	dysentery	441	401	303	0.3	0.3	0.1
	Diseases due to protozoa (28, 29)						
28	Malaria	214	341	443	0.1	0.2	0.3
	(a) Benign tertian malaria	12	18	26	0.0	0.0	0.0
	(b) Quartan malaria	3	2	2	0.0	0.0	0.0
	(c) Malignant tertian (aestivo-autumnal) malaria	12	13	33	0.0	0.0	0.0
	(d) Malaria (unspecified form)	187	308	382	0.1	0.2	0.3
29	Other diseases due to parasitic protozoa (except spirochetes)	57	19	15	0.0	0.0	0.0
	Coccidiosis	-	-	15	0	0	0.0
	Other	57	19	-	0.0	0.0	0
	Diseases due to spirochetes (30-32)						
30	Syphilis	12,671	12,955	14,062	8.8	9.3	10.7
	(a) Locomotor ataxia (tabes dorsalis)	453	486	507	0.3	0.3	0.4
	(b) General paralysis of the insane	3,537	4,028	4,374	2.5	2.9	3.3
	(c) Other syphilis of the central nervous system	1,243	1,333	1,461	0.9	1.0	1.1
	(d) Aneurysm of the aorta	3,405	2,943	2,904	2.4	2.1	2.2
	(e) Other syphilis of the circulatory system	954	959	1,006	0.7	0.7	0.8
	(f) Congenital syphilis	605	624	785	0.4	0.4	0.6
	(g) Other and unspecified forms of syphilis	2,414	2,582	3,025	1.7	1.8	2.3
31	Relapsing fever	1	-	3	0.0	0	0.0
32	Other diseases due to spirochetes	415	390	314	0.3	0.3	0.2
	(a) Spirochetosis icterohaemorrhagica (Weil's disease)	358	315	206	0.2	0.2	0.2
	(b) Other diseases due to spirochetes	57	75	108	0.0	0.1	0.1
	Bronchopulmonary spirochetosis	-	2	3	0	0.0	0.0
	Other	57	73	105	0.0	0.1	0.1
	Diseases due to filtrable viruses (33-38)						
33	Influenza (grippe)	7,664	8,783	10,190	5.3	6.3	7.7
	(a) With respiratory complications specified	4,878	5,322	6,033	3.4	3.8	4.6
	(b) Without respiratory complications specified	2,786	3,461	4,157	1.9	2.5	3.1
34	Smallpox	5	25	12	0.0	0.0	0.0
35	Measles	472	1,310	507	0.3	0.9	0.2
36	Acute poliomyelitis and acute polioencephalitis	580	1,845	1,186	0.4	1.3	0.9

	(e) Chickenpox	88	85	95	0.1	0.1	0.1
	(f) Other diseases ascribed to viruses	3	4	2	0.0	0.0	0.0
	Dengue fever	-	1	-	0	0.0	0
	Psittacosis	1	2	-	0.0	0.0	0
	Other	2	1	2	0.0	0.0	0.0
	Diseases due to Rickettsia (39)						
39	Typhus fever and typhus-like diseases (due to Rickettsia)	224	289	377	0.2	0.2	0.3
	(a) Exanthematic typhus (epidemic form)	-	2	1	0	0.0	0.0
	(b) Endemic typhus fever	88	128	173	0.1	0.1	0.1
	(c) Rocky Mountain spotted fever	105	124	128	0.1	0.1	0.1
	(d) Other typhus-like diseases	31	35	75	0.0	0.0	0.1
	Diseases caused by helminths (40-42)						
40	Ankylostomiasis	9	8	8	0.0	0.0	0.0
41	Hydatid disease	15	10	12	0.0	0.0	0.0
42	Other diseases caused by helminths	51	52	62	0.0	0.0	0.0
	Chylusia	-	1	-	0	0.0	0
	Filariasis	-	1	-	0	0.0	0
	Trichinosis	14	16	20	0.0	0.0	0.0
	Other	37	34	42	0.0	0.0	0.0
	Diseases due to fungi (43)						
43	Mycoses	331	336	284	0.2	0.2	0.2
	Coccidioidal granuloma	42	46	41	0.0	0.0	0.0
	Moniliasis	49	38	34	0.0	0.0	0.0
	Other mycoses	240	252	209	0.2	0.2	0.2
	Other infectious and parasitic diseases (44) (Communicable diseases)						
44	Other infectious and parasitic (communicable) diseases	2,300	2,255	2,242	1.6	1.6	1.7
	(a) Venereal diseases (except gonorrhea and syphilis)	68	83	84	0.0	0.1	0.1
	(b) Lymphogranulomatosis (Hodgkin's disease)	2,163	2,105	2,082	1.5	1.5	1.6
	(c) Mumps	47	52	54	0.0	0.0	0.0
	(d) Other infectious and parasitic (communicable) diseases	22	15	22	0.0	0.0	0.0
	II.--Cancer and other tumors	195,594	188,003	183,586	136.4	134.4	139.1
45-55	Cancer and other malignant tumors	189,811	182,005	177,464	132.4	130.1	134.4
45	Cancer of the buccal cavity and pharynx	5,583	5,438	5,478	3.9	3.9	4.1
	(a) Lip	598	615	579	0.4	0.4	0.4

	(e) Intestines (except duodenum and rectum)	22,555	21,854	21,532	15.7	15.6	16.3
	(f) Liver and biliary passages	10,572	10,804	11,207	7.4	7.7	8.5
	(g) Pancreas	7,587	6,820	6,590	5.3	4.9	5.0
	(h) Mesentery and peritoneum	1,319	1,261	1,220	0.9	0.9	0.9
	(m) Other and unspecified sites	852	810	736	0.6	0.6	0.6
47	Cancer of the respiratory system	17,319	15,218	13,822	12.1	10.9	10.5
	(a) Larynx	1,872	1,746	1,692	1.3	1.2	1.3
	(b) Trachea	71	57	64	0.0	0.0	0.0
	(c) Bronchus	5,095	3,842	3,232	3.6	2.7	2.4
	(d) Lung	9,571	8,864	8,162	6.7	6.3	6.2
	(e) Pleura	151	115	114	0.1	0.1	0.1
	(f) Mediastinum and unspecified sites	559	592	558	0.4	0.4	0.4
48	Cancer of the uterus	17,455	17,205	17,255	12.2	12.3	13.1
	(a) Cervix	7,978	7,396	6,858	5.6	5.3	5.2
	(b) Other and unspecified sites	9,477	9,809	10,397	6.6	7.0	7.9
49	Cancer of other female genital organs	5,831	5,441	5,090	4.1	3.9	3.9
	(a) Ovary	5,026	4,669	4,360	3.5	3.3	3.3
	(b) Fallopian tube and parametrium	33	27	26	0.0	0.0	0.0
	(c) Vagina	285	253	233	0.2	0.2	0.2
	(d) Vulva	430	427	413	0.3	0.3	0.3
	(e) Other and unspecified sites	57	65	58	0.0	0.0	0.0
50	Cancer of the breast	18,030	17,516	17,155	12.6	12.5	13.0
51	Cancer of the male genital organs	12,013	11,564	11,092	8.4	8.3	8.4
	(a) Scrotum	25	27	32	0.0	0.0	0.0
	(b) Prostate	11,050	10,616	10,145	7.7	7.6	7.7
	(c) Testes	643	618	585	0.4	0.4	0.4
	(d) Penis	274	291	315	0.2	0.2	0.2
	(e) Other and unspecified sites	21	12	15	0.0	0.0	0.0
52	Cancer of the urinary organs (male and female)	9,334	8,746	8,317	6.5	6.3	6.3
	(a) Kidney	3,208	2,900	2,815	2.2	2.1	2.1
	(b) Bladder	6,015	5,746	5,410	4.2	4.1	4.1
	(c) Other and unspecified sites	111	100	92	0.1	0.1	0.1
53	Cancer of the skin (except vulva and scrotum)	3,474	3,520	3,390	2.4	2.5	2.6
54	Cancer of the brain and other parts of the central nervous system (including glioma, except when specified as benign)	3,436	3,158	2,854	2.4	2.3	2.2
	(a) Glioma	1,792	1,553	1,360	1.2	1.1	1.0
	(b) Other and unspecified cancers of the brain and central nervous system	1,644	1,615	1,494	1.1	1.2	1.1
55	Cancer of other and unspecified organs	14,215	13,325	12,829	9.9	9.5	9.7
	(a) Adrenal gland	222	178	192	0.2	0.1	0.1
	(b) Bone (except jaw bone and accessory sinuses)	2,347	2,308	2,384	1.6	1.6	1.8
	(c) Thyroid gland	786	728	636	0.5	0.5	0.5
	(d) Nasal cavity and accessory sinuses	379	375	362	0.3	0.3	0.3
	(e) Other and unspecified organs	10,481	9,736	9,255	7.3	7.0	7.0

	(d) Brain and other parts of the central nervous system	1,591	1,656	1,690	1.1	1.2	1.3
	(e) Other and unspecified organs	779	778	717	0.5	0.6	0.5
	III.—Rheumatism, diseases of nutrition and of the endocrine glands, other general diseases and avitaminoses	46,387	43,736	44,942	32.3	31.3	34.0
	Rheumatic diseases (58,59)						
58	Acute rheumatic fever	1,024	1,118	1,341	0.7	0.8	1.0
	(a) Acute rheumatic pericarditis	38	46	58	0.0	0.0	0.0
	(b) Acute rheumatic endocarditis	298	325	410	0.2	0.2	0.3
	(c) Acute rheumatic myocarditis	117	127	130	0.1	0.1	0.1
	(d) Other acute rheumatic heart diseases	194	212	226	0.1	0.2	0.2
	(e) Other forms of acute rheumatic fever	299	334	395	0.2	0.2	0.3
	(f) Rheumatism (not specified as acute or chronic)	78	74	122	0.1	0.1	0.1
59	Chronic rheumatism and other rheumatic diseases	1,941	1,805	1,940	1.3	1.3	1.5
	(a) Rheumatoid arthritis	401	378	327	0.3	0.3	.2
	(b) Other chronic articular rheumatism	1,409	1,392	1,563	1.0	1.0	1.2
	(c) Other and unspecified forms of chronic rheumatism	31	38	50	0.0	0.0	0.0
	Diseases of nutrition and of the endocrine glands and other general diseases (60-66)						
60	Gout	6	5	4	0.0	0.0	0.0
61	Diabetes mellitus	37,515	34,731	35,160	26.2	24.8	26.6
62	Diseases of the pituitary gland	161	138	129	0.1	0.1	0.1
63	Diseases of the thyroid and parathyroid glands	2,795	2,359	2,994	1.9	2.0	2.3
	(a) Simple goiter	146	164	171	0.1	0.1	0.1
	(b) Exophthalmic goiter	2,243	2,357	2,488	1.6	1.7	1.9
	(c) Myxedema and cretinism	320	268	261	0.2	0.2	0.2
	(d) Other diseases of the thyroid glands	60	52	82	0.0	0.0	0.1
	(e) Diseases of the parathyroid glands	26	18	12	0.0	0.0	0.0
64	Diseases of the thymus gland	1,092	1,114	1,159	0.8	0.8	0.9
65	Diseases of the adrenal glands (not specified as tuberculous)	480	479	485	0.3	0.3	0.4
	(a) Addison's disease (not specified as tuberculous)	291	328	327	0.2	0.2	0.2
	(b) Other diseases of the adrenal glands	189	151	158	0.1	0.1	0.1
66	Other general diseases	500	431	551	0.3	0.3	0.4
	(a) Osteomalacia	13	10	13	0.0	0.0	0.0
	(b) Other general diseases	487	421	538	0.3	0.3	0.4

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	VI.—Diseases of the nervous system and sense organs—Continued						
81	Meningitis (not due to meningococcus)	2,009	1,992	2,023	1.4	1.4	1.5
	(a) Simple meningitis	1,946	1,935	1,968	1.4	1.4	1.5
	(b) Acute cerebrospinal meningitis (not due to meningococcus)	63	57	55	0.0	0.0	0.0
82	Diseases of the spinal cord (except locomotor ataxia and disseminated sclerosis)	2,619	2,566	2,498	1.8	1.8	1.9
83	Intracranial lesions of vascular origin	131,039	125,646	129,144	91.4	89.8	97.8
	(a) Cerebral hemorrhage or effusion (excluding birth injuries)	111,725	108,998	113,729	77.9	77.9	86.1
	(b) Cerebral embolism and thrombosis	15,448	12,698	10,949	10.8	9.1	8.3
	(c) Cerebral softening	773	716	772	0.5	0.5	0.6
	(d) Hemiplegia and other paralysis of unspecified origin	3,093	3,234	3,694	2.2	2.3	2.8
84	Mental diseases and deficiency (except general paralysis of the insane)	1,569	1,571	1,826	1.1	1.1	1.4
	(a) Mental deficiency	355	317	355	0.2	0.2	0.3
	(b) Schizophrenia (dementia praecox)	351	365	384	0.2	0.3	0.3
	(c) Manic-depressive psychosis	186	215	230	0.1	0.2	0.2
	(d) Other mental diseases	677	676	857	0.5	0.5	0.6
85	Epilepsy	2,247	2,346	2,607	1.5	1.7	2.0
86	Convulsions (under 5 years of age)	304	357	423	0.2	0.3	0.3
87	Other diseases of the nervous system	4,296	4,155	4,237	3.0	3.0	3.2
	(a) Chorea	15	15	17	0.0	0.0	0.0
	(b) Neuritis (except rheumatic or alcoholic)	99	124	137	0.1	0.1	0.1
	(c) Paralysis agitans (except result of encephalitis)	1,460	1,486	1,527	1.0	1.1	1.2
	(d) Disseminated sclerosis	1,529	1,408	1,439	1.1	1.0	1.1
	(e) other diseases of the nervous system	1,193	1,122	1,117	0.8	0.8	0.8
88	Diseases of the organs of vision	52	43	51	0.0	0.0	0.0
89	Diseases of the ear and mastoid process	673	780	868	0.5	0.6	0.7
	(a) Chronic and other diseases of the	142	200	265	0.1	0.1	0.2

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	VII.—Diseases of the circulatory system—Continued						
	Diseases of the heart (all forms)—Con.						
	Chronic affections of the valves and endocardium—Continued						
	(e) Endocarditis (not specified as acute, chronic, or rheumatic, 45 years of age and over	1,543	1,751	2,312	1.1	1.3	1.8
93	Diseases of the myocardium	238,608	223,049	216,511	166.4	159.4	164.0
	(a) Acute myocarditis (except rheumatic)	3,278	3,329	3,928	2.3	2.4	3.0
	(b) Myocarditis (not specified as acute, chronic, or rheumatic, under 45 years of age)	340	430	556	0.2	0.3	0.4
	(c) Chronic myocarditis and myocardial degeneration, specified as rheumatic	1,293	1,142	1,184	0.9	0.8	0.9
	(d) Chronic myocarditis and myocardial degeneration, not specified as rheumatic	218,111	201,652	192,321	152.1	144.1	145.7
	(e) Other myocarditis (not specified as acute, chronic, or rheumatic)	15,586	16,496	18,522	10.9	11.8	14.0
94	Diseases of the coronary arteries and angina pectoris	154,131	137,153	131,437	107.5	98.0	99.6
	(a) Diseases of the coronary arteries	150,806	133,175	126,473	105.2	95.2	95.8
	(b) Angina pectoris	3,325	3,978	4,964	2.3	2.8	3.8
95	Other diseases of the heart	34,150	33,209	35,236	23.8	23.7	26.7
	(a) Functional diseases of the heart (without mention of organic lesion)	1,047	1,052	1,180	0.7	0.8	0.9
	(b) Other diseases of the heart, specified as rheumatic	7,083	6,461	6,092	4.9	4.6	4.6
	(c) Other diseases of the heart, not specified as rheumatic	26,020	25,696	27,964	18.1	18.4	21.2
96	Aneurysm (except of heart and aorta)	2,237	1,843	1,499	1.6	1.3	1.1
97	Arteriosclerosis (except coronary or renal sclerosis	25,317	24,918	25,968	17.7	17.8	19.7

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	VIII.—Diseases of the respiratory system—Continued						
110	Pleurisy (not specified as tuberculous)—	1,172	1,248	1,367	0.8	0.9	1.0
	(a) Empyema—	504	570	628	0.4	0.4	0.5
	(b) Other and unspecified forms of pleurisy—	668	678	739	0.5	0.5	0.6
111	Hemorrhagic infarction, thrombosis, edema, and chronic congestion of the lungs—	4,202	3,902	3,824	2.9	2.8	2.9
	(a) Hemorrhagic infarction and thrombosis of the lungs—	1,782	1,629	1,451	1.2	1.2	1.1
	(b) Acute edema of the lungs—	160	162	157	0.1	0.1	0.1
	(c) Chronic and unspecified congestion of the lungs—	2,260	2,111	2,256	1.6	1.5	1.7
112	Asthma—	2,712	2,555	2,521	1.9	1.8	1.9
113	Pulmonary emphysema—	320	254	260	0.2	0.2	0.2
114	Other diseases of the respiratory system (except tuberculosis)—	1,974	1,827	1,910	1.4	1.3	1.4
	(a) Silicosis—	455	366	357	0.3	0.3	0.3
	(b) Other and unspecified forms of pneumoconioses—	159	124	152	0.1	0.1	0.1
	(c) Gangrene of lung—	62	84	87	0.0	0.1	0.1
	(d) Abscess of lung—	491	548	592	0.3	0.4	0.4
	(e) Other and unspecified diseases of the respiratory system—	809	707	722	0.6	0.5	0.5
	IX.—Diseases of the digestive system—	62,055	61,031	67,513	45.3	45.6	51.1
115	Diseases of the buccal cavity, pharynx, tonsils, and adnexa—	1,360	1,714	2,179	0.9	1.2	1.7
	(a) Diseases of the teeth and gums—	95	126	155	0.1	0.1	0.1
	(b) Septic sore throat—	407	556	791	0.3	0.4	0.6
	(c) Diseases of the pharynx and tonsils—	747	878	1,063	0.5	0.6	0.8
	(d) Diseases of other and unspecified [illegible]						

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DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	IX.—Diseases of the digestive system—Continued						
125	Other diseases of the liver	1,845	1,792	1,775	1.3	1.3	1.3
	(a) Acute yellow atrophy of the liver (nonpuerperal)	736	724	676	0.5	0.5	0.5
	(b) Other diseases of the liver	1,109	1,068	1,099	0.8	0.8	0.8
126	Biliary calculi	3,363	3,[illegible]	3,755	2.7	2.6	2.8
127	Other diseases of the gallbladder and biliary ducts	2,445	2,518	2,947	1.7	1.9	2.2
	(a) Cholecystitis (without mention of biliary calculus)	1,641	1,656	2,092	1.1	1.2	1.6
	(b) Other diseases of the gallbladder and biliary ducts	804	862	855	0.6	0.6	0.6
128	Diseases of the pancreas (except diabetes mellitus)	1,039	897	917	0.7	0.6	0.7
129	Peritonitis (cause not stated)	870	889	1,020	0.6	0.6	0.9
	X.—Diseases of the genito-urinary system	93,963	95,778	102,813	65.5	68.5	77.9
130–132	Nephritis	80,288	81,701	88,078	56.0	58.4	66.7
130	Acute nephritis	2,114	2,397	2,855	1.5	1.7	2.2
131	Chronic nephritis	74,296	75,256	80,493	51.8	53.8	61.0
	(a) Arteriosclerotic kidney	56,691	56,095	58,653	39.5	40.1	44.4
	(b) Other chronic nephritis	17,605	19,161	21,840	12.3	13.7	16.5
132	Nephritis unspecified (10 years of age and over)	3,878	4,048	4,730	2.7	2.9	3.6
133	Other diseases of the kidneys and ureters (except diseases associated with pregnancy, childbirth, or puerperium)	3,088	2,950	3,203	2.2	2.1	2.4
	(a) Pyelitis, pyelonephritis, and						

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued.

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	XI.—Diseases of pregnancy, childbirth, and the puerperium—Continued						
	Abortion with mention of infection—Con.						
	(b) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of other infection	279	354	458	0.2	0.3	0.3
	(c) Self-induced abortion with mention of infection	29	43	46	0.0	0.0	0.0
	(d) Abortion (induced for non-therapeutic reasons by persons other than the woman herself) with mention of infection	58	70	79	0.0	0.1	0.1
141	Abortion without mention of infection[1]	213	284	301	0.1	0.2	0.2
	(a) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of hemorrhage, trauma or shock, and toxemia	4	8	10	0.0	0.0	0.0
	(b) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of hemorrhage, trauma or shock (but not toxemia)	73	88	103	0.1	0.1	0.1
	(c) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of toxemia (but not hemorrhage, trauma or shock)	55	76	70	0.0	0.1	0.1
	(d) Abortion (spontaneous, therapeutic, or of unspecified origin)(without mention of hemorrhage, trauma or shock, or toxemia)	63	84	89	0.0	0.1	0.1
	(e) Self-induced abortion	11	9	13	0.0	0.0	0.0
	(f) Abortion (induced for nontherapeutic reasons by persons other than the woman herself)	7	19	19	0.0	0.0	0.0

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23).

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	XI.—Diseases of pregnancy, childbirth, and the puerperium—Continued						
147	Infection during childbirth and the puerperium[2]	1,006	1,056	1,171	0.7	0.8	0.9
	(a) Puerperal pyelitis and pyelonephritis	22	29	29	0.0	0.0	0.0
	(b) General or local puerperal infection (except pyelitis)	339	374	479	0.2	0.3	0.4
	(c) Puerperal thrombophlebitis	158	169	175	0.1	0.1	0.1
	(d) Puerperal embolism and sudden death	487	434	488	0.3	0.3	0.4
148	Puerperal toxemias (excluding death before delivery)[2]	784	737	810	0.5	0.5	0.6
	(a) Puerperal eclampsia	457	396	430	0.3	0.3	0.3
	(b) Puerperal albuminuria and nephritis	174	192	216	0.1	0.1	0.2
	(c) Acute yellow atrophy of the liver (puerperal)	28	31	27	0.0	0.0	0.0
	(d) Other puerperal toxemias	145	118	137	0.1	0.1	0.1
149	Other accidents and specified conditions of childbirth[2]	376	395	431	0.3	0.3	0.3
	(a) Laceration, rupture, or other trauma of pelvic organs and tissue	98	87	95	0.1	0.1	0.1
	(b) Other specified conditions of childbirth	278	308	336	0.2	0.2	0.3
150	Other and unspecified conditions of childbirth and the puerperium	325	296	331	0.2	0.2	0.3
	(a) Infection of breast during lactation	1	1	1	0.0	0.0	0.0
	(b) Psychosis of the puerperium	12	9	8	0.0	0.0	0.0
	(c) Other and unspecified conditions of childbirth and the puerperium	312	286	322	0.2	0.2	0.2
	XII.—Diseases of the skin and cellular tissue	954	926	994	0.7	0.7	0.8
151	Carbuncle and furuncle	49	73	112	0.0	0.1	0.1

Hemorrhagic conditions	575	639	626	0.4	0.5	0.5
(a) Primary purpuras	459	506	491	0.3	0.4	0.4
(b) Hemophilia	116	123	132	0.1	0.1	0.1
(c) Other hemorrhagic conditions	-	10	3	0	0.0	0.0
Anemias (except splenic anemia)	2,750	2,772	3,257	1.9	2.0	2.5
(a) Pernicious anemia	1,598	1,636	2,084	1.1	1.2	1.5
(b) Other hyperchromic anemias	120	111	130	0.1	0.1	0.1
(c) Hypochromic anemias	22	13	23	0.0	0.0	0.0
(d) Other and unspecified anemias	1,010	1,012	1,050	0.7	0.7	0.8
Leukemias and aleukemias	7,293	6,608	6,304	5.1	4.7	4.8
(a) Leukemias	6,954	6,304	6,028	4.8	4.5	4.6
(b) Aleukemias	339	304	276	0.2	0.2	0.2
Diseases of the spleen	453	486	515	0.3	0.3	0.4
(a) Splenic anemia	61	73	76	0.0	0.1	0.1
(b) Splenomegaly (of undetermined nature)	269	310	327	0.2	0.2	0.2
(c) Other diseases of the spleen	123	103	112	0.1	0.1	0.1
Other diseases of the blood and blood-forming organs	278	249	267	0.2	0.2	0.2
(a) Agranulocytosis	126	120	151	0.1	0.1	0.1
(b) Erythrocytosis	54	50	36	0.0	0.0	0.0
(c) Hemoglobinemia	5	-	3	0.0	0	0.0
(d) Other diseases of the blood and blood-forming organs	93	79	75	0.1	0.1	0.1
V.—Chronic poisoning and intoxication	2,351	2,382	2,416	1.6	1.7	1.8
Alcoholism (ethylism)	2,249	2,209	2,293	1.6	1.6	1.7
(a) Alcoholic pellagra	1	-	1	0.0	0	0.0
(b) Other deficiency states associated with alcoholism	44	32	57	0.0	0.0	0.0
(c) Acute alcoholism	816	844	811	0.6	0.6	0.6
(d) Chronic alcoholism	851	768	823	0.6	0.5	0.6
(e) Other and unspecified alcoholism	537	565	601	0.4	0.4	0.5
Lead poisioning	32	46	45	0.0	0.0	0.0
(a) Specified as occupational	13	21	13	0.0	0.0	0.0
(b) Not specified as occupational	19	25	32	0.0	0.0	0.0
Chronic poisioning by other mineral or organic substances	70	77	78	0.0	0.1	0.1
(a) Specified as occupational	11	16	16	0.0	0.0	0.0
(b) Not specified as occupational	59	61	62	0.0	0.0	0.0
VI.—Diseases of the nervous system and sense organs	145,970	140,768	145,064	101.8	100.6	109.9
Encephalitis (nonepidemic)	1,162	1,312	1,387	0.8	0.9	1.1
(a) Intracranial abscess	384	414	417	0.3	0.3	0.3
(b) Other encephalitis (nonepidemic)	778	898	970	0.5	0.6	0.7

84	Mental diseases and deficiency (except general paralysis of the insane)	1,569	1,571	1,826	1.1	1.1	1.4
	(a) Mental deficiency	355	317	355	0.2	0.2	0.3
	(b) Schizophrenia (dementia praecox)	351	365	384	0.2	0.3	0.3
	(c) Manic-depressive psychosis	186	215	230	0.1	0.2	0.2
	(d) Other mental diseases	677	676	857	0.5	0.5	0.6
85	Epilepsy	2,247	2,346	2,607	1.6	1.7	2.0
86	Convulsions (under 5 years of age)	304	357	423	0.2	0.3	0.3
87	Other diseases of the nervous system	4,296	4,155	4,237	3.0	3.0	3.2
	(a) Chorea	15	15	17	0.0	0.0	0.0
	(b) Neuritis (except rheumatic or alcoholic)	99	124	137	0.1	0.1	0.1
	(c) Paralysis agitans (except result of encephalitis)	1,460	1,486	1,527	1.0	1.1	1.2
	(d) Disseminated sclerosis	1,529	1,408	1,439	1.1	1.0	1.1
	(e) other diseases of the nervous system	1,193	1,122	1,117	0.8	0.8	0.8
88	Diseases of the organs of vision	52	43	51	0.0	0.0	0.0
89	Diseases of the ear and mastoid process	673	780	868	0.5	0.6	0.7
	(a) Otitis and other diseases of the ear	542	600	665	0.4	0.4	0.5
	(b) Diseases of the mastoid process	131	180	203	0.1	0.1	0.2
	VII.—Diseases of the circulatory system	494,113	461,687	457,524	344.5	330.0	346.6
90-95	Diseases of heart (all forms)	460,580	429,250	424,328	321.2	306.8	321.4
90	Pericarditis (except acute rheumatic)	521	520	476	0.4	0.4	0.4
	(a) Chronic rheumatic pericarditis	22	13	19	0.0	0.0	0.0
	(b) Other pericarditis	499	507	457	0.3	0.4	0.3
91	Acute endocarditis (except rheumatic)	1,202	1,474	1,788	0.8	1.1	1.4
	(a) Bacterial endocarditis (acute, subacute, or unspecified	786	921	1,137	0.5	0.7	0.9
	(b) Other acute or subacute endocarditis	320	395	450	0.2	0.3	0.3
	(c) Endocarditis (not specified as acute, chronic, or rheumatic, under 45 years of age)	96	158	201	0.1	0.1	0.2
92	Chronic affections of the valves and endocardium	31,968	33,825	38,880	22.3	24.2	29.5
	(a) Diseases of the aortic valve (without mention of diseases of the mitral valve or rheumatic fever)	3,021	3,008	3,098	2.1	2.2	2.3
	(b) Diseases of the mitral valve (whether or not specified as rheumatic)	13,371	13,981	15,455	9.3	10.0	11.7
	(c) Diseases of other and unspecified valves and chronic endocarditis, specified as rheumatic	2,098	1,962	2,052	1.5	1.4	1.6
	(d) Diseases of other and unspecified valves and chronic endocarditis, not specified as rheumatic	11,955	13,123	15,983	8.3	9.4	12.1

	years of age)	340	450	556	0.2	0.3	0.4
	(c) Chronic myocarditis and myocardial degeneration, specified as rheumatic	1,293	1,142	1,184	0.9	0.8	0.9
	(d) Chronic myocarditis and myocardial degeneration, not specified as rheumatic	218,111	201,652	192,321	152.1	144.1	145.7
	(e) Other myocarditis (not specified as acute, chronic, or rheumatic)	15,586	16,496	18,522	10.9	11.8	14.0
94	Diseases of the coronary arteries and angina pectoris	154,131	137,153	131,437	107.5	98.0	99.6
	(a) Diseases of the coronary arteries	150,806	133,175	126,473	105.2	95.2	95.8
	(b) Angina pectoris	3,325	3,978	4,964	2.3	2.8	3.8
95	Other diseases of the heart	34,150	33,209	35,236	23.8	23.7	26.7
	(a) Functional diseases of the heart (without mention of organic lesion)	1,047	1,052	1,180	0.7	0.8	0.9
	(b) Other diseases of the heart, specified as rheumatic	7,085	6,461	6,092	4.9	4.6	4.6
	(c) Other diseases of the heart, not specified as rheumatic	26,020	25,696	27,964	18.1	18.4	21.2
96	Aneurysm (except of heart and aorta)	2,237	1,843	1,499	1.6	1.3	1.1
97	Arteriosclerosis (except coronary or renal sclerosis	25,317	24,918	25,968	17.7	17.8	19.7
98	Gangrene	380	396	498	0.3	0.3	0.4
99	Other diseases of the arteries	2,040	2,018	1,960	1.4	1.4	1.5
100	Diseases of the veins	1,379	1,195	1,097	1.0	0.9	0.8
	(a) Varices	310	288	323	0.2	0.2	0.2
	(b) Other diseases of the veins	1,069	907	774	0.7	0.6	0.6
101	Diseases of the lymphatic system	56	60	73	0.0	0.0	0.1
102	High blood pressure (idiopathic)	1,911	1,828	1,864	1.3	1.3	1.4
103	Other diseases of the circulatory system	213	201	237	0.1	0.1	0.2
	VIII.—Diseases of the respiratory system	68,771	67,184	72,098	48.0	48.0	54.6
104	Diseases of the nasal fossae and accessory sinuses	454	501	527	0.3	0.4	0.4
	(a) Diseases of the nasal fossae	250	196	241	0.2	0.1	0.2
	(b) Diseases of the accessory sinuses	204	305	286	0.1	0.2	0.2
105	Diseases of the larynx	290	272	352	0.2	0.2	0.3
106	Bronchitis	3,467	3,084	3,141	2.4	2.2	2.4
	(a) Acute	820	727	735	0.6	0.5	0.5
	(b) Chronic	2,055	1,829	1,748	1.4	1.3	1.3
	(c) Unspecified	592	528	658	0.4	0.4	0.5
107-109	Pneumonia (all forms)	54,172	53,541	58,196	37.8	38.3	44.1
107	Bronchopneumonia (including capillary bronchitis)	28,087	27,667	28,794	19.6	19.8	21.8
108	Lobar pneumonia	20,272	20,252	23,299	14.1	14.5	17.6
109	Pneumonia (unspecified)	5,813	5,622	6,103	4.1	4.0	4.6
	(A) Atypical or virus pneumonia	1,039	918	929	0.7	0.7	0.7
	(B) Pneumonia (all other, unspecified)	4,774	4,704	5,174	3.3	3.4	3.9

112	Asthma	2,712	2,555	2,521	1.9	1.9	1.9
113	Pulmonary emphysema	320	254	260	0.2	0.2	0.2
114	Other diseases of the respiratory system (except tuberculosis)	1,974	1,827	1,910	1.4	1.5	1.4
	(a) Silicosis	455	366	357	0.3	0.3	0.3
	(b) Other and unspecified forms of pneumoconioses	159	124	152	0.1	0.1	0.1
	(c) Gangrene of lung	62	84	87	0.0	0.1	0.1
	(d) Abscess of lung	491	546	592	0.3	0.4	0.4
	(e) Other and unspecified diseases of the respiratory system	809	707	722	0.6	0.5	0.5
	IX.—Diseases of the digestive system	62,055	61,031	67,513	43.3	43.6	51.1
115	Diseases of the buccal cavity, pharynx, tonsils, and adnexa	1,360	1,714	2,179	0.9	1.2	1.7
	(a) Diseases of the teeth and gums	95	126	153	0.1	0.1	0.1
	(b) Septic sore throat	407	556	791	0.3	0.4	0.6
	(c) Diseases of the pharynx and tonsils	747	878	1,063	0.5	0.6	0.8
	(d) Diseases of other and unspecified parts of the buccal cavity and adnexa	111	154	172	0.1	0.1	0.1
116	Diseases of the esophagus	245	256	242	0.2	0.2	0.2
117	Ulcer of stomach or duodenum	8,611	8,164	8,958	6.0	5.8	6.8
	(a) Stomach	5,333	5,312	5,971	3.7	3.8	4.5
	(b) Duodenum	3,278	2,852	2,987	2.3	2.0	2.3
118	Other diseases of the stomach (except cancer	1,342	1,435	1,644	0.9	1.0	1.2
119, 120	Diarrhea, enteritis, and ulceration of the intestines	8,069	8,090	11,465	5.6	5.8	8.7
119	Diarrhea, enteritis, and ulceration of the intestines (under 2 years of age)	6,046	6,019	9,055	4.2	4.3	6.9
	(a) Diarrhea and enteritis	5,998	5,972	9,000	4.2	4.3	6.8
	(b) Ulceration of intestines (except duodenum)	48	47	55	0.0	0.0	0.0
120	Diarrhea, enteritis, and ulceration of the intestines (2 years of age and over)	2,023	2,071	2,410	1.4	1.5	1.8
	(a) Diarrhea and enteritis	1,328	1,379	1,675	0.9	1.0	1.3
	(b) Ulceration of the intestines (except duodenum)	695	692	735	0.5	0.5	0.6
121	Appendicitis	4,786	5,285	6,697	3.3	3.8	5.1
122	Hernia and intestinal obstruction	10,764	11,221	11,621	7.5	8.0	8.8
	(a) Hernia	4,492	4,782	5,004	3.1	3.4	3.8
	(b) Intestinal obstruction	6,272	6,439	6,617	4.4	4.6	5.0
123	Other diseases of the intestines	1,876	1,707	1,752	1.3	1.2	1.3
124	Cirrhosis of the liver	14,940	13,451	12,541	10.4	9.6	9.5
	(a) With mention of alcoholism	2,228	1,807	1,737	1.6	1.3	1.3
	(b) Without mention of alcoholism	12,712	11,644	10,804	8.9	8.3	8.2

128	Diseases of the pancreas (except diabetes mellitus)	1,039	897	917	0.7	0.6	0.7
129	Peritonitis (cause not stated)	870	889	1,020	0.6	0.6	0.8
	X.—Diseases of the genito-urinary system	93,963	95,778	102,813	65.5	68.5	77.9
130-132	Nephritis	80,288	81,701	88,078	56.0	58.4	66.7
130	Acute nephritis	2,114	2,397	2,855	1.5	1.7	2.2
131	Chronic nephritis	74,296	75,256	80,493	51.8	53.8	61.0
	(a) Arteriosclerotic kidney	56,691	56,095	58,653	39.5	40.1	44.4
	(b) Other chronic nephritis	17,605	19,161	21,840	12.3	13.7	16.5
132	Nephritis unspecified (10 years of age and over)	3,878	4,048	4,730	2.7	2.9	3.6
133	Other diseases of the kidneys and ureters (except diseases associated with pregnancy, childbirth, or puerperium)	3,088	2,950	3,203	2.2	2.1	2.4
	(a) Pyelitis, pyelonephritis, and pyelocystitis	2,225	2,071	2,181	1.6	1.5	1.7
	(b) Other diseases of the kidneys and ureters	863	879	1,022	0.6	0.6	0.8
134	Calculi of the urinary passages	1,398	1,398	1,396	1.0	1.0	1.1
	(a) Kidneys and ureters	1,123	1,118	1,104	0.8	0.8	0.8
	(b) Bladder	247	254	262	0.2	0.2	0.2
	(c) Other and unspecified parts of the urinary passages	28	26	30	0.0	0.0	0.0
135	Diseases of the urinary bladder	605	623	691	0.4	0.4	0.5
	(a) Cystitis	201	193	234	0.1	0.1	0.2
	(b) Other diseases of the bladder	404	430	457	0.3	0.3	0.3
136	Diseases of the urethra (except calculus)	328	309	395	0.2	0.2	0.3
	(a) Stricture of the urethra	176	184	223	0.1	0.1	0.2
	(b) Others under this title	152	125	172	0.1	0.1	0.1
137	Diseases of the prostate	7,092	7,361	7,443	4.9	5.3	5.6
	(a) Hypertrophy of the prostate	6,089	6,288	6,245	4.2	4.5	4.7
	(b) Other diseases of the prostate	1,003	1,073	1,198	0.7	0.8	0.9
138	Diseases of other male genital organs (not specified as venereal)	27	30	31	0.0	0.0	0.0
139	Diseases of the female genital organs	1,137	1,406	1,576	0.8	1.0	1.2
	(a) Ovaries, fallopian tubes, and parametria	640	804	959	0.4	0.6	0.7
	(b) Uterus	475	566	580	0.3	0.4	0.4
	(c) Other and unspecified female genital organs	22	36	37	0.0	0.0	0.0
	XI.—Diseases of pregnancy, childbirth, and the puerperium	4,978	5,153	5,668	3.5	3.7	4.3
140	Abortion with mention of infection[1]	372	476	587	0.3	0.3	0.4
	(a) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of pyelitis	6	9	4	0.0	0.0	0.0

[1]Gestation less than 28 weeks.

141	Abortion without mention of infection[1]	213	284	301	0.1	0.2	0.2
	(a) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of hemorrhage, trauma or shock, and toxemia	4	8	10	0.0	0.0	0.0
	(b) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of hemorrhage, trauma or shock (but not toxemia)	73	88	103	0.1	0.1	0.1
	(c) Abortion (spontaneous, therapeutic, or of unspecified origin) with mention of toxemia (but not hemorrhage, trauma or shock)	55	76	70	0.0	0.1	0.1
	(d) Abortion (spontaneous, therapeutic, or of unspecified origin)(without mention of hemorrhage, trauma or shock, or toxemia)	63	84	89	0.0	0.1	0.1
	(e) Self-induced abortion	11	9	10	0.0	0.0	0.0
	(f) Abortion (induced for nontherapeutic reasons by persons other than the woman herself)	7	19	19	0.0	0.0	0.0
142	Ectopic gestation	300	329	334	0.2	0.2	0.3
	(a) With mention of infection	51	71	86	0.0	0.1	0.1
	(b) Without mention of infection	249	258	248	0.2	0.2	0.2
143	Hemorrhage of pregnancy (death before delivery)	62	59	60	0.0	0.0	0.0
	(a) Placenta praevia	18	19	21	0.0	0.0	0.0
	(b) Premature separation of placenta	17	19	12	0.0	0.0	0.0
	(c) Other or unspecified hemorrhage of pregnancy	27	21	27	0.0	0.0	0.0
144	Toxemias of pregnancy (death before delivery)	437	475	515	0.3	0.3	0.4
	(a) Eclampsia of pregnancy	259	248	266	0.2	0.2	0.2
	(b) Albuminuria and nephritis of pregnancy	111	100	116	0.1	0.1	0.1
	(c) Acute yellow atrophy of liver (during pregnancy)	13	17	13	0.0	0.0	0.0
	(d) Other toxemias of pregnancy	114	110	120	0.1	0.1	0.1
145	Other diseases and accidents of pregnancy (death before delivery)	255	257	241	0.2	0.2	0.2
	(A) With mention of infection	162	168	156	0.1	0.1	0.1
	(B) Without mention of infection	93	89	85	0.1	0.1	0.1
146	Hemorrhage of childbirth and the puerperium[2]	788	739	887	0.5	0.6	0.7
	(a) Placenta praevia (with childbirth)	125	155	196	0.1	0.1	0.1
	(b) Premature separation of placenta (with childbirth)	163	162	174	0.1	0.1	0.1
	(c) Other and unspecified hemorrhages of childbirth and the puerperium	500	472	517	0.3	0.3	0.4

[1] Gestation less than 28 weeks.
[2] Gestation 28 weeks or over, or unspecified.

	before delivery)[2]	784	737	810	0.5	0.5	0.6
	(a) Puerperal eclampsia	437	396	430	0.3	0.3	0.3
	(b) Puerperal albuminuria and nephritis	174	192	216	0.1	0.1	0.2
	(c) Acute yellow atrophy of the liver (puerperal)	28	31	27	0.0	0.0	0.0
	(d) Other puerperal toxemias	145	113	137	0.1	0.1	0.1
149	Other accidents and specified conditions of childbirth[2]	376	395	431	0.3	0.3	0.3
	(a) Laceration, rupture, or other trauma of pelvic organs and tissue	98	87	95	0.1	0.1	0.1
	(b) Other specified conditions of childbirth	278	308	336	0.2	0.2	0.3
150	Other and unspecified conditions of childbirth and the puerperium	325	296	331	0.2	0.2	0.3
	(a) Infection of breast during lactation	1	1	1	0.0	0.0	0.0
	(b) Psychosis of the puerperium	12	9	8	0.0	0.0	0.0
	(c) Other and unspecified conditions of childbirth and the puerperium	312	286	322	0.2	0.2	0.2
	XII.—Diseases of the skin and cellular tissue	954	926	994	0.7	0.7	0.8
151	Carbuncle and furuncle	49	73	112	0.0	0.1	0.1
152	Phlegmon and acute abscess	134	187	219	0.1	0.1	0.2
153	Other diseases of the skin and cellular tissue	771	666	663	0.5	0.5	0.5
	XIII.—Diseases of the bones and organs of movement	726	765	840	0.5	0.5	0.6
154	Osteomyelitis and periostitis	190	249	292	0.1	0.2	0.2
	(a) Acute	6	12	20	0.0	0.0	0.0
	(b) Chronic and unspecified	184	237	272	0.1	0.2	0.2
155	Other diseases of the bones (except tuberculosis)	206	170	182	0.1	0.1	0.1
156	Diseases of the joints and other organs of movement	330	346	366	0.2	0.2	0.3
	(a) Diseases of the joints (except tuberculosis and rheumatism)	64	64	89	0.0	0.0	0.1
	(b) Diseases of other and unspecified organs of movement	266	282	277	0.2	0.2	0.2
	XIV.—Congenital malformations	20,315	17,749	16,187	14.2	12.7	12.3
157	Congenital malformations (stillbirths not included)	20,315	17,749	16,187	14.2	12.7	12.3
	(a-d) Congenital malformations of the central nervous system						
	(a) Congenital hydrocephalus	2,977	2,650	2,463	2.1	1.9	1.9
	(b) Spina bifida and meningocele	1,398	1,310	1,365	1.0	0.9	1.0
	(c) Anencephalus	562	537	438	0.4	0.4	0.3

[2]Gestation 28 weeks or over, or unspecified.

1558

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	XIV.—Congenital malformations—Con.						
	Congenital malformations (stillbirths not included)—Continued						
	(d) Other congenital malformations of the central nervous system	1,055	875	693	0.7	0.6	0.5
	(e,f) Congenital malformations of the cardiovascular system						
	(e) Congenital malformations of the heart	9,415	8,299	7,673	6.6	5.9	5.8
	(f) Other congenital malformations of the cardiovascular system	207	185	139	0.1	0.1	0.1
	(g,h,m) Other congenital malformations:						
	(g) Congenital malformations of the digestive system	3,345	2,855	2,480	2.3	2.0	1.9
	(h) Congenital malformations of the genito-urinary system	409	242	167	0.3	0.2	0.1
	(m) Other and unspecified congenital malformations	949	816	771	0.7	0.6	0.6
	XV.—Diseases peculiar to the first year of life	65,308	61,738	50,779	45.5	44.1	38.5
158	Congenital debility (cause not stated)	1,718	1,797	2,202	1.2	1.3	1.7
159	Premature birth (cause not stated)	41,053	39,824	31,614	28.6	28.5	23.9
160	Injury at birth	13,075	11,738	9,762	9.1	8.4	7.4
	(a) Intracranial or spinal hemorrhage	5,685	4,970	4,049	4.0	3.6	3.1
	(b) Other intracranial or spinal injuries	833	673	558	0.6	0.5	0.4
	(c) Other injuries at birth	6,559	6,095	5,155	4.6	4.4	3.9
161	Other diseases peculiar to the first year of life	9,462	8,379	7,201	6.6	6.0	5.5
	(a) Asphyxia (cause not specified), atelectasis	5,756	4,825	4,054	4.0	3.4	3.1
	(b) Infection of the umbilicus;						

	(g) Congenital malformations of the digestive system	3,345	2,855	2,480	2.3	2.0	1.9
	(h) Congenital malformations of the genito-urinary system	409	242	167	0.3	0.2	0.1
	(m) Other and unspecified congenital malformations	949	816	771	0.7	0.6	0.6
	XV.—Diseases peculiar to the first year of life	65,308	61,738	50,779	45.5	44.1	38.5
158	Congenital debility (cause not stated)	1,718	1,797	2,202	1.2	1.3	1.7
159	Premature birth (cause not stated)	41,053	39,824	31,614	28.6	28.5	23.9
160	Injury at birth	13,075	11,738	9,762	9.1	8.4	7.4
	(a) Intracranial or spinal hemorrhage	5,685	4,970	4,049	4.0	3.6	3.1
	(b) Other intracranial or spinal injuries	853	673	558	0.6	0.5	0.4
	(c) Other injuries at birth	6,559	6,095	5,155	4.6	4.4	3.9
161	Other diseases peculiar to the first year of life	9,462	8,379	7,201	6.6	6.0	5.5
	(a) Asphyxia (cause not specified), atelectasis	5,756	4,825	4,054	4.0	3.4	3.1
	(b) Infection of the umbilicus; pemphigus and other infections (nonsyphilitic)	168	149	135	0.1	0.1	0.1
	(c) Other specified diseases peculiar to the first year of life	3,538	3,405	3,012	2.5	2.4	2.3
	XVI.—Senility	9,706	10,027	10,815	6.8	7.2	8.2
162	Senility	9,706	10,027	10,815	6.8	7.2	8.2
	(a) Senility with mention of senile dementia	938	973	1,120	0.7	0.7	0.8
	(b) Senility without mention of senile dementia	8,768	9,054	9,695	6.1	6.5	[illegible]
	XVII.—Violent or accidental deaths	124,825	123,119	118,432	87.0	88.0	89.7
163, 164	Suicide	16,538	16,152	14,782	11.5	11.5	11.2
163	Suicide by poisoning	3,890	3,859	3,718	2.6	2.8	2.8
	Suicide by solid or liquid poisons:						
	(A) Arsenic and compounds	138	167	133	0.1	0.1	0.1
	(B) Barbituric acid and derivatives	558	559	403	0.4	0.4	0.3
	(C) Cresol compounds	55	76	70	0.0	0.1	0.1
	(D) Mercury and compounds	80	107	92	0.1	0.1	0.1
	(E) Nux vomica and strychnine	135	135	126	0.1	0.1	0.1
	(F) Carbolic acid and phenol	150	145	137	0.1	0.1	0.1
	(G) Other solid or liquid poisons	758	796	774	0.5	0.6	0.6
	Suicide by poisonous gases:						
	(H) Utility gas	1,202	1,303	1,410	0.8	0.9	1.1
	(M) Motor-vehicle exhaust gas	491	481	453	0.3	0.3	0.3
	(O) Other carbon monoxide gas	79	62	65	0.1	0.0	0.0
	(X) Other poisonous gases	46	49	55	0.0	0.0	0.0
164	Suicide by other means	12,848	12,293	11,064	9.0	8.8	8.4
	(a) Suicide by hanging or strangulation	3,750	3,599	3,301	2.6	2.6	2.5

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	XVII.—Violent or accidental deaths—Continued						
	Suicide—Continued						
	Suicide by other means—Continued						
	(b) Suicide by drowning	781	765	715	0.5	0.5	0.5
	(c) Suicide by firearms and explosives	6,691	6,276	5,321	4.6	4.5	4.0
	(d) Suicide by cutting or piercing instruments	678	718	763	0.5	0.5	0.6
	(e) Suicide by jumping from high places	627	654	634	0.4	0.5	0.5
	(f) Suicide by crushing	161	170	161	0.1	0.1	0.1
	(g) Suicide by other or unspecified means	160	151	171	0.1	0.1	0.1
165–168	Homicide	8,555	8,784	7,412	6.0	6.3	5.6
165	Infanticide (homicide of infants under 1 year of age)	[3](174)	[3](154)	[3](149)	[3](0.1)	[3](0.1)	[3](0.1)
166	Homicide by firearms	4,922	4,966	4,029	3.4	3.5	3.1
167	Homicide by cutting or piercing instruments	1,981	2,159	1,857	1.4	1.5	1.4
168	Homicide by other means	1,652	1,659	1,546	1.2	1.2	1.2
169–195	Accidental deaths	99,579	98,035	95,918	69.4	70.1	72.7
169	Railway accidents (except collisions with motor vehicles)	2,665	2,937	3,320	1.9	2.1	2.5
170	Motor-vehicle accidents	32,697	33,411	28,076	22.8	23.9	21.3
	(a) Collisions between automobiles and trains	1,736	1,705	1,703	1.2	1.2	1.3
	(b) Collisions between automobiles and streetcars	102	174	163	0.1	0.1	0.1
	(c) Automobile accidents (except collisions with trains or streetcars)	30,074	30,827	25,672	21.0	22.0	19.4
	(d) Motorcycle accidents (except						

DEATHS AND CRUDE DEATH RATES FOR EACH CAUSE: UNITED STATES, 1945–47—Continued

(See headnote on p. 23)

Int. List No.	CAUSE OF DEATH	NUMBER			RATE		
		1947	1946	1945	1947	1946	1945
	XVII.—Violent or accidental deaths—Continued						
	Acute accidental poisoning by solids or liquids—Continued						
	(C) Cresol compounds	7	19	13	0.0	0.0	0.0
	(D) Mercury and compounds	25	27	33	0.0	0.0	0.0
	(E) Nux vomica and strychnine	37	45	52	0.0	0.0	0.0
	(F) Carbolic acid and phenol	11	16	13	0.0	0.0	0.0
	(G) Lye and potash	72	90	79	0.1	0.1	0.1
	(H) Tobacco and derivatives	10	11	9	0.0	0.0	0.0
	(M) Narcotics	28	20	37	0.0	0.0	0.0
	(O) Methanol and other alcohols	178	139	188	0.1	0.1	0.1
	(X) Other and unspecified substances	670	670	658	0.5	0.5	0.5
180	Conflagration	3,315	3,017	2,914	2.3	2.2	2.2
181	Accidental burns (except conflagration)	4,685	4,856	5,105	3.3	3.5	3.9
182	Accidental mechanical suffocation	1,930	1,605	1,483	1.3	1.1	1.1
183	Accidental drowning	5,737	5,577	5,676	4.0	4.0	4.3
184	Accidental injury by firearms	2,586	2,816	2,454	1.7	2.0	1.9
185	Accidental injury by cutting or piercing instruments	285	317	329	0.2	0.2	0.2
186	Accidental injury by fall or crushing	24,397	23,028	23,818	17.0	16.5	18.0
	(a) Fall	23,961	22,581	23,333	16.7	16.1	17.7
	(b) Crushing	436	447	485	0.3	0.3	0.4
187	Cataclysm (all deaths attributed to a cataclysm, regardless of their nature)	393	148	300	0.3	0.1	0.2
188	Injury by animals (not specified as venomous or occurring in the course of agricultural and forestry operations)	113	142	152	0.1	0.1	0.1
189	Hunger or thirst	26	27	29	0.0	0.0	0.0
190	Excessive cold	270	193	277	0.2	0.1	0.2
191	Excessive heat	540	182	265	0.4	0.1	0.2

VITAL STATISTICS—SPECIAL REPORTS

SYMBOLS USED IN SPECIAL REPORTS

Class or item not applicable (three dots)	...
Data not available (three dashes)	---
Quantity is zero, in frequency tables (one dash)	-
Quantity is zero, in rate or percent tables (one cipher)	0
If rate or percent is more than 0 but less than 0.05	0.0
If both frequency and population base are zero in rate or percent tables (one dash)	-

2710 IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1949

No. 568

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Feb. 8, 1950

1. Now come the Appellants in the above cause and for their statement of points upon which they intend to rely in their appeal in this Court adopt the points contained in their Assignment of Errors heretofore filed herein.

2. Appellants deem all the parts of the record in this cause which were filed in this Court pursuant to the appellants' praecipe to the Clerk of the United States District Court for the District of Columbia necessary for the consideration of the foregoing points, and appellants designate those parts of said record described in said praecipe and filed in this Court pursuant to said praecipe for printing by the Clerk of this Court.

Philip B. Perlman
Solicitor General

Dated: February 8, 1950

2711 CERTIFICATE.

I hereby certify that a true copy of the attached Statement of Points to be Relied upon and Designation of Parts of the Record Necessary for Consideration Thereof was duly served on the appellee on this 8 day of February, 1950, by depositing in the United States mails copies thereof addressed to Charles S. Rhyne, counsel for appellee.

Vincent A. Kleinfeld

2712 [File endorsement omitted]

2713 IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1949

No. 568

APPELLEE'S DESIGNATION OF RECORD FOR PRINTING

Filed Feb. 20, 1950

Now comes the Appellee in the above cause and hereby designates the following part of the record, prepared by the Clerk of the United States District Court for the District of Columbia and filed in this Court, for printing by the Clerk of this Court:

1. Transcript of Hearing on Plaintiff's Motion for Modification of Pre-Trial order before Judge Goldsborough on September 21, 1949.

Respectfully submitted,
Charles S. Rhyne
Lester L. Lev
Attorneys for Appellee

Dated: February 20, 1950

2714 CERTIFICATE OF SERVICE

Service of Appellee's Designation of Record for Printing was had by mailing a copy thereof on February 20, 1950 to the Honorable Philip B. Perlman, Solicitor General of the United States, Department of Justice, Washington, D. C.

Charles S. Rhyne
Attorney for Appellee

Dated: February 20, 1950

2715 SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 568

ORDER NOTING PROBABLE JURISDICTION—February 20, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on cover: File No. 54,317 U. S. District Court, District of Columbia, Term No. 568. Oscar R. Ewing, Federal Security Administrator, et al., Appellants, vs. Mytinger & Casselberry, a California Corporation. Filed January 30, 1950. Term No. 568 O.T. 1949.

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No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1949

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS

vs.

MUTUAL CREDIT ASSOCIATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

165	Infanticide (homicide of infants under 1 year of age)	[3](174)	[3](154)	[3](149)	[3](0.1)	[3](0.1)	[3](0.1)
166	Homicide by firearms	4,922	4,966	4,029	5.4	5.5	5.1
167	Homicide by cutting or piercing instruments	1,981	2,159	1,857	1.4	1.5	1.4
168	Homicide by other means	1,652	1,659	1,546	1.2	1.2	1.2
169-195	Accidental deaths	99,579	98,033	95,918	69.4	70.1	72.7
169	Railway accidents (except collisions with motor vehicles)	2,665	2,937	3,320	1.9	2.1	2.5
170	Motor-vehicle accidents	32,697	33,411	28,076	22.8	23.9	21.3
	(a) Collisions between automobiles and trains	1,736	1,705	1,705	1.2	1.2	1.3
	(b) Collisions between automobiles and streetcars	102	174	163	0.1	0.1	0.1
	(c) Automobile accidents (except collisions with trains or streetcars)	30,074	30,827	25,672	21.0	22.0	19.4
	(d) Motorcycle accidents (except collisions with automobiles)	785	707	538	0.5	0.5	0.4
171	Streetcar and other road-transport accidents	597	734	836	0.4	0.5	0.6
	(a) Streetcar accidents (except collisions with trains or motor vehicles)	422	544	618	0.3	0.4	0.5
	(b) Other and unspecified road-transport accidents	175	190	218	0.1	0.1	0.2
172	Water-transport accidents	1,244	1,056	1,021	0.9	0.8	0.8
173	Air-transport accidents	2,013	1,851	3,552	1.4	1.3	2.7
174	Accidents in mines and quarries	1,509	1,278	1,352	1.1	0.9	1.0
175	Agricultural and forestry accidents	2,287	2,455	2,416	1.6	1.8	1.8
	(a) Accidents involving agricultural machinery and vehicles	914	970	1,006	0.6	0.7	0.8
	(b) Injury by animals, in agriculture	278	297	326	0.2	0.2	0.2
	(c) Other agricultural accidents	666	780	809	0.5	0.6	0.6
	(d) Accidents involving forestry machinery and vehicles	62	69	40	0.0	0.0	0.0
	(e) Other forestry accidents	367	337	235	0.3	0.2	0.2
176	Other accidents involving machinery	1,208	1,173	1,225	0.8	0.8	0.9
177	Food poisoning	318	369	459	0.2	0.3	0.3
178	Accidental absorption of poisonous gas	1,958	1,874	2,131	1.4	1.3	1.6
	(A) Utility gas	1,009	1,043	1,273	0.7	0.7	1.0
	(B) Motor-vehicle exhaust gas	285	236	205	0.2	0.2	0.2
	(C) Other carbon monoxide gas	354	354	393	0.2	0.3	0.3
	(X) Other poisonous gases	290	241	260	0.2	0.2	0.2
179	Acute accidental poisoning by solids or liquids	1,504	1,586	1,532	1.0	1.1	1.2
	(A) Arsenic and compounds	48	63	58	0.0	0.0	0.0
	(B) Barbituric acid and derivatives	418	436	392	0.3	0.3	0.3

[3]Included in figures for homicide.

	(X) Other and unspecified substances	670	670	658	0.5	0.5	0.5
180	Conflagration	3,515	3,017	2,914	2.3	2.2	2.2
181	Accidental burns (except conflagration)	4,685	4,856	5,105	3.3	3.5	3.9
182	Accidental mechanical suffocation	1,930	1,605	1,483	1.3	1.1	1.1
183	Accidental drowning	5,737	5,577	5,676	4.0	4.0	4.3
184	Accidental injury by firearms	2,386	2,816	2,454	1.7	2.0	1.9
185	Accidental injury by cutting or piercing instruments	285	317	329	0.2	0.2	0.2
186	Accidental injury by fall or crushing	24,397	23,028	23,818	17.0	16.5	18.0
	(a) Fall	23,961	22,581	23,333	16.7	16.1	17.7
	(b) Crushing	436	447	485	0.3	0.3	0.4
187	Cataclysm (all deaths attributed to a cataclysm, regardless of their nature)	393	148	300	0.3	0.1	0.2
188	Injury by animals (not specified as venomous or occurring in the course of agricultural and forestry operations)	113	142	152	0.1	0.1	0.1
189	Hunger or thirst	26	27	29	0.0	0.0	0.0
190	Excessive cold	270	193	277	0.2	0.1	0.2
191	Excessive heat	540	182	265	0.4	0.1	0.2
192	Lightning	338	231	268	0.2	0.2	0.2
193	Accidents due to electric currents (except lightning)	867	725	620	0.6	0.5	0.5
194	Poisoning by venomous animals (not occurring in the course of agricultural and forestry operations)	64	62	50	0.0	0.0	0.0
195	Other accidents	6,255	6,441	6,258	4.4	4.6	4.7
	(a) Sequelae of preventive immunization, inoculation, or vaccination	16	19	14	0.0	0.0	0.0
	(b) Other accidents due to medical or surgical intervention	44	47	50	0.0	0.0	0.0
	(c) Lack of care of the newborn	29	46	22	0.0	0.0	0.0
	(d) Obstruction, suffocation, or puncture by ingested objects	1,203	1,076	897	0.8	0.8	0.7
	(e) Other and unspecified accidents	4,960	5,253	5,275	3.5	3.9	4.0
196	Deaths of military personnel during operations of war	-	20	176	0	0.0	0.1
197	Deaths of civilians due to operations of war	-	1	9	0	0.0	0.0
198	Legal executions	153	129	135	0.1	0.1	0.1
	XVIII.— Ill-defined and unknown causes	17,850	17,580	18,166	12.4	12.6	13.3
199	Sudden death	1,149	1,055	1,352	0.8	0.8	1.0
200	Ill-defined and unknown causes	16,701	16,525	16,814	11.6	11.8	12.7
	(a) Ill-defined	7,511	6,931	6,909	5.2	5.0	5.2
	(b) Found dead (cause unknown)	694	693	777	0.5	0.5	0.6
	(c) Unknown or unspecified cause	8,496	8,901	9,128	5.9	6.4	6.9

In the United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY, A CALIFORNIA CORPORATION, PLAINTIFF

v.

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR; J. HOWARD MCGRATH, ATTORNEY GENERAL; PAUL B. DUNBAR, COMMISSIONER OF FOOD AND DRUGS; CHARLES W. CRAWFORD, ASSOCIATE COMMISSIONER OF FOOD AND DRUGS; GEORGE P. LARRICK, ASSISTANT COMMISSIONER OF FOOD AND DRUGS; AND LOUIS D. ELLIOTT, ASSISTANT COMMISSIONER OF FOOD AND DRUGS, DEFENDANTS

STATEMENT AS TO JURISDICTION

The defendants-appellants, having this day presented their petition for appeal, now pursuant to United States Supreme Court Rule 12, paragraph 1, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question, and should exercise such jurisdiction in this case.

OPINION BELOW

The district court delivered no written opinion or discussion of the case, but did make certain findings of fact and conclusions of law in connection with the entry of the decree in question. Copies

of these findings and conclusions, and of the final decree herein, are attached to this jurisdictional statement.

JURISDICTION

The appeal herein is from a final decree made and entered by a United States District Court for the District of Columbia specially constituted under 28 U. S. C. 2282 and 2284 upon the plaintiff's application for an interlocutory and permanent injunction to restrain the enforcement, operation, or execution of an Act of Congress, to wit, a part of Section 304(a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1044, 21 U. S. C. 334(a), for repugnance to the due process clause of the Fifth Amendment to the Constitution of the United States.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U. S. C. 1253 and 2101(a). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Phillips* v. *United States*, 312 U. S. 246; and *California Water Service* v. *Redding*, 304 U. S. 252.

The final decree appealed from was made and entered on December 14, 1949.

The application for appeal was presented on January 9, 1950.

QUESTIONS PRESENTED

Section 304(a) of the Federal Food, Drug and Cosmetic Act permits more than one libel against different articles similarly misbranded "when the Administrator has probable cause to believe from facts found, without hearing, * * * that the

misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." The principal questions presented are:

(1) Whether the above provision is unconstitutional because the Administrator may act without holding a hearing prior to authorizing the judicial proceeding.

(2) Whether the District Court lacked jurisdiction to review the Administrator's determination of probable cause, or to determine, in advance of the libel proceedings, whether the appellee's labeling is misleading.

(3) If these questions are not both answered in favor of the appellants, the additional questions raised in the assignment of errors will also be presented. These include (a) whether the District Court erred in holding that the action of the administrative officials was without reasonable basis, and (b) whether the District Court seriously erred in excluding evidence offered by the Government and improperly admitting evidence, sometimes of the same type, offered by the plaintiff.

STATUTE INVOLVED

The statute of the United States that is involved is the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 *et seq.* The particular section of that Act involved is Section 304(a), 52 Stat. 1044, 21 U. S. C. 334(a), which provides in pertinent part as follows:

> (a) Any article of . . . drug . . . that is . . . misbranded when introduced into or while in interstate commerce . . . shall be

liable to be proceeded against . . . on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that *such limitations shall not apply* (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceedings under this Act, or (2) *when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency* that the misbranded article is dangerous to health, or *that the labeling of the misbranded article* is fraudulent, or *would be in a material respect misleading to the injury or damage of the purchaser or consumer.* * * * (Italics ours.)

The District Court held that the italicized portion of the statute is unconstitutional under the due process clause of the Fifth Amendment to the Constitution.

STATEMENT

Mytinger & Casselberry, Inc., is the exclusive national distributor of "Nutrilite Food Supplement", an encapsulated concentrate of alfalfa, watercress, and parsley fortified with synthetic vitamins and sold in a combination package with mineral tablets. The labeling consists in part of various editions of a booklet entitled "How to Get Well and Stay Well", a carefully conceived writ-

ing that is used by salesmen in soliciting contracts calling for delivery of a year's supply of Nutrilite, which costs approximately $200 per year payable in monthly installments.

An edition of the booklet in use until May 1948 was the basis for an indictment returned in the Southern District of California against Mytinger & Casselberry, a partnership, and Lee S. Mytinger and William S. Casselberry, charging a deliberate offense against the Federal Food, Drug, and Cosmetic Act. The booklet was revised during the investigation which preceded the indictment, and the 58 page booklet, involved in the present case, was the result.

On September 28, 1948, the defendant Charles W. Crawford, Associate Commissioner of Food and Drugs, recommended that a seizure case be instituted against a shipment of "Nutrilite Food Supplement" found in Belleville, New Jersey. The action was filed on October 6, 1948, upon a libel that alleged that the drug was misbranded when introduced into interstate commerce because of false labeling representations as to its therapeutic effect. The statements on which the charge of misbranding was based were taken from pages 37-58 of the booklet.

On September 30, another seizure recommendation came before Mr. Crawford in the regular course of business based upon the same alleged misbranding. With the papers was a finding of fact in writing signed by Robert C. Rutz, a medical officer of the Food and Drug Administration, dated September 30, 1948 which stated that "Nutrilite Food Supplement" when taken as directed would not be effective in the treatment of a number of symptoms and conditions that were enumerated.

Mr. Crawford, after considering the finding which advised him of the medical facts, and after considering the 58-page booklet (more particularly pages 37-58) which was a part of the labeling, concluded that there was probable cause to believe and that he did believe that the labeling of the drug would be in a material respect misleading to the injury or damage of the purchaser or consumer. His action was taken in accordance with 21 U. S. C. 334(a), and thereafter 3 additional libel suits were recommended on behalf of the Federal Security Agency and were filed by the appropriate United States Attorneys.

Subsequent revisions of the booklet came before defendants Larrick and Dunbar, and similar determinations of probable cause were made on December 2 and 9. Libel suits were filed on the basis of these determinations.

This suit was filed on December 30, 1948. On January 24, 1949, Judge David A. Pine of the United States District Court for the District of Columbia, questioned the authority of Defendants Crawford, Larrick, and Dunbar, as delegatees, to make the probable cause determinations. The defendants were given an opportunity to present the matter to the Federal Security Administrator, and on January 28, 1949, Acting Administrator J. Donald Kingsley made the same determinations. The motion to dismiss was renewed, and Judge Pine granted it on March 3, 1948.

An amended complaint was filed the same day. It alleged that the multiple seizure provisions of 21 U. S. C. 334(a) were unconstitutional under the due process clause of the Fifth Amendment in failing to provide for a hearing prior to the determination of probable cause (Par. 18(e)). Arbi-

trary and capricious action on the part of the defendants in the administration of the Federal Food, Drug, and Cosmetic Act also was alleged (Par. 9, 11, 12, 15, 18(d), 13, 14, 16, 18, 19, 20, 21, 22 and 26).

Application was made for a three-judge statutory court. District Judge Edward A. Tamm granted a temporary restraining order on March 4, 1949. After a hearing on defendants' motion to dismiss, the three-judge court granted a temporary injunction on April 6, 1949, without hearing evidence and without making findings of fact.

Defendants answered, challenging the Court's jurisdiction to try the issue whether plaintiff's labeling was materially misleading and alleging that they had acted pursuant to 21 U. S. C. 334(a).

A petition for writs of prohibition and/or mandamus was filed in the Supreme Court on the ground that the district court was acting in excess of its jurisdiction in undertaking a trial *de novo* on the issue whether the plaintiff's labeling was materially misleading. The petition was denied on May 16, 1949. No. 597 Misc., October Term, 1948. 337 U. S. 902.

The case was tried in October, 1949, on two issues: (1) the constitutionality of the provision of Section 304(a) of the Federal Food, Drug, and Cosmetic Act under which the defendants made their administrative determinations, and (2) whether the defendants acted arbitrarily, unlawfully, oppressively and capriciously in making the determinations without affording the plaintiff a preliminary administrative hearing.

The Court found that Nutrilite is not harmful *per se* (Finding 5), that the administrative determinations of probable cause were made *ex parte* (Findings 17, 23, 29, 30 and 35), that no separate issues of fact or law, and no public emergency,

necessitated more than one libel suit (Findings 22, 42), and that damage, through loss of potential sales and costs of litigation, followed the filing of the suits.[1] The Court concluded that the portion of section 304(a) of the Federal Food, Drug, and Cosmetic Act, referred to above, was unconstitutional and that defendants should be permanently enjoined from enforcing it against plaintiff (Concl. 1).

THE QUESTIONS ARE SUBSTANTIAL

A. *The Constitutional Question*

The District Court has held unconstitutional that part of Section 304(a) which permits the Administrator to recommend the institution of multiple seizure suits, i.e., civil actions for condemnation against more than one shipment of a drug, each shipment alleged to be misbranded in the same way, when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the labeling of the misbranded drug would be in a material respect misleading to the injury of the purchaser or consumer. The provision was held to be repugnant to the due process clause of the Fifth Amendment because of its failure to provide the

[1] Other findings were made as to the arbitrary and capricious action of the defendants (Findings 9, 12(e) and (f), 13-18, 21-22, 24, 26, 29-32, 35, 38-43) and the good faith of the plaintiff (Findings 8-10, 12-13, 19-20). No conclusion of law followed these findings, but the Court did conclude that the defendants acted arbitrarily, oppressively, and capriciously in instituting multiple libel proceedings without first affording the plaintiff a hearing on the issue whether there was probable cause to believe that the labeling was misleading in a material respect (Concl. 4). Since these findings and the conclusions do not bear upon the Supreme Court's jurisdiction to review this case on direct appeal they will not be discussed further here. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171.

shipper an opportunity for a preliminary hearing before the Administrator prior to the administrative "probable cause" decision.

The express language of Section 304(a) clearly excludes a preliminary administrative hearing, and we respectfully submit that the section does not contravene the due process clause of the Fifth Amendment. If the provision of the statute which imposes conditions upon the bringing of more than one action based upon the same alleged misbranding, were not in the law, a shipper of an article made offensive and illicit because of misbranding who forwarded his drug into many parts of the United States would have no right to complain that his product was being proceeded against in each jurisdiction where found. A person who has violated the same law in different transactions in 16 jurisdictions, and has been prosecuted in each jurisdiction for his transgression, has no constitutional right to insist that no more than one prosecution be brought. And a claimant of seized merchandise would have no immunity from all but one seizure. The restrictions upon multiple actions found in Section 304(a) were not devised to take from the citizen any rights he had had. Rather, Congress imposed a limitation upon administrative action to stay the hand of enforcement in specific cases.

The determination of probable cause, authorized by Section 304(a), is preliminary in nature as a predicate to the institution of multiple law suits. After institution the claimant may defend each action or may consolidate them for a single defense. 21 U. S. C. 334(b). In such defense, he is entitled to a complete trial on the merits of the Government's claimed right to condemnation. But Congress provided that no hearing be held in connec-

tion with the probable cause determination in order to make possible the prompt application of the Act against fraudulent articles, dangerous articles, and seriously misleading articles. The provision in question was an attempt to strike a balance of interests in protection of both the consuming public and shippers of commodities.

While the Constitution may require a hearing by an administrative agency when an issue is committed to administrative adjudication rather than to judicial determination, it obviously does not require an administrative hearing as a prerequisite to an administrative agency's right to report facts to prosecuting officials for trial and determination in a district court. The Constitution does not require that those functions of Government that traditionally have been conducted as investigative and reporting activities preliminary to a law suit must be conducted by judicial methods.

In considering the due process contention it is appropriate to inquire as to the nature of the "property" that is being taken as a result of the administrative determination of probable cause. Cf. *Federal Communications Commission* v. *W. J. R., The Goodwill Station*, 337 U. S. 265. The determination does not have the effect of finally adjudicating the character of the drug. The drug can be condemned only after a complete trial at which the claimant may present witnesses and arguments to show that the article is not misbranded.

The District Court apparently has held that whenever the property of a person is temporarily taken into custody of law pursuant to judicial process, a denial of due process results unless such

individual has had an opportunity to be heard before administrative officials prior to such deprivation. It is clear that this theory, if applicable in a case of property, should likewise be applicable with even greater force in a case where the liberty of an individual is at stake. But an indictment returned by a grand jury, which does not grant the defendant a hearing, or indeed any notice of its proceedings, and the subsequent commitment of the accused pending trial are not violative of the due process clause. The Supreme Court has held that an indictment, fair on its face, returned by a regularly constituted grand jury *conclusively* determines the existence of probable cause for the purpose of holding the accused to answer. *Ex parte United States*, 287 U. S. 241.

The analogy to the case at bar is clear. The accused in a criminal proceeding has the opportunity to vindicate himself at trial. So, too, here the drug may be vindicated at trial, but due process does not require that a prospective claimant be given notice and opportunity to be heard by the Administrator before the Administrator determines that probable cause exists and recommends multiple seizures.

B. *The District Court Was Without Jurisdiction to Review the Probable Cause Determinations or to Try the Issue Whether Plaintiff's Labeling Was Misleading*

By Section 304(a), Congress has established a procedure for the protection of the consumer against misleading as well as dangerous labeling through multiple libel actions which may be instituted upon an administrative determination of

probable cause. The claimant is protected against harassment by his right to consolidate the cases for a single trial in any of the districts he may select. Section 304(b), 21 U. S. C. 334(b). The history of the statute set forth below shows[2] that

[2] Under the Federal Food and Drugs Act of 1906, 34 Stat. 771, goods that were adulterated or misbranded were subject to seizure wherever found, and multiple seizures regularly were made. The Act of 1906 was revised comprehensively in 1938. Bills originally proposed provided for executive seizures of articles "dangerous to health" (S. 2000, Sec. 16(a), and S. 2800, Sec. 16(a), 73rd Cong., 2d Sess. Dunn, *Federal Food, Drug, and Cosmetic Act* (1938) 61, 81, 102) and placed no limitation on the number of libel actions. This was subsequently redrafted to allow the United States district courts to restrain a multiplicity of seizures in specified cases. See S. 2800, Section 19(c), *Dunn*, p. 105. The Senate at one time accepted an amendment prohibiting multiple seizures except after a judicial show-cause order proceeding. S. Rep. 361, 74th Cong., 1st Sess., Part 2, p. 11, *Dunn*, pp. 263, 389, 399, 468-469. A later draft eliminated the provision for executive seizures, and authorized multiple libel actions in case of misbranding when the Secretary had probable cause to believe from facts found by him that the article was so misbranded as to render it imminently dangerous as to health or when the alleged misbranding had been the subject of a prior judgment. *Dunn*, pp. 505-506.

Three further changes were made, all pertinent here. A provision was added authorizing multiple seizure in cases where the Secretary had probable cause to believe that the misbranding was in a material respect false, misleading or fraudulent. *Dunn*, pp. 546, 558. The House Committee Report (H. Rept. 2755; 74th Cong., 2d Sess., *Dunn*, pp. 550, 558) stated:

> "There are two substantive changes made by this committee. One is that multiple seizures would be permitted in cases where the Secretary has probable cause to believe that the misbranding is in a material respect false, misleading, or fraudulent. This will permit protection of the public against such nostrums as a brew of weeds labeled as a treatment for diabetes and against innumerable other cheats and frauds which at best rob the consumer's pocketbook, and at worst rob him of health or life through his mistaken reliance upon them while his disease progresses unchecked. With this change the seizure section will continue to function as a 'means of arresting the bullet in flight before it claims its victim,' although the administrative agency will have materially

these provisions were very carefully considered, and that Congress eliminated a provision which would have allowed the courts to restrain multiple seizures.

That the district court lacked jurisdiction to substitute itself for the Administrator by trying *de novo* the issue of misleading labeling or to review the Administrator's preliminary determination of probale cause appears not only from the general statutory plan, which vests in the libel courts sole authority to hear the merits of the cases, but from other factors as well. Several sections of the Federal Food, Drug and Cosmetic Act authorize judicial review of administrative action. Sections 505(h), 701(f), 21 U. S. C. 355(h) and 371(f). The absence of any such provision with respect to the preliminary finding of probable cause manifests a legislative intent that there be no review of such a finding, much more clearly than in the statute before the Court in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. Furthermore, the finding as to probable cause is obviously preliminary in nature. All it does is to permit the institution of law suits, in which the controversial issues may be submitted to a court. Preliminary orders are not reviewable in an injunction suit when they culminate in further administrative action. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130-131, and cases cited. When the preliminary administrative de-

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less latitude, in making multiple seizures, when it had under the present law for the past 30 years."

The committee eliminated the provision of the Senate bill which gave the district courts jurisdiction to restrain a multiplicity of seizure actions. *Dunn*, pp. 429, 558. And finally the conference committee inserted the words "without hearing" in the provision requiring the Administrator to make a finding as to probable cause. *Dunn*, pp. 974, 992-3.

termination merely has the effect of authorizing the filing of lawsuits, the absence of jurisdiction in any other tribunal to review the administrative finding should be even clearer.

Under Section 304, the administrative finding of probable cause is to be made without hearing, undoubtedly because a hearing would follow immediately in the libel proceeding. But the court below held a hearing *de novo* on the "merits" of the case in order to determine whether the Administrator should have made the preliminary finding. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185; and *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. We submit that this plainly was not within the authority of the district court.

The procedure followed by the district court is not only clearly contrary to the congressional policy embodied in the statute, but is contrary to the public interest which that policy was designed to protect—the safeguarding of the public health and purse against deception. The sanction of multiple actions is essential to arrest the distribution of a dangerous product, a fraudulent product, or a materially misleading product before it has claimed its victims and before irreparable injury is done. Without the sanction, there is no way in which dangerous, fraudulent, or seriously misleading drugs may be removed from the market and held within the custody of law pending a determination of the alleged misbranding. Under the decision of the three-judge court, all persons who distribute seriously misleading drugs throughout the country would have the right to challenge the Government's libel allegations in injunction suits in the District of Columbia whenever the Government thought it

in the public interest to seize more than one shipment of the product. This might well stay the arm of enforcement for months while either the misleading character of the labeling or the "probable cause" issue was in litigation. It was precisely to avoid the evils of such delay that the Administrator was authorized to make the determination of probable cause without hearing. If the court has the right to try the merits of the issue *de novo*, the beneficial effects of the expeditious procedure prescribed for administrative action are nullified; and great public harm can be done through widespread distribution of seriously mislabeled articles before the administrative officials may report the shipments of contraband for the institution of appropriate action.

More is involved here than the rights of the parties litigant. The public has an important stake in the outcome. No means exist to protect the consumer from the consequences of protracted proceedings. The injury to the public is direct in terms of money expended for a materially misbranded drug and in terms of health hazards inherent in experimenting with the drug in the treatment of what may well be serious disorders which require prompt, competent medical attention. This was deemed by Congress to outweigh possible harm to purveyors of drugs through temporary interruption of their business.

C. Other Errors of the Court Below

The defendants have challenged many other rulings of the district court, each of which would be ground for reversal. These relate to (1) the probing of the mental processes of administrative

officials; (2) the scope of the injunction that issued; (3) the findings of arbitrary and capricious action in the administrative process; (4) the finding that the labeling was not misleading; (5) the evidence and findings as to plaintiff's good faith; (6) unreasonable curtailment of defendants' right to cross-examination; (7) the improper admission of evidence in support of the plaintiff's case; and (8) the exclusion of proper evidence offered to support the defendants' case.

Many of these errors are serious and important. Inasmuch, however, as the two major questions already treated are sufficient to dispose of the case, and are clearly substantial, it does not seem necessary to discuss these additional points in this statement. Since this case is one required to be heard by a district court of three judges, the Supreme Court has jurisdiction of the case on appeal, and that jurisdiction extends to every question involved in the case. *Sterling* v. *Constantin*, 287 U. S. 378, 393, 394; *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U. S. 175; and *Horner* v. *United States*, 143 U. S. 570, 576.

CONCLUSION

The question as to the lack of jurisdiction in the court below to determine whether plaintiff's labeling was misleading and to review the administrator's preliminary determination of probable cause was argued before this court on the application for prohibition and mandamus last May. We believe that plaintiff's contentions with respect to that point, as well as on the question of constitutionality, though accepted below, are plainly without merit. We respectfully suggest that this Court may find this case an appropriate one for reversal

without further argument, and dismissal of the complaint. *Securities and Exchange Commission* v. *Otis & Co.*, No. 244, this Term, decided October 17, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JANUARY, 1950

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY, INC., PLAINTIFF

v.

OSCAR R. EWING, ADMINISTRATOR, ET AL., DEFENDANTS

PERMANENT INJUNCTION

This cause came on to be tried upon the issues raised in plaintiff's complaint for a permanent injunction as set forth in the Pre-Trial Order herein. After hearing and considering the evidence presented at the trial and upon the Findings of Fact and Conclusions of Law made and filed herein, it is by this Special Three-Judge Statutory United States District Court for the District of Columbia this 14th day of December, 1949,

Adjudged, ordered and decreed that the defendants, and each of them, their successors in office, their agents, servants, employees, attorneys and all persons in active concert and participation with them be and hereby are permanently enjoined from continuing or causing to be continued the prosecution of any of the libel for condemnation actions now pending against Nutrilite Food Supplement; and it is further

Adjudged, ordered and decreed that the defendants, and each of them, their successors in office, their agents, servants, employees, attorneys, and all persons in active concert and participation with them be and hereby are permanently enjoined from instituting or causing to be instituted any further or additional libel for condemnation actions, or any other actions, against Nutrilite Food Supple-

ment under that part of 21 U. S. C. 334(a) herein held to be unconstitutional to wit: "such limitations shall not apply . . . when the Administrator has probable cause to believe from the facts found, without hearing, by him or any officer or employee of the agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer.

BENNETT C. CLARK,
Circuit Judge.
T. ALAN GOLDSBOROUGH,
District Judge.
EDWARD A. TAMM,
District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY, INC., PLAINTIFF

vs.

OSCAR R. EWING, ADMINISTRATOR, ET AL., DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard before this specially constituted Court of three judges convened pursuant to the provisions of Section 2284, Title 28, U. S. C. Evidence and briefs having been submitted, oral argument of counsel had and the Court being now duly advised in the premises makes the following Findings of Fact and enters the following Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a California corporation, having its principal place of business in the City of Long

Beach, California. Defendant Oscar R. Ewing is the Administrator of the Federal Security Agency; Defendants Paul B. Dunbar, Charles W. Crawford, Louis D. Elliott and George P. Larrick are the Commissioner, Associate Commissioner and Assistant Commissioners, respectively, of the Food and Drug Administration of the Federal Security Agency; and Defendant J. Howard McGrath is the Attorney General of the United States and was substituted as a defendant in place of Tom C. Clark on October 17, 1949. Defendants are all charged by law with the administration and enforcement of the Federal Food, Drug and Cosmetic Act of 1938.

2. This suit arises from administrative action taken by the defendants under that part of Section 304(a) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301, 334(a)) which provides that more than one libel for condemnation proceeding may be brought upon the same alleged misbranding "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the Agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer"; and under Sections 2282 and 2284 of Title 28 of the United States Code, Judiciary and Judicial Procedure, which provides the procedure by which this court was convened to hear an application to restrain the enforcement, operation, or execution of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 et seq.) for repugnance to the United States Constitution. (Complaint, Par. 2; Answer, Third Defense, Par. 2.)

3. The plaintiff is the exclusive national distributor of a food supplement consisting of multiple vitamins and minerals sold under the trade name of "Nutrilite Food Supplement" (hereinafter called Nutrilite) through more than 5,000 distributors throughout the United States.

4. Nutrilite contains certain vitamins and minerals in a balanced proportion and in amounts claimed by some experts in the field as essential in human nutrition, plus extracts from alfalfa, parsley and watercress.

5. Nutrilite contains no substance or material or combination of substances or materials harmful or deleterious in any manner to human users thereof when taken in suggested dosage. No claim has been made by any Federal, State or other governmental agency that Nutrilite is adulterated or harmful in any manner to the health of human users thereof, insofar as the record before the court shows.

6. The label of the package in which Nutrilite was and is sold complies with all requirements of the Food, Drug and Cosmetic Act of 1938.

7. The objection of the defendants to the sale of Nutrilite, which is the basis of this action, is the use by plaintiff of an advertising pamphlet entitled "How to Get Well and Stay Well". Nutrilite is sold directly to users thereof and this pamphlet is used in making about 40% of the initial sales of Nutrilite.

8. The product now sold as Nutrilite was first marketed about 1933; defendants' records show they received information about it in 1939 and had correspondence about it in 1940; plaintiff has been its exclusive national distributor since 1945; defendants received their first copies of the then current edition of the pamphlet "How to Get Well and Stay Well" on December 5, 1946, together with names and addresses of certain of plaintiff's distributors outside of California.

9. In June 1947, the Food and Drug Administration sent plaintiff a notice of a hearing under Section 305 of the Food, Drug and Cosmetic Act of 1938. This notice and hearing are provided for prior to institution of criminal proceedings under the Act and said notice provided that it related

solely to "possible criminal action" and not to action "involving the seizure of the article" in libel cases. At the time of the hearing, July 15, 1947, Nutrilite Products had been in business some 15 years and up to 5 years before the time of said hearing Nutrilite representatives had been bringing Nutrilite labeling to the Los Angeles office of the Food and Drug Administration for comment and there had been no change in the labeling in the preceding five years. Neither the notice nor the statements of the Food and Drug Administration representative at the hearing specified any exact objections to particular language in the then current edition of the pamphlet "How to Get Well and Stay Well", but plaintiff's attorney advised plaintiff he thought he understood the objections of the Food and Drug Administration and he advised the Food and Drug Administration's representative that the pamphlet would be revised to eliminate these objections.

10. Plaintiff's attorney further advised the Food and Drug Administration on October 4, 1947, that the rewriting of plaintiff's pamphlet had commenced promptly and was progressing as rapidly as possible considering the quantity of the material involved and the corrections required by him and that when finally completed he was sure none of the literature of plaintiff would be objectionable to said Administration.

11. There are three editions of the plaintiff's advertising pamphlet, "How to Get Well and Stay Well", which are involved in the libel seizure cases, hereinafter described: the 58-page edition which was used by plaintiff from January 1948 until a few days after the first seizure in October, 1948, and which is identified in the record as plaintiff's Exhibit #1; the 36-page edition consisting of the first 36 pages of the 58-page edition, which was used from the time the 58-page edition was discontinued up to about December 1, 1948, and which is identified in the record as plaintiff's Exhibit #2;

and the 42-page edition consisting of the 36-page edition changed slightly in non-substantial statements plus 6 additional pages, which has been used from about December 1, 1948 up to the time of the trial herein, and which is identified in the record as plaintiff's Exhibit #3.

12. (a) Three editions of the advertising pamphlet "How to Get Well and Stay Well" which are involved in and form the basis of the seizure actions hereinafter described, were written and prepared chiefly by William S. Casselberry, President of the plaintiff corporation. He has an A.B. degree from the University of California and M.A. and Ph.D degrees from Stanford University. Prior to writing "How to Get Well and Stay Well" he read some medical and nutritional literature on the subject of vitamins and minerals. In the preparation of the three pamphlets he relied upon some scientific and medical treatises; surveys made by the medical profession with respect to the use of vitamins and minerals; publications of the Federal Government relating to the amount of vitamins and minerals required in the diet of humans and the efficacy of vitamins and minerals in human nutrition; and the findings and statements made by the Food and Drug Administration with respect to the need for and desirability of vitamins and minerals in the human diet.

(b) The rewriting of the pamphlet required a period of approximately five months. During this period Dr. Casselberry checked the various drafts of the pamphlet with his company's attorney, the chemist who discovered and developed Nutrilite's secret base, and with neighbors to get the reactions of laymen to the pamphlet.

(c) Plaintiff's attorney, who supervised the rewriting, has specialized in the Food and Drug Act field for many years. He has in his library, and has read, a number of books and scientific writings written by medical doctors and others in the field of nutrition, vitamins and minerals. Defendants

have stated that he is an experienced attorney in this field. He has approved the final drafts of each edition of the pamphlet before plaintiff began using them.

(d) The beneficial effects of vitamins and minerals for nutritional deficiencies is a well established medical fact. Many of the statements in the pamphlet about the beneficial effects of particular vitamins and minerals for nutritional deficiencies are confirmed by the admissions of the defendants herein.

(e) The three pamphlets (P.'s Exs. #1, 2 and 3), when read as a whole and fairly interpreted, without lifting statements therein out of context, do no more than represent that Nutrilite is a vitamin-mineral food supplement designed and intended to build up the bodies of human users thereof in order that it may aid nature to help the users enjoy better health through better nutrition. Said pamphlets do not represent to the minds of ordinary, reasonable and prudent persons that all of the symptoms, conditions and diseases of the human body necessarily or generally result from dietary deficiencies alone, or that all of the symptoms, conditions and diseases of the human body can be prevented, cured or treated by the use of Nutrilite, and said pamphlets do not represent, suggest, or imply that Nutrilite is a medicine or drug, or that it is efficacious or beneficial in the prevention, treatment or cure of all diseases.

These pamphlets represent the product only as a food supplement containing vitamins and minerals beneficial to building up health and bodies and in alleviating, in some but not in all instances, symptoms resulting from vitamin and mineral deficiencies in the diet. Purchasers and consumers do not understand from these pamphlets that Nutrilite is a treatment or cure for any disease. The defendants' own survey to determine the impression gained by purchasers and consumers of the representations contained in these pamphlets under customary

conditions of purchase and use reveals that the users interviewed uniformly came to these conclusions and understandings of the statements in the pamphlets.

(f) These three pamphlets when read as a whole are not fraudulent, misleading in a material respect to the injury or damage of the purchaser or consumer, or false or misleading in any particular. Neither Nutrilite nor its labeling has been made the basis of a prior judgment in favor of the United States in any case or proceedings finding it to be misbranded or adulterated, nor do these pamphlets misbrand the product Nutrilite Food Supplement within the intent of the provisions of the Food, Drug and Cosmetic Act of 1938. It is therefore found that the plaintiff has been and is acting in good faith in preparing and using these pamphlets.

13. After the plaintiff's rewriting of the pamphlet, and its publication in January, 1948, plaintiff learned that agents of the Food and Drug Administration were interrogating some of plaintiff's distributors and customers. In order to determine the basis for such interrogations, plaintiff arranged a meeting with representatives of the Food and Drug Administration at the Administration's office in Los Angeles. Plaintiff stated to the Chief of said Administration's office that it wished to comply with every phase of the Food, Drug and Cosmetic Act and asked whether the investigation and interrogations were prompted by a belief that any part of plaintiff's label or labeling in any way violated any provision of said Act. The said Chief advised plaintiff that the investigation and interrogations were merely routine in nature and said Chief made no statement implying or suggesting that the Food and Drug Administration had any objection to the pamphlet "How to Get Well and Stay Well".

Plaintiff further stated to said Chief that should any question arise any time in the future concerning the alleged violation of said Act (misbranding) by any product distributed by plaintiff or in con-

nection with any phase of plaintiff's business or operations, that if the Food and Drug Administration would notify the plaintiff thereof immediately when such question arose, plaintiff would do its utmost to comply with the views of the Food and Drug Administration.

14. On September 15, 1948, a secret indictment was returned in Los Angeles against the plaintiff's two principal stockholders, Lee S. Mytinger and William S. Casselberry, based upon allegations of misbranding of Nutrilite by the edition of the pamphlet "How to Get Well and Stay Well" obtained by defendants on December 5, 1946, products shipped by plaintiffs on January 3, 1947 and February 26, 1947, and which were involved in the notice and hearing thereon in July, 1947. The Federal Judge to whom this indictment was assigned for trial has advised the parties that he considers the trial a waste of Government money due to the discontinuance of the labeling there questioned. This indictment has not yet been set for trial.

15. On October 6, 1948, without prior notice to plaintiffs, the defendants instituted or caused to be instituted and commenced a libel action under which some packages of Nutrilite and some copies of the 58-page pamphlet "How to Get Well and Stay Well" were seized in Belleville, New Jersey. Said libel alleged the misbranding of Nutrilite through the use of pages 37 through 58 of the 58-page edition of said pamphlet.

16. On September 28, 1948, defendant Crawford had authorized said seizure action of October 6, 1948, in Belleville, New Jersey, without reading pages 1 through 36 of this 58-page pamphlet. A reading of pages 1 through 36 of this pamphlet is hereby found to be essential in fairly interpreting pages 37 through 58.

17. On September 30, 1948 defendant Crawford authorized multiple seizures of Nutrilite in an *ex parte* secret decision holding the 58-page pamphlet

would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. This decision was made without reading all of the 58-page pamphlet or re-reading pages 37-58, and it is admitted that defendant Crawford had not read all of the 58-page pamphlet prior to January 28, 1949. When this decision was made he had before him no facts showing injury or damage by Nutrilite or the 58-page pamphlet to any purchaser or consumer of Nutrilite and no facts showing that any user, purchaser or consumer of Nutrilite had made any complaint against the product or the 58-page pamphlet. No notice or copy of this decision was given or disclosed to plaintiff and plaintiff's first knowledge of its existence and contents came on January 17, 1949, when defendants filed a copy thereof in this Court.

Defendant Crawford is not a nutritional expert but claimed he had before him this time (but not on September 28), and relied upon, a so-called finding of fact in writing which purported to be signed by a Dr. Robert C. Butz, an employe of the Food and Drug Administration, and which was dated September 30, 1948. Dr. Butz was not an employe of the Food and Drug Administration at the time of the trial of this cause.

18. (a) Defendants' actions in initiating and carrying out the multiple seizures of Nutrilite are primarily attributed by them to certain findings of fact on plaintiff's pamphlets entitled "How to Get Well and Stay Well" purportedly by Dr. Robert C. Butz, then an employe of the Food and Drug Administration. The defendants who had made said decisions each testified that they had not discussed said findings with Dr. Butz. These findings were offered in evidence by defendants and received for the limited purpose of proving their existence as a part of the decision made by defendant Crawford and the decisions referred to herein as having been made by defendants Larrick, Dunbar and Mr. Kingsley, in holding said pamphlets to be misleading, and not as proof of the facts contained in said

findings. Dr. Butz was not produced as a witness and no evidence was offered that he actually and personally made the findings or that he based them upon plaintiff's product or pamphlets.

(b) The defendants admitted in open Court that they had not contacted Dr. Butz to see if he was available to them as a witness, offered no proof of his unavailability as a witness, and in fact stated defendants *would not* make any effort to obtain him as a witness. After specifically warning Counsel for defendants that these circumstances would cause the Court to draw an unfavorable inference against defendants on the qualifications of Dr. Butz, and defendants' right to rely upon him, the Court admitted into evidence a deposition given by Dr. Butz as an adverse witness, under subpoena, of the plaintiff.

(c) In the deposition he repudiated some of the statements in said findings. The deposition indicated he consulted four medical doctors of the Food and Drug Administration on vitamins and minerals in general, but not on Nutrilite in particular. He had seen no assay or analysis of the contents of Nutrilite. He did not read the 58-page pamphlet in connection with the finding of September 30, 1948, but *relied upon excerpts therefrom.* He did not connect or identify the statements in his findings with any representations in the 58, 36 or 42-page pamphlet.

(d) The four medical doctors employed by the Food and Drug Administration whom Dr. Butz named as his consultants did not testify herein. Defendants have never conducted any experiments to determine the effect of Nutrilite upon deficiency diseases or any other ailment.

(e) From the facts herein, the Court finds that the defendants Crawford, Larrick, Dunbar and Mr. Kingsley, when they made their respective decisions described herein acted arbitrarily, capriciously and unreasonably in placing reliance upon

any of the so-called findings of Dr. Butz, the circumstances under which the findings were prepared, the contents thereof, the knowledge of those making decisions on plaintiff's said pamphlets, their actual reliance upon Dr. Butz, and the other actions of defendants herein which are claimed to be connected with the purported findings of Dr. Butz. It is further found that defendants' failure to produce or to try to produce Dr. Butz as a witness raises an inference that if he had testified in person his testimony would have been adverse to defendants.

19. On October 11, 1948, plaintiff received a copy of the libel papers filed in the Belleville, New Jersey, case on October 6, 1948, and learned therefrom for the first time that defendants were objecting to pages 37 through 58 of the 58-page pamphlet. Plaintiff immediately, on the same day, sent telegrams to all of its top agents throughout the United States instructing them in part as follows:

> "Inform all agents and distributors in your group immediately that pending court ruling pages 37 through 58 inclusive of customer book . . . must not be used in selling Nutrilite. Remove pages 37 to 58 by cutting along fold with sharp knife. Wrap, seal and place disputed material in third party's hands to be held pending final ruling. Books . . . in hands of prospects, junior distributors and customers to be treated in same way. Full explanation will appear with Nutrilite News, but follow above instructions at once."

A bulletin containing a full explanation was then mailed directly to all of plaintiff's agents and distributors to insure that every salesman in plaintiff's organization would get the information on discontinuance of use of pages 37-58 and would follow instructions. This explanation stated that regardless of whether the Food and Drug Administration

is right or wrong, the plaintiff wanted to follow that Administration's views.

20. On October 12, 1948, the plaintiff's attorney advised the Food and Drug Administration in Washington, D. C., by letter, that use of pages 37 through 58 of the 58-page pamphlet had been ordered to be discontinued by all of plaintiff's agents and distributors by said telegram and said bulletin immediately upon receipt of said libel papers. He also advised:

> "In this connection I want to say that the filing of this libel in New Jersey was the first intimation that we had received that any of the literature we are using at present was objectionable to your office. In the future I will appreciate it if you will advise me if you find anything in our literature that you take exceptions to. Mytinger and Casselberry are a reputable firm, and are desirous of co-operating with your Agency in every way possible. I need not point out that the offense of 'misbranding' is not a well defined one in the light of present day scientific knowledge, and it is very easy for a firm in the nutritional supplement field to make statements in the best of faith which do not 'square' with the views of your office. In this case a letter from your Agency pointing out your objections would bring a correction without the necessity of court action.
>
> * * * * * *
>
> "With mutual cooperation, I believe that much trouble and expense can be saved for all parties concerned."

This letter and the facts set forth in paragraph 19 hereof show plaintiff was, in good faith, trying to comply with defendants' interpretations of the Food, Drug and Cosmetic Act of 1938.

21. On October 19, 1948, after failing to answer this said letter of October 12, 1948, the defendants made a second similar seizure in New York City.

22. The libel papers in this said second seizure action and the libel papers in the eight additional seizure actions described hereinafter contain statements which are in substance identical. There are no separate issues of fact or law necessitating more than one such action, as a decision in the first libel action would settle all said issues with respect to the alleged misbranding of Nutrilite by the use of the three editions of the pamphlet "How to Get Well and Stay Well." These libel seizure actions having been instituted in widely separated jurisdictions in the United States inflicted unnecessary punishment and expense on the plaintiff.

23. The October 19, 1948 seizure and the ten other seizures hereinafter found to have been made and instituted against plaintiff's product Nutrilite, were made under the provisions of Section 334(a) of Title 21 of the United States Code which permits multiple libel seizure actions based upon the same alleged misbranding "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the agency . . . that the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer."

24. On approximately October 18, 1948, plaintiff agreed to the request of the Government that the indictment matter in California be continued to December 5, 1948, upon plaintiff's understanding that the defendants contemplated making no more seizures. However, other seizures were made thereafter.

25. On October 28, 1948, the third said similar seizure was made in Buffalo, New York.

26. In November, 1948, plaintiff requested defendants to agree to consolidation and trial in the United States District Court in Los Angeles, within 25 miles of plaintiff's principal place of business in Long Beach, of the said three libel seizures which

had then been filed. Defendants refused said request and informed plaintiff that they would agree to consolidation for trial of the three cases in Phoenix, Arizona, or in San Francisco, California, only. Defendants at the same time advised the plaintiff that they had already approved further seizures and did not promise to withhold said seizures if the first three were consolidated for trial.

27. After plaintiff and its agents and distributors had removed the pages objected to in the first libel action, the remaining 36 pages of the 58-page edition of "How to Get Well and Stay Well" were used for a short period while an epilogue was being written to complete said booklet. This 36-page edition is identical with the first 36 pages of the 58-page edition of said pamphlet which Defendant Crawford had before him in making his decision of September 30, 1948. Subsequently, 6 pages were added to the said 36-page booklet which did not alter or enlarge the sense and meaning of the first 36 pages. The addition of these pages resulted in the so-called 42-page edition of "How to Get Well and Stay Well" which has been used by plaintiff since approximately December 1, 1948.

28. On December 1, 1948, the fourth said similar seizure was made in Hastings, Nebraska.

29. On December 2, 1948, the defendant Larrick made an *ex parte* decision holding that the 36-page edition of the pamphlet "How to Get Well and Stay Well" would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. Defendant Larrick at the time of his December 2, 1948 decision, knew that defendant Crawford, in his decision of September 30, 1948, had these 36 pages before him and that defendant Crawford had not found these 36 pages to be objectionable and that said 36 pages of the said 58-page pamphlet were identical with the 36-page pamphlet before him. He knew of the communication from plaintiff's attorney requesting

an opportunity to comply with future objections, as described in paragraph 13 hereof. He had no facts before him at the time of his decision showing that Nutrilite or any of its labeling, including the 36-page pamphlet, had damaged or injured any purchaser or consumer. He is not a nutritional expert and claimed that he relied on a so-called finding of fact purportedly made by Dr. Robert C. Butz, referred to in paragraph 18 hereof and "accepted Dr. Butz' conclusions as to the misleading character of the statements in it". Said decision of defendant Larrick was not disclosed to plaintiff until Jan. 17, 1949, when a copy thereof was filed in the instant case. The findings in said paragraph 18 as to Dr. Butz and defendant Larrick apply here.

30. On December 9, 1948, defendant Dunbar made an *ex parte* decision holding that the 42-page edition of plaintiff's pamphlet "How to Get Well and Stay Well" would be and is misleading in a material respect to the injury or damage of the purchaser or consumer. This matter was brought to him for decision by a Mr. Murray, an employe of the Food and Drug Administration and author of a memorandum indicating that the defendants planned to "keep the pressure" on plaintiff. Mr. Murray informed defendant Dunbar that he (Murray) was considering a number of seizure recommendations against Nutrilite based on the labeling contained in the 42-page pamphlet. Defendant Dunbar read only certain unidentified parts of the pamphlet pointed out to him by Mr. Murray before making his decision that the pamphlet was misleading and relied on oral statements made to him by Mr. Murray. He had before him at the time of his decision no facts showing damage or injury to any purchaser or consumer by Nutrilite or any of plaintiff's labeling, and had not seen nor heard of any complaints that Nutrilite or its labeling had injured or damaged any person. He did not consider the report on the defendants' own survey to determine how purchasers and consumers

interpreted this pamphlet, although it was then in his files. He, too, testified that he was not a nutritional expert but claimed he relied upon a finding of fact purportedly made by Dr. Butz and the findings in paragraph 18 hereof on Dr. Butz and defendant Dunbar apply here. This decision of defendant Dunbar was not disclosed to plaintiff until January 17, 1949, when a copy thereof was filed in the instant case.

31. Through the actions of defendants, additional similar seizures of Nutrilite and said pamphlets were then made in the following places:

Belleville, New Jersey	December 15, 1948
Spokane, Washington	December 23, 1948
Seattle, Washington	December 30, 1948
Clarkfield, Minnesota	December 31, 1948
St. Petersburg, Florida	January 4, 1949
Chicago, Illinois	January 3 & 4, 1949

Finding 22 hereof covers the similarity of issues in these cases. These seizures were made after defendants had made a survey to determine whether plaintiff's said pamphlets were misleading in any particular to consumers and purchasers thereof under customary conditions of purchase and use and after said survey had revealed that said pamphlets were not in fact misleading in any particular to purchasers and consumers.

32. (a) On December 30, 1948, the instant injunction action was filed. At this time it was the intention and plan of the defendants to file many more libel seizure actions and seize Nutrilite throughout the Nation. The Food and Drug inspectors knew of this general policy.

(b) It was the plan of defendants to keep a sustained pressure against plaintiff through such seizures until an injunction was granted in the instant action or the indictment case in California based upon the discontinued literature went to trial. This plan of defendants is set forth in writing in a memorandum written by A. G. Murray, an

administrative officer of the Food and Drug Administration, and addressed to the Division of Field Operations of the Food and Drug Administration. It was not denied that Mr. Murray was and is under the control of the defendants and that he was present in Court. No effort was made by the defendants to call Mr. Murray and explain the circumstances under which the memorandum was written and used. Defendant Larrick admitted that said memorandum was an accurate statement of defendants' policy in regard to plaintiff, and that said memorandum was circularized in the offices of the Food and Drug Administration and created a general impression in said offices highly prejudicial to plaintiff. The Court presumes, from defendants' refusal to call Mr. Murray as a witness, that his testimony, not only in regard to the contents and use of said memorandum, but also in regard to the seizure recommendations presented to defendant Dunbar by him, would have been adverse to the defendants.

(e) Defendants made no effort to secure an early trial in the libel cases and in order to effect seizures more quickly, mimeographed copies of the booklets "How to Get Well and Stay Well" were prepared for transmission to United States Attorneys.

33. On January 17, 1949, defendants filed in the United States District Court for the District of Columbia a motion to dismiss the complaint herein.

34. On January 24, 1949, Judge David A. Pine of the United States District Court for the District of Columbia found that the actions of the defendants in rendering said decisions were "unfair", "drastic", "shocking", and "harsh" and held that the decisions of defendants Crawford, Larrick and Dunbar, described *supra*, were unlawful because the Administrator of the Federal Security Agency did not have the authority to delegate this power to make such decisions to said defendants.

35. (a) On January 28, 1949, at the request of defendant Dunbar, the Acting Administrator of

the Federal Security Agency, J. Donald Kingsley, made three decisions identical in language with the three decisions of defendants Crawford, Larrick and Dunbar, *supra*, (paragraphs 17, 29 and 30) respectively. He is not a nutritional expert but claimed he relied upon three so-called findings purportedly made by Dr. Robert C. Butz.

(b) Kingsley did not talk to Dr. Butz or identify the Butz findings contained in defendants' Ex. No. 23 as those upon which he (Kingsley) relied in connection with any particular one of his three decisions. He is uncertain as to which version or versions of the pamphlet he had before him, and did not read all three pamphlets before making his decision condemning all three as misleading in a material respect to the injury or damage of the purchaser or consumer. Kingsley did not consider the defendants' own investigation and report thereon in his files showing that consumers and purchasers did not receive a misleading impression from reading plaintiff's pamphlets.

(c) Kingsley had no facts before him showing injury or damage to any purchaser or consumer of Nutrilite by the product or its labeling, and had no facts before him showing any complaints of injury or damage from Nutrilite or its labeling.

(d) Kingsley, as Acting Administrator of the Federal Security Agency, twice refused requests of plaintiff that he grant it a hearing prior to making a decision on whether Nutrilite was misbranded by said labeling, the three editions of the pamphlet "How to Get Well and Stay Well". Said requests advised him that if officials of the Food and Drug Administration asked him to make a decision that plaintiff's advertising and labeling were misleading in a material respect to the injury or damage of the purchasers or consumers of Nutrilite, plaintiff could present him with the full and true facts showing that the labeling of Nutrilite was not misleading in any respect. He was advised by plaintiff that the consequences of an erroneous decision on

this matter by him would be that plaintiff would be put out of business completely and irreparably damaged by the multiple seizures so authorized and threatened by defendants prior to any possible opportunity plaintiff might have to defend itself against said decision. He twice denied this request for a hearing prior to his decisions, talked only to his own counsel and to defendants Dunbar and Crawford about the decision of Judge Pine, and made an *ex parte* decision that plaintiff's labeling is misleading. The findings in paragraph 18 hereof on Dr. Butz and Mr. Kingsley apply here.

(e) Defendants did not produce Kingsley as a witness or prove that he was unavailable to them as a witness, and his deposition is incomplete. Counsel states therein that the deposition is to be completed at a later date when certain records, which defendants refused to produce at the time of the taking of the deposition, were made available under Court order. The order was made but the deposition was not completed. Defendants' failure to produce Kingsley as a witness, or to prove his unavailability to them as a witness, warrants an inference that if he had testified his testimony would have been adverse to defendants.

36. On March 3, 1948, Judge David A. Pine granted a motion to dismiss plaintiff's complaint with leave to amend and the Amended Complaint, which is before this Special Three-Judge Court, was then filed. A temporary restraining order was then signed enjoining defendants from making any further seizures of Nutrilite *pendente lite*.

37. On April 5, 1949, plaintiff filed a motion in the Federal District Court in Newark, New Jersey, to consolidate the ten libel actions for trial in Los Angeles, California, which motion defendants opposed. Said motion was argued on Monday, September 19, 1949, at which time it was the defendants' general position that the defendants did not want the libel issues tried in Federal Court in Los Angeles. Three days later, on Thursday, September 22, 1949, however, the defendants filed an in-

junction action in the very Federal Court in Los Angeles involving identical issues insofar as plaintiff's pamphlet "How to Get Well and Stay Well" is concerned. The defendants' action herein was deliberate and arbitrary to increase the plaintiff's irreparable damage. Defendants knew that plaintiff could consolidate all such actions and that the only accomplishment of the filing of the numerous seizure actions would be the irreparable injuries set forth in finding 39 herein.

38. The defendants have caused embargoes to be instituted and placed on Nutrilite prior to the institution of libel for condemnation proceedings in New York, New Jersey, Washington State, Florida, and various localities in the United States by requests to State and local health authorities, which embargoes naturally frightened agents, distributors and customers of Nutrilite and had very much the same damaging and injurious effect as the seizures. These embargoes obtained in widely scattered jurisdictions of the United States caused maximum and irreparable injury to plaintiff.

39. The seizure actions caused plaintiff a sales loss of some $100,000 per month from the time of the first seizure until the instant action was filed, and the defendants were restrained from making further seizures. The seizures had the effect of frightening plaintiff's agents and distributors, so that they worked less, and some resigned, with the net result of loss of morale among agents and distributors, loss in sales volume and loss of personnel. Unfavorable opinions and injurious information with respect to the labeling of plaintiff's product reached many private individuals and organizations. Publicity about the seizure cases initiated by defendants appeared in newspapers and magazines in a way which did injuriously damage plaintiff and this led to loss of customers. Plaintiff was compelled to hire counsel in the ten libel cases and put up bonds and costs in each case. The value of the Nutrilite seized by defendants in the ten libel

actions is $6,822.17 and the product so seized will be unsaleable if returned to plaintiff. The nature of plaintiff's business makes good-will of the public one of its most valuable assets and the acts of the defendants in the embargoes and seizure actions in widely separated parts of the United States has caused the plaintiffs injury and damage. Defendants admit injury to plaintiff and that there has been a serious impact on plaintiff's rights by their actions, and that there is no provision of law requiring or permitting defendants to reimburse plaintiff for the damages herein found or for the injury or for destruction of its business and good-will by the actions of the defendants, in the event of a determination of said libel actions in favor of plaintiff. The injury and damage to plaintiff which has occurred and which is threatened by defendants is therefore substantial and irreparable.

40. The defendants have never advised plaintiff of the particulars of plaintiff's literature considered to be objectionable by defendants. The defendants have not provided an opportunity to plaintiff whereby such literature could be corrected, revised and amended in a manner which would conform to the views of and be acceptable to the defendants.

41. That plaintiff would have been subjected to many additional seizures of its product throughout the United States in addition to the existing 11 seizures of its product, if not enjoined from so doing, is admitted by defendants. It was a general policy and plan of the defendants to make with all possible speed many seizures of plaintiff's product. Such additional seizures, and the product could be seized by defendants in the hands of more than 5,000 of plaintiff's distributors, would have the effect of destroying plaintiff's business prior to any possible adjudication of the disputed issues on plaintiff's labeling in any of the libel actions already filed or threatened.

42. There was and is no emergency involving injury or damage of any kind to the public or to any purchaser, consumer or user of Nutrilite or in connection with Nutrilite and plaintiff's use of the three pamphlets which constitute defendants' sole objection to Nutrilite's sale. Defendants have not, at any time, indicated or contended that there is an emergency or situation of compelling public necessity with respect to the labeling of plaintiff's product and no such emergency or situation did, in fact, exist at or prior to any of the actions of defendants described herein.

43. The evidence herein on the actions, conduct and course of action of defendants before and after the decisions of Crawford, Larrick, Dunbar and Kingsley described above reveal, as do their decisions and actions in making said decisions, that the defendants in making said decisions acted capriciously, arbitrarily, unreasonably, oppressively and unlawfully.

Conclusions of Law

The Court, upon the basis of the Findings of Fact herein, makes Conclusions of Law as follows:

1. This Court has jurisdiction to hear and determine this case.

2. The following provisions of the Food, Drug and Cosmetic Act of 1938, Section 334, Title 21, United States Code, are unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States: " . . . such limitations shall not apply . . . when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the agency that . . . the labeling of the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer." The defendants should be permanently enjoined from enforcing this unconstitutional provision against plaintiff.

3. The provisions just quoted in the second conclusion hereof were intended by the Congress to be and are hereby found to be separable from the remaining provisions of the said Act and said remaining provisions remain in full force and effect.

4. Defendants Crawford, Larrick, Dunbar, Kingsley and Ewing, in instituting multiple libel proceedings against the product Nutrilite Food Supplement without first affording the plaintiff a hearing on the issue of whether there was probable cause to believe that the labeling of the product was misleading in a material respect, acted arbitrarily, oppressively, and capriciously in violation of the Fifth Amendment to the Constitution.

5. The defendants and all persons acting in concert with them or under their direction, supervision, or control, should be permanently enjoined from instituting or maintaining any action or proceeding raising issues of fact or law that Nutrilite Food Supplement is misbranded under the Food, Drug and Cosmetic Act of 1938, by the plaintiff's pamphlets, Exhibits 1, 2 and 3, herein.

BENNETT C. CLARK,
Circuit Judge.
T. ALAN GOLDSBOROUGH,
District Judge.
EDWARD A. TAMM,
District Judge.

Dated: DECEMBER 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS

v.

MYTINGER & CASSELBERRY, INC., A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The district court delivered no written opinion, but made findings of fact and conclusions of law which are reported in 87 F. Supp. 650 (R. 756-771).

JURISDICTION

The final decree of permanent injunction was entered by the United States District Court for the District of Columbia, specially constituted

under 28 U.S.C. 2282 and 2284, on December 14, 1949 (R. 771). The appeal was allowed on January 9, 1950 (R. 773), and this Court noted probable jurisdiction on February 20, 1950 (R. 1565). This Court has jurisdiction under 28 U.S.C. 1253 and 2101(a) to review the judgment and decree by direct appeal.

The judgment and decree (R. 771) permanently enjoin the enforcement, operation, and execution of a part of Section 304(a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. 334(a), on the ground that it violates the due process clause of the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

Section 304(a) of the Federal Food, Drug, and Cosmetic Act permits multiple libel suits to be filed against a misbranded drug "when the Administrator has probable cause to believe from facts found, without hearing, * * *" that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." The questions presented by this appeal are:

1. Whether this provision violates the due process clause of the Fifth Amendment because it permits the Administrator to find "probable cause" without holding a hearing.

2. Whether the District Court had jurisdiction to review the Administrator's determination of probable cause.

3. Whether the District Court had jurisdiction to decide whether the labeling of appellee's product was misleading.

4. Whether, if the District Court had jurisdiction to determine the issue, the administrative finding of probable cause rested upon a rational basis.

5. Whether, if the District Court had jurisdiction to determine the issue, appellee's labeling was misleading.

6. Whether the District Court committed procedural errors requiring reversal:

(a) in unreasonably curtailing the cross-examination of appellee's witnesses;

(b) in the admission and exclusion of evidence;

(c) in pre-trial rulings that appellee could probe appellants' mental processes and require the production of agency files for its examination without showing "good cause"; and

(d) in ruling that appellee's "good faith" was a material issue.

STATUTE INVOLVED

Section 304 of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U.S.C. 334, provides in pertinent part as follows:

> (a) Any article of * * * drug * * * that is * * * misbranded when introduced into

or while in interstate commerce * * * shall be liable to be proceeded against * * * on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involv-

ing the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States Attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

STATEMENT

Mytinger & Casselberry, Inc., appellee herein, is the exclusive national distributor of "Nutrilite Food Supplement", an encapsulated concentrate of alfalfa, watercress, parsley, and synthetic vitamins combined in a package with mineral tablets

(Pl. Ex. 8, R. 725, 740, 55).[1] The drug[2] is not marketed through customary retail channels, but is sold by salesmen who directly solicit consumer contracts (R. 725, 56, 213-214, 315). These salesmen approach prospective customers with a booklet entitled "How to Get Well and Stay Well", which discusses the relation between vitamins, nutrition, and disease. As part of the sales promotion program, this booklet is left with the prospective purchaser on loan for perusal at his leisure. The salesman calls for the booklet a few days later and undertakes to obtain a contract for delivery of a year's supply of Nutrilite (one box each month) costing approximately $200 a year payable in monthly installments. (R. 315.)

The booklet has been through several revisions, each precipitated by regulatory action on the part of the Food and Drug Administration. An early version (Deft. Ex. 7, R. 1104, 298), in use until May 1948, was the basis for an indictment returned in the Southern District of California charging Lee S. Mytinger and William S. Casselberry, as partners, with deliberately misrepresenting the therapeutic value of Nutrilite, in violation of the Federal Food, Drug, and Cosmetic

[1] Plaintiff's Ex. 8, a box and label of Nutrilite, is on file with the Clerk of this Court.

[2] Although under the statutory definition appellee's product is a drug (Section 201(g), 21 U.S.C. 321(g)), appellee prefers to characterize it as a food. The difference is immaterial, inasmuch as the applicable statutory provisions are identical. Sections 403(a), 502(a), 304, 21 U.S.C. 343(a), 352(a) and 334.

Act.[3] (R. 729, 751). In this version the booklet represented, without qualification, that Nutrilite is an effective therapeutic agent in "almost every case" and is a cure of "common ailments" (R. 1155), which were specifically listed[4] as "low blood pressure, ulcers, mental depression, pyorrhea, muscular twitching, rickets, worry over small things, tonsilitis, hay fever, sensitiveness to noise, underweight, easily tired, gas in stomach, cuts heal slowly, faulty vision, headache, constipation, anemia, boils, lack of ambition, certain bone conditions, nervousness, nosebleed, insomnia (sleeplessness), allergies, asthma, restlessness, bad skin color, poor appetite, biliousness, neuritis, night blindness, migraine, high blood pressure, sinus trouble, lack of concentration, dental caries, irregular heartbeat, flabby tissues, hysterical tendency, eczema, overweight, faulty memory, colitis, craving for sour foods, arthritis (rheumatism), neuralgia, deafness, subject to colds" (R. 1155-1156). At another point (R. 1127), it implied that "cancer, diabetes, heart trouble, high blood pressure, constipation, tuberculosis, arthritis, neuritis" and numerous other

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[3] This case had not been tried. An injunction suit was also brought against appellee in the Southern District of California on September 22, 1949. Trial of that proceeding has been put off by reason of the pendency of the instant case; in any event, unless the findings in the instant case are set aside by this Court, appellee will assert that they are *res judicata* and dispositive of the injunction proceeding.

[4] The list was omitted in subsequent revisions; for a time a similar list appeared on a card shown to prospective purchasers (Def. Ex. 3, R. 1058, 198).

diseases would respond to Nutrilite treatment.

As a result of governmental action (Pl. Ex. 9, R. 1018, 56, 35, 726-729, 750-751), the partners consulted an attorney who advised that the booklet be revised to eliminate the names of all diseases, and the use instead of descriptions of symptoms manifested by persons who had sought relief through Nutrilite (R. 35, 207-208). The 58-page edition of "How to Get Well and Stay Well", one of those involved in the present case, was the result of such revision (Pl. Ex. 1, R. 783-843, 207-208). The change in technique is readily apparent from a comparison of the two booklets (Deft. Ex. 7, R. 1104-1162D, 298, Pl. Ex. 1, R. 783-843).[5] Pages 37-58 do not make direct curative claims, but include a number of case histories explaining how persons have obtained relief and freedom from various ailments and symptoms of disease listed in the following paragraph (R. 822-843).

The Administrative Determinations and the Libels. On September 28, 1948, appellant Charles W. Crawford, Associate Commissioner of Food and Drugs, recommended that a seizure case be instituted in the United States District Court for

[5] Compare, especially, R. 825-838 with R. 1105-1118, and R. 790 with R. 1138A, and the following statements (R. 818) "Think of our population, and think of all the common ailments," with (R. 1127) "Think of our population, and think of the number of cases of cancer, diabetes, heart trouble, high blood pressure, constipation, tuberculosis, arthritis, neuritis, and so on ad infinitum."

the District of New Jersey against a shipment of "Nutrilite Food Supplement" found in Belleville, New Jersey. Its labeling included a number of copies of the 58-page booklet (R. 188, 332). The seizure was accomplished on October 6, the libel charging that the drug was misbranded when introduced into interstate commerce because of false labeling representations (R. 729, 751).

On September 30, 1948, another seizure recommendation came before Mr. Crawford based upon the same alleged misbranding (R. 333). Attached to the recommendation was a finding of fact in writing signed by Robert C. Butz, M. D., a medical officer of the Food and Drug Administration, stating that "Nutrilite Food Supplement," taken as directed, would not be effective in the treatment of "low vitality, over-fatigue, insomnia, poor appetite, gastro-intestinal distress, recurrent vague aches and pains, weak eyes, defective teeth, nervousness, heart disease, stomach pains, disease conditions requiring surgery, feeble-mindedness, diabetes, hemorrhage connected with the menopause, indigestion, sneezing, weeping, anemia, leukemia, sinus trouble, constipation, tuberculosis, headache, dizziness, vomiting, and all deficiency diseases" (Deft. Ex. 13, R. 1173-1174, 333, 334). With this medical finding before him, Mr. Crawford reexamined the booklet to determine whether the booklet represented Nutrilite to prospective purchasers as an effective treatment for those symptoms and

conditions (R. 334, 384). He concluded that there was probable cause to believe, and that he did believe, that the labeling of the drug would be in a material respect misleading to the injury or damage of the purchaser or consumer (Deft. Ex. 13, R. 1173, 333). This determination of probable cause was made as required under Section 304(a), *supra*, and thereafter three additional libel suits based upon the same alleged misbranding were recommended by the Federal Security Agency and were filed by the appropriate United States Attorneys (R. 729, 751).

Appellee then abandoned pages 37-58, ordered its salesmen to delete them from all booklets, and continued its sales campaign with the resulting 36-page version (Pl. Ex. 2, R. 844-882, 272, Pl. Ex. 11, R. 1024A, 273, 59-60, 188). On December 2, 1948, appellant George P. Larrick, Assistant Commissioner of Food and Drugs, made a probable cause determination on this booklet in circumstances substantially similar to those in which Mr. Crawford had acted. (Deft. Ex. 15, R. 1216, 408, 389, 395). The only difference was that the statements charged to be false and misleading were drawn from the first 36 pages of the booklet, the particular portions considered offensive being set forth in an exhibit attached to the finding of fact.[6] One additional libel

[6] This exhibit, although offered in evidence by appellants, was not admitted by the district court (R. 392, 408). The exhibit as offered is printed at R. 1218-1223.

suit was recommended by the Agency, and was consummated on December 15, 1948 (R. 408, 729, 751).

Shortly thereafter, representatives of the Food and Drug Administration in the field encountered a further revision of the booklet, this one 42 pages long (Pl. Ex. 3, R. 883-927, 272, 315, 188-189, 205). A seizure recommendation came before appellant Dr. Paul B. Dunbar, Commissioner of Food and Drugs, on December 9, 1948 (R. 311-315). Dr. Dunbar was presented with a medical finding of fact that the drug, taken as directed, would not be effective in preventing or treating most common diseases (R. 1171-1172), and was given the 42-page booklet for his examination (R. 313-315). He concluded, after examining the booklet, that it seriously misbranded the drug by exaggerating its effectiveness in the prevention and treatment of "most common diseases", and he accordingly made his probable cause determination (Deft. Ex. 12, R. 1171-1172, 314, 315). Five seizure cases were filed on the basis of this finding (R. 729, 751).

The Complaint and Pre-Trial Proceedings. The present suit was filed in the United States District Court for the District of Columbia, on December 30, 1948, seeking to enjoin the prosecution of all of the libel suits except the one first filed and to prevent the filing of additional libel suits. No issue of constitutionality was raised (R. 689). On January 24, 1949, at a hearing on appellants' motion to dismiss the complaint on the ground that it

failed to state a claim upon which relief could be granted, Judge Pine questioned the authority of appellants Crawford, Larrick, and Dunbar to act on behalf of the Federal Security Administrator in making the determinations of probable cause. (R. 593-4). However, he gave appellants an opportunity to present the matter to the Federal Security Administrator, and on January 28, Acting Administrator J. Donald Kingsley made the same probable cause determinations (Deft. Ex. 23, R. 1532-41, 518, 503). On March 4, Judge Pine granted the motion to dismiss the complaint (R. 724), with leave to amend to attack the constitutionality of Section 304(a) of the Act. (R. 608-609).

On that day, an amended complaint alleging substantially the same facts as were alleged in the original complaint but adding allegations of unconstitutionality, was filed (R. 725). Section 304(a) of the Act was alleged to be repugnant to the due process clause because it failed to afford appellee an opportunity for a hearing prior to the determination of probable cause (R. 733). Appellee prayed that appellants be ordered to dismiss all libel cases except the one first instituted; that the multiple seizure provisions of Section 304(a) be held invalid; and that a three-judge court be convened (R. 736). Judge Tamm granted a temporary restraining order on March 4, 1949 (R. 739). After a hearing on appellants' motion to dismiss, the three-judge court granted a temporary

injunction on April 6, 1949, without hearing evidence and without making findings of fact or conclusions of law (R. 741-742).

On April 14 notices to take depositions were served on Federal Security Administrator Ewing,[7] Assistant Administrator Kingsley, Commissioner Dunbar, Assistant Commissioner Larrick, and three subordinate officials of the Food and Drug Administration in the Los Angeles area. The notices were followed by the service of *subpoenas duces tecum* which called for production of all records of the Agency relating to Mytinger & Casselberry, Inc., Lee S. Mytinger, William S. Casselberry, Nutrilite Products, Inc., Carl F. Rehnborg, and "Nutrilite Food Supplement." (R. 743-745.) Appellants moved to quash the subpoenas on numerous grounds (R. 746). A hearing was held before Judge Clark, who overruled appellants' objections (R. 747-748).

A pre-trial conference was held before Judge Tamm on April 13, 1949 (R. 643). Thereafter, a petition for writs of prohibition and/or mandamus was filed in this Court on the ground that the District Court proposed action in excess of its jurisdiction in undertaking a trial *de novo* on the issue whether the labeling was materially misleading. The petition was denied on May 16, 1949. 337 U.S. 902.

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[7] Mr. Ewing was absent from duty because of illness. Upon assurance from counsel that Mr. Ewing had not participated in the administrative decisions, he was excused from interrogation.

The Trial. The trial began before Judges Clark, Goldsborough, and Tamm on October 17 and was completed on October 27. Aside from reading into the record portions of the appellants' answer, admissions made under Rule 36 of the Federal Rules of Civil Procedure, and several memoranda taken from the files of the Food and Drug Administration (R. 58-59, 70, 273-283, 28, 48-49, 61, Pl. Ex. 4, R. 929-939, 47, Pl. Ex. 16, R. 1030 A, 69, 38-47, 64-65, 67-68, 269-271), appellee's case consisted of the testimony of William S. Casselberry, its president, and Dr. John A. Myers, and a deposition of Lee J. Myers, an attorney.[8] In substance, their testimony was that appellee had acted in good faith in making the statements contained in the booklets; that, in their opinion, there was nothing in the booklets that was false or misleading; and that the statements contained therein conformed to the consensus of medical opinion. (R. 35-38, 50-53, 57-65, 75, 85, 86, 257-258.)

The three editions of the booklets were introduced into evidence. (Pl. Ex. 1, 2 and 3, R. 783-927, 272). The contents of the booklets are analyzed in Point III, *infra*, pp. 82-95.

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[8] The only other testimony, the deposition of Roger W. Truesdail, read into the record by appellee, declared that there would be a gradual loss of certain vitamin factors in multiple vitamin products with prolonged storage, and that there would be a loss of potency over the period of a year (R. 285). See p. 73, *infra*.

Cross-examination of Casselberry on specified passages in the booklet was not permitted (R. 230-233). At the court's suggestion, the questions ruled objectionable were embodied in a written "offer of proof" (R. 232-233), but when this offer of proof was presented, the court held that it was improper under rules "universal in every court in the United States", and rejected it (R. 520-528). After this ruling, the court also refused to permit the recall of Casselberry, who was present in the courtroom (R. 527-528).

Dr. Myers testified on direct examination that many common symptoms, such as headaches, gastric distress, lack of pep, fatigue, etc., reveal that widespread sub-clinical dietary deficiency diseases exist in the United States (R. 74-84, 86, 95, 145-147, 148), and that the vitamins and minerals in Nutrilite would be "helpful" for the symptoms mentioned in the booklet, though not necessarily sufficient to eradicate them completely (R. 86). On cross-examination, however, he testified that he understood the terms "common illnesses," "common diseases", "common deficiency diseases that cause death in the 40s and 50s," and "common dietary deficiency diseases", as used in the booklets (See R. 116-118), to include peptic ulcers, colds, sinusitis, colitis, eye trouble, diseases of cardio-vascular origin, arthritis, pneumonia, cancer, tuberculosis, nephritis, diabetes, etc. (R. 95, 97, 98, 100-115, 118, 121-122, 128, 135, 136, 138, 139);

and he admitted that in each of these "common illnesses" and "common diseases" vitamin pills alone would not cure or help (R. 99-102, 106-107, 112, 127-128, 131-132, 148, 163).

The court stated, on several occasions during the course of the trial, that the booklets, as the court read them, represented only that the product would tend, by contributing to better general health, to increase the body's ability to withstand the inroads of disease, and thus in that sense to act as a preventative and not as a cure (R. 115-118, 122-127, 149-150, and see Finding 12(e) and (f), R. 759-760). For that reason, Judge Clark admonished counsel for appellants that the cross-examination had "gone far afield" (R. 115-116, 148) and cross-examination on Dr. Myers' understanding of various statements in the booklets was cut off (R. 181-183). Cross-examination as to the truth or falsity of claims drawn from testimonial letters found in pages 37-58 of the 58-page booklet was not permitted on the ground that counsel should not "twist" a testimonial into a representation of general applicability (R. 151-152), and that whatever possible misrepresentations there might be in the testimonials if they stood alone were fully explained in the first part of the booklet (R. 149-150).

At the conclusion of the appellee's case, the appellants moved for dismissal, urging that the evidence showed at most only that the booklets were not false or misleading to Casselberry, Mr. Myers

and Dr. Myers, and that this did not establish that the determinations of probable cause had no rational basis. The motion to dismiss was denied (R. 287-295).

The evidence offered by appellants fell into two categories: (1) testimony of the administrative officials concerned to show the basis for their determinations of probable cause; (2) testimony of three physicians not connected with the Government, and a Government expert on vitamins, and the deposition of Dr. Butz as to the medical facts on which the administrative officials based their determinations of probable cause.

Acting Administrator Kingsley's deposition, which had been taken by appellee, was read into the record by appellants (R. 501-518),[9] and received in evidence (Deft. Ex. 22, R. 518). There were also received in evidence certified copies of the three determinations of probable cause made by Mr. Kingsley together with the supporting medical findings of fact of Dr. Butz. (Deft. Ex. 23, R. 1532, 518.) Mr. Kingsley's deposition stated that he had examined the editions of "How to Get Well and Stay Well" upon which his determinations were based, that he was an expert on standard propaganda technique, and that the total effect of the pamphlet, as well as of almost every page, was

[9] A part of this deposition was read into the record by appellees (R. 269-270). Appellants exercised their right to read the remainder under Rule 26(d)(4) of the Rules of Civil Procedure for the United States District Courts.

misleading (R. 509-510, 512). He testified that "My decision was based upon the total impression of the publication rather than upon a particular sentence or paragraph. It employs a standard propaganda technique, first of all, of rousing strong emotion, which in this case, is fear, it seems to me, and then following through with the various kinds of suggestions. The whole thing seems to me to be very carefully calculated to produce a misleading impression" (R. 509), and that "the total impression [of the pamphlet] is a product of a substantial number of specifically misleading statements or impressions" (R. 510).

Appellants Crawford, Larrick, and Dunbar testified as experts with long experience in construing labeling and its impact on the consumer, and explained in detail how they had reached their conclusions that the pamphlets were materially misleading. Mr. Crawford testified that he had been with the Food and Drug Administration since 1917, that since 1918 one of his functions has been to review labeling and to evaluate the representations made to the public generally (R. 331-332), and that "this booklet [the 58-page version] fell into a very familiar pattern. It wins the reader's confidence right at the beginning by making statements of fact that everybody knows, and by professions of honesty and good will toward mankind, and then starts playing upon the scare technique, on persuading the reader that something is wrong with him.

* * * It creates an aura of honesty, an aura of good faith, for implications, innuendoes, inferences, that I believed when I read the book first—and believe now—are highly misleading, and are likely to be of great damage to consumers who are persuaded by this book or this material, and rely upon it for the purposes for which it is held forth in this book" (R. 334-336).

Mr. Crawford testified that the testimonials contained in the 58-page booklet would be accepted by the reader as representations that Nutrilite would be an efficacious treatment for the conditions, symptoms and diseases described therein (R. 336, 374-376). The court refused, however, to hear all of his testimony, because in the court's view, each testimonial merely represented the experience of one person and could be shown to be untrue only by proof that the testimonial giver had had no such experience (R. 376, 378-383). The court ruled, as a matter of law, that the testimonials were not intended to be, and could not be considered to be, general representations as to the beneficial effects of Nutrilite for the conditions mentioned therein (R. 152, 378-383).

Appellants Larrick and Dunbar testified similarly as to their lengthy service with the Food and Drug Administration and experience with labels and their effect on the consumer (R. 308-310, 385-387), that their opinions as to the representations made in the 36-page and 42-page booklets were simi-

lar to that of Mr. Crawford's with respect to the 58-page booklet, and that the booklets led readers to believe that Nutrilite offers an effective means of preventing and curing common and serious diseases such as ailments involving the heart and arteries, high blood pressure, coronary diseases, pneumonia, tuberculosis, and cancer (R. 326-327, 396, 398-400). Dr. Dunbar, Commissioner of Food and Drugs, testified that he had been with the Food and Drug Administration since 1907, that he had extensive experience in determining whether labels are misleading, and that "In making that survey of labels, it is always my effort to place myself in the position of the individual who is going to read that label and attempt to determine what impression the labeling will make on the person—the customer or purchaser—who reads that label" (R. 308, 310-311). He went through the 42-page booklet *seriatim*, and testified in detail as to the misleading statements contained in, and impressions conveyed, by, the booklet (R. 315-326). He stated that (R. 316-317):

> A scare technique was being followed in the early part of this booklet to impress the prospective purchasers with the idea that almost everyone they met—members of their family, their friends, and they themselves—were afflicted with something or other that needed treatment or something terrible would happen.
>
> It is quite a favored technique with those who in times past—and even to this day—are

> selling various types of worthless patent medicines. It is very adroitly worded. There is a vast amount of factual statement in here, so I felt, that would create a fear complex in the mind of the purchaser.
>
> I read the first six pages most carefully to determine whether that impression was carried out through the initial paragraphs of the book; then turned back and found further on that this product eventually is offered as the salvation of the individual who fears that he is afflicted with some of these diseases, or may be afflicted with those diseases.

These officials testified that, having drawn the conclusion that the booklets offered Nutrilite as a cure for common diseases and for a large number of symptoms, and being advised by medical findings of fact that the drug would not be effective in preventing or treating most common diseases or in treating the many symptoms and conditions expressly mentioned in the booklets, they had concluded that they had probable cause to believe that the labeling would be in a material respect misleading to the injury or damage of the purchaser or consumer (Deft. Ex. 12, R. 1171, 314; Deft. Ex. 13, R. 1173, 333; Deft. Ex. 15, R. 1216, 392, 408; Deft. Ex. 23, R. 1532, 518). To be sure, these witnesses did not have before them when the determinations of probable cause were made, facts showing actual physical injury or damage to any particular purchaser or consumer (R. 330, 385, 406, 507); but

each testified that his determination as to probable injury or damage to purchasers or consumers was based upon his conclusion that the labeling exaggerated the therapeutic value of the drug and that there was probable cause to believe that this labeling would cause consumers and purchasers in most cases to rely upon "Nutrilite Food Supplement" in treating conditions for which it was ineffective (R. 315-319, 335-336, 376-378, 395-405, 509-510). It was also testified that, in some cases, the labeling would cause them to delay in obtaining competent diagnosis and treatment for serious disease conditions with consequent irreparable damage to their health (R. 318, 403-404).

The appellants also presented medical and scientific testimony that vitamin and mineral deficiency diseases in this country today are rare (R. 340-341, 427-431, 442-444), and that a product of the composition of Nutrilite, taken in the recommended dosages and with the frequency prescribed, would not be efficacious for the prevention or cure of the diseases, conditions, and symptoms enumerated by Dr. Butz in his medical findings of fact or for the prevention or cure of so-called "common diseases" (R. 342-343, 344, 348-350, 351, 354-360, 362, 364-365, 432, 434, 437, 472-478).

Documentary evidence was introduced to prove that the booklet misrepresented (1) the significance of dietary disease as one of the causes of rejections among the W.A.C. (Deft. Ex. 4, R. 1059, 234) and

in the Selective Service System (Def't. Ex. 5, 19, 20, R. 1061, 1250, 1391, 465, 1063, 1068-1074, 1086-1099, 1264-1274, 1404-1411); (2) the results of a nutrition survey conducted by the Pennsylvania State College (Def't. Ex. 17, R. 1225, 456-457); (3) the educational background and professional standing of Carl F. Rehnborg (Def't. Ex. 24, R. 1542, 520); and (4) the role of dietary deficiency disease as a cause of death in the United States (Def't. Ex. 25, R. 1543, 529).

The findings and conclusions: The District Court made findings of fact and conclusions of law on December 14, 1949 (R. 756-771), holding that the multiple seizure provision of Section 304(a) under which the appellants had acted was unconstitutional under the due process clause of the Fifth Amendment (Concl. 2, R. 770); that the appellants had acted arbitrarily, oppressively, and capriciously in violation of the Fifth Amendment in instituting multiple libel proceedings without first affording the appellee a hearing on the probable cause question (Concl. 4, R. 770-771); and that the appellants should be permanently enjoined from instituting or maintaining any action raising a claim that Nutrilite is misbranded by the booklet "How to Get Well and Stay Well" (Concl. 5, R. 771).

The court found that the appellants had acted arbitrarily, capriciously and unreasonably in reaching their administrative determinations of probable cause (1) because the pamphlets when read as a whole, without lifting statements out of context,

are not fraudulent, false or misleading in any particular (Findings 12(e) and (f) R. 759-760); (2) because the administrative decisions permitted the institution of suits in widely separated jurisdictions (Finding 22 (R. 763-764)); (3) because appellants had placed reliance upon findings of fact made by Dr. Butz without talking to him about them; (4) because appellants had failed to rely upon a "survey",[10] then in their files, which showed consumer reaction to the pamphlets; (5) because appellants had had before them no evidence of actual injury or damage to purchasers, and (6) because appellants had had insufficient knowledge as to the content of the pamphlets (Findings 17, 18, 29, 30, 31 and 35; R. 761-2, 765-768). The court also made a number of findings as to the appellee's good faith in attempting to comply with the law (Find-

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[10] The "survey" (Pl. Ex. 4, R. 929-939, 47) was a memorandum from one inspector of the Food and Drug Administration to the effect that he had interviewed seven users of Nutrilite, who did not believe that it was a cure-all but consisted of "vitamins and minerals which would build their bodies up." The memorandum pointed out that "None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type" (R. 930). Attached to the memorandum were five memoranda of interviews conducted by the inspector, which revealed that the purchasers were not using the drug as a preventative, but were using it for arthritis, anemia, hemorrhaging ulcers, and other serious diseases (R. 931-937). Although the court below treated this report as significant (Fdg. 30, 35(b), R. 765-766, 767), the administrative officials were obviously not bound to regard this statement of the views of seven persons as proof that the public would not be deceived by appellee's representations. In addition the memoranda were hearsay.

ings 8-10, 12-13, 19-20; R. 757-760, 762-763).[11] The court accordingly enjoined the maintenance and prosecution of all seizure actions, including the first instituted (R. 771-772), although the complaint had prayed only that all seizure actions other than the first be enjoined (R. 725, 736).

SPECIFICATION OF ERRORS TO BE URGED

1. The court erred in holding unconstitutional a portion of Section 304(a). (Asgt. 1, pp. 35-46, *infra*).

2. The court erred in holding that it had jurisdiction to review the administrative decisions as

[11] The Court found also that conduct of employees of the Food and Drug Administration before and after the administrative decisions also showed that the decisions were made arbitrarily. (Findings 9, 13-16, 21, 24, 26, 32, 37-42; R. 757-758, 760-761, 763, 764, 766, 768-770). The conduct deemed relevant to show that the decisions were made arbitrarily included: (1) the Food and Drug Administration's failure at all times to specify the exact statements in each pamphlet that were deemed to be false or misleading and to give the Company an opportunity to correct the labeling (Findings 9 and 40); (2) the interrogation of the Company's distributors and customers (Finding 13); (3) the "secret indictment" of Lee S. Mytinger and William S. Casselberry and the institution of the first libel without notice to the Company (Findings 14-16); (4) the failure to answer a letter which advised the defendants of the Company's good faith (Finding 21); (5) the institution of a libel suit contrary to the Company's understanding that no further actions were contemplated (Finding 24); (6) refusal to stipulate for removal of the cases to the Company's home district (Findings 26, 37); (7) placing city and State embargoes at the instance of the Food and Drug Administration (Finding 38); (8) giving unfavorable publicity regarding "Nutrilite" (Finding 39) and the preparation of an inter-office memorandum by an administrative subordinate in the Food and Drug Administration proposing a program for keeping pressure on the Company until there could be a determination on the merits of the controversy (Finding 32).

to whether there was probable cause to believe that the labeling of plaintiff's product would be in a material respect misleading to the injury or damage of purchasers or consumers. (Asgts. 4, 7, pp. 46-74, *infra.*)

3. The court erred in holding that it had jurisdiction to try in a *de novo* proceeding the question whether plaintiff's labeling was false or misleading in any particular or in a material respect to the injury or damage of purchasers or consumers. (Asgts. 2, 3, 7, pp. 74-76, *infra.*)

4. The court was clearly erroneous in finding that the administrative decisions of Dr. Dunbar, Mr. Crawford, Mr. Larrick, and Mr. Kingsley were made arbitrarily and capriciously. (Asgts. 8, 9, pp. 76-98, *infra.*)

5. The court was clearly erroneous in finding that the plaintiff's labeling is not fraudulent, misleading in a material respect to the injury or damage of purchasers or consumers, or false or misleading in any particular. (Asgt. 10, pp. 76-98, *infra.*)

6. The court erred in holding that plaintiff's good faith was a material issue in this case. (Asgt. 11, pp. 96-98, *infra.*)

7. The court erred in unreasonably curtailing the cross-examination of Dr. John A. Myers and Wil-

liam S. Casselberry, witnesses for the plaintiff. Asgts. 12-13, pp. 99-102, *infra.*)

8. The court erred in permitting the witness Casselberry to testify as an expert in the field of nutrition that there are no claims in the labeling that are untrue and that certain excerpts from medical and popular writings represented a good cross-section of medical opinion on questions of nutrition. (Asgts. 15, 16, pp. 105-106, *infra.*)

9. The court erred in admitting in evidence an exhibit offered by plaintiff which contained excerpts from medical and popular publications to prove medical opinions in the field of nutrition. (Asgt. 17, p. 105, *infra.*)

10. The court erred in rejecting a scientific article offered by the defendants as to the prevalance of dietary deficiency diseases even though the author, an outstanding man of science, was present for cross-examination. (Asgt. 18, pp. 104-105, *infra.*)

11. The court erred in permitting Dr. John A. Myers to testify to his understanding of what the labeling claimed for Nutrilite, and, upon his understanding of the labeling, that the said labeling did not represent that Nutrilite would cure all cases of dietary deficiency diseases or all cases of common diseases. (Asgt. 21, pp. 105-106, *infra.*)

12. The court erred in permitting Dr. John A. Myers, over defendants' objections, to testify that he found nothing in the labeling that was false or misleading, the said question requiring not only his expert opinions as a medical man but also an evaluation by him as to what the labeling would convey to the persons to whom it was directed. (Asgt. 22, pp. 105-106, *infra.*)

13. The court erred in permitting Lee J. Myers, an attorney and witness for the plaintiff, to testify that the statements in the labeling conformed to the consensus of informed medical opinion, and that the labeling was not false or misleading, misbranded or fraudulent, and would not cause injury or damage to the purchaser or consumer, the said questions requiring expert medical testimony, legal conclusions, and an evaluation of what the labeling would convey to the persons to whom directed. (Asgts. 23, 24, pp. 105-106, *infra.*)

14. The court erred in ruling that objections could not be taken at the trial to testimony in Lee J. Myers' deposition unless the objection was saved when the deposition was taken. (Asgt. 25, pp. 102-103, *infra.*)

15. The court erred in rejecting an official government publication which contained the vital statistics of the United States showing the major causes of death by age groups, which said publication was offered by defendants to disprove the labeling claims that dietary deficiency diseases were the

common diseases most responsible for death from illness. (Asgt. 27, pp. 103-104, *infra.*)

16. The court erred in refusing to permit Dr. E. M. Nelson, a witness for the defendants; to make comparisons between the daily dosage of Nutrilite and minimum daily requirements for the several vitamins and minerals contained therein as established pursuant to law by the Federal Security Administrator. (Asgt. 26, p. 107, *infra.*)

17. The court erred in admitting into evidence, over defendants' objections, memoranda of interviews with five persons prepared by an inspector of the Food and Drug Administration. (Asgt. 20, p. 24, note 10, *supra.*)

18. The court erred in allowing the plaintiff to probe the mental processes of the administrative officials in reaching their decisions. (Asgt. 5, pp. 108-109, *infra.*)

19. The court erred in denying defendants' motion to quash subpoenas duces tecum, served in connection with the oral interrogation of the Federal Security Agency defendants before trial, which required the defendants to deliver to plaintiff all records of the Food and Drug Administration relating to plaintiff, its predecessors, and its product, without requiring a showing of good cause under Rule 34 of the Rules of Civil Procedure for the United States District Courts. (Asgt. 6, pp. 108-109, *infra.*)

SUMMARY OF ARGUMENT

I

The court below held Section 304(a) unconstitutional to the extent that it allowed the administrative finding of probable cause to be made without a hearing. But this finding is merely preliminary to the institution of proceedings in court, which fully satisfied all constitutional requirements for a hearing. A great many decisions hold that due process does not require a hearing at the initial stage or any particular stage of an administrative proceeding, so long as an administrative or judicial hearing is held before any official binding order is entered. *E.g., Lichter* v. *United States*, 334 U.S. 742, 791-793; *Bourjois, Inc.* v. *Chapman*, 301 U.S. 183, 189. This principle applies *a fortiori* where the Administrator makes a mere preliminary finding of probable cause to institute a judicial proceeding. Any injury to appellee, while its product is detained until the outcome of the litigation, does not render unconstitutional the statutory scheme authorizing the suspension *pendente lite*, for the protection of the public, of allegedly unlawful activity. *Bowles* v. *Willingham*, 321 U.S. 503, 520; *Yakus* v. *United States*, 321 U.S. 414, 422-423; *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597.

II

A. The District Court had no jurisdiction to review the administrative finding of probable cause.

This finding is merely a preliminary ruling such as the courts have consistently refused to review. Its only legal effect is as a condition precedent to a request that the Department of Justice institute libel proceedings, and even after the Department, in the exercise of its own authority, commences suit, the articles are condemned only after trial in a district court. Such administrative recommendations having no legal effect in themselves are not reviewable. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 112-113; *United States* v. *Los Angeles and Salt Lake R. Co.*, 273 U.S. 299. This conclusion is not affected by the fact that the commencement of the litigation which will determine appellee's rights may in itself be expensive to the defending party. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52.

B. This general principle of non-reviewability is reinforced by specific manifestations of legislative intention that the administrative finding of probable cause was not to be reviewable. The very fact that Congress provided that the preliminary finding of probable cause be made without a hearing demonstrates that it was not to be judicially reviewed. Specific provisions of the Act for judicial review of other administrative determinations show that no review of the finding of probable cause was intended. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 305-306. The history of the statute here involved also shows that power

to restrain multiple libels was eliminated from the bill after a preliminary administrative finding of probable cause was required. Furthermore, review of the administrative finding in an injunction suit prior to permitting multiple seizures would defeat the statutory purpose to stop distribution of a product deemed to be materially misbranded in a manner injurious or damaging to consumers before it reaches the public. The jurisdictional question here presented thus goes to the heart of the effectiveness of the scheme established by Congress to protect the public health and welfare.

C. The District Court also lacked jurisdiction as a court of equity because appellee had an adequate remedy at law. Section 304 allows a claimant of products libeled in more than one action to have the various proceedings consolidated for trial in a single district. Equity will not grant relief against a multiplicity of suits when the cases can be consolidated for trial. 1 Pomeroy, *Equity Jurisprudence* (5th Ed., 1941), pp. 495, 506, 511. Nor do the various types of injury alleged by appellee provide a basis for not giving effect to the carefully devised statutory procedure for consolidation.

D. The District Court also lacked jurisdiction to determine whether appellee's labeling was misleading. The preceding discussion of the statutory procedure shows that Congress intended this question to be decided by the court in which the libel proceedings are tried. To permit the basic issue as to

the deceptive character of the labeling to be decided in an injunction suit while the pending seizures were, at the command of the injunction court, held in abeyance, would be inconsistent with the basic purpose of Section 304 to protect the public during the period of pendency of the litigation. The injury to the owner of the products which often results when multiple seizures are begun was to be alleviated by consolidation, not by resort to a suit for injunction in the District of Columbia. The argument as to lack of equity jurisdiction is equally applicable to this aspect of the case.

III

If the District Court had jurisdiction to determine such issues, it should have found that the facts amply support the administrative determination of probable cause and that appellee's labeling is misleading. There was no substantial dispute in the medical testimony that Nutrilite, a vitamin and mineral product, would not cure or prevent most common diseases. The critical question was whether the administrative officials had reason to believe that appellee's booklets would give the reader a contrary impression. The 58-page booklet unquestionably represented, through testimonials, that Nutrilite was effective in the treatment of symptoms of serious diseases. Even after the testimonials were eliminated, a number of statements in the booklets were unquestionably false. And

an examination of the booklets as a whole, in the light of the conceded medical facts as to the inability of Nutrilite to cure or prevent most common diseases, demonstrates that they were designed to give readers a false impression that Nutrilite would prevent or cure all but acute ailments, and that almost everyone needed it in order to avoid dietary deficiency. See pp. 77-96, *infra*. "Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false." *United States* v. *95 Barrels* * * * *Vinegar*, 265 U.S. 438, 442-443. "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true." *Donaldson* v. *Read Magazine*, 333 U.S. 178, 188-189. The evidence of record demonstrates not only that the administrative finding was a reasonable one, but that the finding of the court below that the booklets were not misleading was utterly erroneous.

Appellee's good faith in issuing the booklets is irrelevant if they are misleading. *United States* v. *Dotterweich*, 320 U.S. 277, 281. Moreover, despite the finding below to the contrary, we think that the record clearly demonstrates that appellee was merely trying to avoid prosecution by the Government, not to be honest in its dealings with the public.

IV

If the Court should decide all of the above questions adversely to the Government, it becomes necessary to deal with the many errors committed by the District Court in the course of the trial. These consisted in brief of the improper curtailment of cross-examination of appellee's witnesses, incorrect rulings in excluding evidence offered by appellants and admitting, sometimes inconsistently, evidence offered by appellee, and improperly allowing interrogation of administrative officials and discovery of administrative records. In their cumulative effect, these errors seriously prejudiced the defense in the district court.

ARGUMENT

I

The Due Process Clause Does Not Prevent Congress from Authorizing Administrative Determinations of Probable Cause, Upon Which Institution of Multiple Seizure Suits Is Conditioned, to Be Made Without a Hearing

The original Food and Drugs Act of 1906 (34 Stat. 768, 771, Section 10) provided for the seizure of misbranded food and drugs "by a process of libel for condemnation." The Act in no way restricted the power of the Government to commence a number of separate condemnation proceedings against different shipments of the same article, and such multiple seizures were not uncommon.

When the food and drug legislation was revised in 1938 and embodied in the present Federal Food,

Drug, and Cosmetic Act, the libel for condemnation provision was incorporated in Section 304(a) (52 Stat. 1040, 1044, 21 U. S. C. 334). The revised provision limits the authority of the Government to institute more than one libel proceeding against different shipments of the same misbranded product [12] by requiring compliance with one of certain conditions before more than one such proceeding can be instituted.[13] The provision pertinent to the constitutional issue here is that which permits the institution of more than one libel for condemnation "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." Section 304(b) provides that when more than one condemnation proceeding is filed, the claimant can have the proceedings consolidated for trial.

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[12] If there has been a prior judgment in favor of the United States, or if the drug is libeled because it is "adulterated," as distinct from misbranded, there is no bar whatever to multiple actions based upon the same charge. "Adulteration" is used in the statute in a special sense. Sections 402, 501. The Act provides its own glossary. *United States* v. *Coca Cola Co.*, 241 U. S. 265. For example, a drug is deemed to be "adulterated" if it fails to meet standards of strength, quality, or purity prescribed in the United States Pharmacopoeia.

[13] The history of the libel provisions is discussed at greater length in Point II, pp. 52-58, *infra*.

The court below concluded that (R. 770):

> The following provisions [of the Act] * * * are unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States: "* * * such limitations shall not apply * * * when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employe of the agency that * * * the labeling of the misbranded article * * * would be in a material respect misleading to the injury or damage of the purchaser or consumer."

The court did not write any opinion expressly indicating the basis for its conclusion as to the invalidity of the quoted portion of the statute. It is clear from the record and findings, however, that the court was of the view that the constitutional defect resided in the provision permitting the Administrator to act without hearing. It is not entirely clear whether the decision below means (a) that the Constitution precludes the institution of more than one judicial proceeding against different shipments of an article, in the absence of a prior administrative hearing, or only (b) that, if Congress provides for an administrative finding as prerequisite to suit the Constitution requires that such finding must be preceded by a hearing.

If the first theory is the basis for the decision below, the Food and Drugs Act would have been

unconstitutional since 1906, inasmuch as prior to the 1938 Act there was no requirement for any administrative action at all before the commencement of more than one condemnation proceeding. Furthermore, even the present Act contains no limitation upon the right to make multiple seizures of products which are adulterated (Sec. 304). It is more likely, therefore, that the decision below was predicated upon the second theory, and that the statute was held unconstitutional because the 1938 limitation upon the power of the Government to bring more than one action[14] in condemnation permits an administrative finding without a prior hearing.

It is unnecessary, however, to resolve these doubts as to the precise legal theory embodied in the decision below. For many holdings of this Court demonstrate the unsoundness of either theory and the validity of the statute as enacted and as here applied.

The administrative finding of probable cause required by Section 304(a) is merely the prerequisite to the bringing of a lawsuit. Not until the Administrator has made the required finding is he in a position to request the Department of Justice to institute more than one condemnation proceeding against different shipments of the mis-

[14] The decree, however, also enjoins the first libel (R. 771-772), as to which no administrative finding of probable cause is required by the statute.

branded product. After the finding has been made, the Department may file libels for condemnation, accompanied by seizures of the property in question against different shipments. The owner of the property then has an opportunity to appear as claimant, and he is entitled to a full hearing before a district court in which one libel has been filed or to which the various cases may be removed and consolidated for trial. The statute (Section 304(b)) provides that the procedure shall conform to the "procedure in admiralty," except that on demand of either party trial shall be by jury.

Such a trial in court fully satisfies all constitutional requirements. We have been unable to discover any authorities to support the notion that the due process clause of the Constitution requires an administrative hearing in order to determine whether there is probable cause for instituting a judicial proceeding in which the matter will be fully tried.

On the contrary, a great many decisions of this Court show plainly that the due process clause has never been regarded as containing any such unreasonable requirement. The Court has stated in at least three recent cases that "the demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Lichter* v. *United*

States, 334 U. S. 742, 791-792; *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152-153. See to the same effect *Bowles* v. *Willingham*, 321 U. S. 503, 519-520. In each of the cases cited, the statute permitted an administrative agency to make a preliminary determination, after which a full administrative hearing was available to any aggrieved party.

The principle enunciated in those decisions would seem to have particular force where, as here, the subsequent hearing is to be held before a court in lieu of an administrative body. Many cases have held that an administrative hearing is not essential to due process where no final action takes place until after the case has been heard by a court. In 1918 this Court stated that "this, as repeatedly has been held, satisfies the requirements of due process of law." *Wells-Fargo & Co.* v. *Nevada*, 248 U. S. 165, 168. Other cases to the same effect are *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189; *Utley* v. *St. Petersburg*, 292 U. S. 106, 109; *Nickey* v. *Mississippi*, 292 U. S. 393, 396; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *Coffin Bros.* v. *Bennett*, 277 U. S. 29, 31; *Mount St. Mary's Cemetery* v. *Mullins*, 248 U. S. 501, 506; *Pittsburgh &c. Railway* v. *Board of Public Works*, 172 U. S. 32, 45; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Gallup* v. *Schmidt*, 183 U. S. 300, 307; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Hagar* v. *Reclamation District*, 111 U. S. 701.

In most of the cases cited, the administrative or taxing agency made a determination as to the merits of the matter in issue before the question was submitted to a court. The correctness of the Government's position in the present case would seem to follow *a fortiori*. Here the Administrator made a mere preliminary finding. He did not finally adjudicate the contraband character of the drug. He did not purport to decide the question which would be before the court, but only whether there was probable cause to believe that the product had been materially mislabeled, sufficient to warrant the institution of the judicial proceeding. In other words, the Administrator, far from making any definitive adjudication, merely found that the facts presented an issue for adjudication by a court. Even in the absence of the express provision of the statute that such a preliminary finding could be made "without hearing," a hearing would not have been required as a condition precedent to the making of such a determination. Compare *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 149. While the Constitution may require a hearing by an administrative agency when an issue is committed to administrative adjudication rather than to judicial determination, it obviously does not require an administrative hearing as a prerequisite to an administrative agency's right to report facts to prosecuting officials for trial and determination in a district court. The Constitution does not require that those functions of Gov-

ernment that traditionally have been conducted as investigative and reporting activities preliminary to a lawsuit be conducted by judicial methods. Cf. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 641.

Probably the closest analogy is the institution of criminal proceedings by an indictment returned by a grand jury. The grand jury determines, in substance, that there is probable cause to believe that the accused is guilty; the result is that the defendant may be arrested and held for trial. *Beavers* v. *Henkel*, 194 U. S. 73, 84. The proceeding before the grand jury is obviously not a "hearing" in the usual sense, inasmuch as the defendant has no right to appear and present his own witnesses or to cross-examine the Government's witnesses. Clearly, if such a hearing is not essential to a finding of probable cause when the liberty of an individual is at stake, the same must be true with respect to a similar administrative finding which serves as a statutory prerequisite to the institution of legal proceedings affecting an individual's property. This Court has recognized that "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." *Ex parte United States*, 287 U. S. 241, 250. The Constitution can require no more as to a determination

of probable cause made "for the purpose of holding" food or drugs alleged to be misbranded.

Appellee will doubtless argue that the withholding of the seized property until the conclusion of the libel action is injurious, both because of the interference with its business operations during the interim and because the quality of the product may deteriorate,[15] even though the product will eventually be returned if the Government does not establish its case. But injury of this sort does not render unconstitutional judicial proceedings in which a defendant is temporarily restrained from continuing his allegedly unlawful conduct *pendente lite*. The public interest has often been held to justify a temporary and probably costly suspension of activities claimed by the Government to be unlawful and injurious to the public interest. In *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597, in language reaffirmed in *Bowles* v. *Willingham*, 321 U. S. 503, 520, the Court declared:

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of

[15] As to the degree and rate of deterioration, see pp. 73-74, *infra*.

property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing. Compare *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Hutchinson* v. *Valdosta*, 227 U. S. 303; *Adams* v. *Milwaukee*, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in war-time. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *United States* v. *Pfitsch*, 256 U. S. 547, 553. Compare *Miller* v. *United States*, 11 Wall. 268, 296; *International Paper Co.* v. *United States*, 282 U. S. 399; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 518; *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306.

The *Phillips* case held that the collection of taxes could be enforced in advance of the opportunity to litigate their validity. In *Yakus* v. *United States*, 321 U. S. 414, 442-443, the Court sustained the provision of the Emergency Price Control Act permitting the minimum prices established by the Administrator to remain in effect pending their

review in the courts. This Court stated (321 U. S. at 442):

> Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity.

The *Yakus* opinion then proceeded to give the same illustrations found in the above quotation in the *Phillips* opinion, and to add others.

Both the *Phillips* and *Yakus* opinions cite, as a prominent example of the right of the State to act without a prior hearing, the cases permitting the summary destruction of property for the protection of the public health. The libel provision of the food and drug legislation, which is modeled on the procedure in admiralty, does not go nearly that far. It provides only for the interim protection of the public against the distribution of food and drugs believed to be dangerous to health or misbranded in a fraudulent or materially misleading respect, by holding the products until the legality of the branding has been determined. In view of the great harm which members of the public may suffer if even harmless articles are allowed to be sold as panaceas for illness or disease, there can be no question as to the reasonableness and fairness of a statutory procedure which treats the interest of the public, *pendente lite*, as superior to that of the owner of the product. Cf. *Yakus* v. *United States*, 321 U. S. at 437-443.

II

The District Court Had No Jurisdiction to Review the Administrative Determination of Probable Cause or to Decide Whether Appellee's Labeling Was Misleading

The formal "Conclusion of Law" entered by the court below (Conclusion 4, R. 770-771) was that the officials of the Food and Drug Administration had acted arbitrarily in instituting multiple libel proceedings without first affording the appellee a hearing on the issue of whether there was probable cause to believe that its labeling was fraudulent or misleading in a material respect. Obviously, the mere failure to grant appellee a hearing could not be arbitrary or capricious or oppressive, if we are correct in our previous contention that Congress could constitutionally provide that the determination of probable cause could be made without a hearing. If the statute is valid, the officials did not violate the Constitution merely by following the express terms of the law.

The court below also held, in accordance with appellee's contentions, that the administrative officials acted capriciously, arbitrarily and unreasonably in making their decisions with respect to appellee's product (Fdg. 43, R. 770). The plain implication of this finding would seem to be that the determinations of probable cause were invalid because the officials who made such determinations had no rational basis for their actions. Furthermore, the court also held that the labeling of ap-

pellee's product was not false and misleading in any particular (Fdg. 12(f), R. 759-760).[16]

It is our contention that the court lacked jurisdiction to pass upon these issues. The finding serves merely as a condition precedent to a recommendation for the institution of judicial proceedings, and under established principles is not ripe for review. Furthermore, whether the labeling was misleading was intended to be determined in the condemnation proceedings. In addition, we shall show that since the statute provides an adequate remedy at law for persons against whose product more than one libel is instituted, the court below, as a court of equity, lacked jurisdiction to decide these issues in this injunction suit brought against the administrative officials.

A. Preliminary Administrative Rulings Which Are Mere Prerequisites to the Commencement of Additional Proceedings Are Not Reviewable

The Administrator's finding of probable cause is not reviewable since it is only a preliminary ruling of a sort which the courts have consistently refused to review. The finding is, it is true, a necessary prerequisite to the commencement of more than a single libel action based upon the same alleged misbranding. But the only positive effect of a finding is to enable the Administrator to re-

[16] These conclusions, though contained in the formal Findings of Fact, rather than in the Conclusions of Law, are in fact legal conclusions. They clearly constitute a part of the reasoning of the court below in support of its judgment.

quest the Department of Justice to cause the libels to be instituted. The Department is not bound to accept the Administrator's recommendation.[17] Even if it should do so, it only initiates the proceeding, and the drugs may be condemned only after trial by the district court.

In *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-113, and *United States* v. *Los Angeles and Salt Lake R. Co.*, 273 U. S. 299, this Court was also requested to review administrative rulings which were conditions precedent to the entry of final decisions but which in themselves had no binding legal consequences. The final valuations of the Interstate Commerce Commission which were before the Court in the *Los Angeles and Salt Lake* case were made "prima facie evidence of the value of the property" in subsequent rate proceedings (273 U. S. at 310-311). The decisions of the Civil Aeronautics Board such as were involved in the *Chicago & Southern* case are under the statute necessary prerequisites to Presidential action. The President need not follow the Board's recommendations, though he generally

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[17] "* * * while the Attorney General, in the performance of his official duties, has power to decide, or delegate power to decide, whether a particular statute has been violated and, if so, whether to initiate prosecution, his judgment is not in any way controlled by a report from the Federal Security Administrator, much less by the declaration or recommendation of an officer subordinate to the Federal Security Administrator; specifically, he is under no 'mandatory duty' to do anything under such circumstances." *Helen Products Co., Inc.* v. *McNutt*, 137 F. 2d 681, 683 (C.A. D.C.).

does. As the Court stated in the *Chicago & Southern* case, the Board's decision "may be a step which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order." But, the Court continued, "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

This principle that preliminary or intermediate agency action shall not be directly reviewable is also recognized in Section 10(c) of the Administrative Procedure Act.[18]

It may be suggested that the administrative finding of probable cause does constitute the "consummation of the administrative process," inasmuch as the Administrator himself takes no further action. But his finding results only in a recommendation that the Department of Justice proceed. It is apparent that his finding is not the conclusion of the administrative process, even if the subsequent judicial participation in the proceedings be disregarded.

[18] "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." Section 10(c), 5 U.S.C. 1009(c).

But if it be assumed that the intervention of the Department of Justice between the Administrator and the district court may not be taken into account, on the ground that the Department is an automatic conduit for the Administrator's wishes—which it is not—appellee is in no better position. For it cannot be said that an administrative finding which is a condition precedent to a trial *de novo* in a court before rights are determined is any more reviewable than a finding which serves merely as a prerequisite to further administrative proceedings. If anything, the reasoning of the decisions cited would seem to apply even more clearly in the former case.

The finding of probable cause prior to the institution of legal proceedings is by no means peculiar to the Food, Drug, and Cosmetic Act. The function of the grand jury is to determine whether there is "probable cause" to believe that a defendant is guilty before subjecting him to the burden of trial. *Beavers* v. *Henkel*, 194 U. S. 73, 84. But persons charged with crime cannot sue to enjoin prosecution on the ground that the evidence before the grand jury was insufficient to show probable cause. Indeed, they are not entitled to any trial of that issue. *Ex parte United States*, 287 U. S. 241, 250, quoted at p. 42, *supra*. Although the grand jury proceeding is a guarantee against arbitary action, it does not accord the defendant a chance to try his case twice—or even to have a hearing upon the

question of probable cause at all. See p. 42, *supra*. The language of this Court, although uttered in a factually different connection in *Beavers* v. *Henkel*, which involved removal proceedings after indictment, sets forth the general considerations relevant here:

> The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. [194 U.S. at 84-85.]
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> The indictment alone was, as we have seen, a showing of probable cause sufficient to justify the issue of a warrant. [194 U.S. at 87.]

Appellee may urge that the finding of probable cause should not be treated as merely preliminary in nature since the institution of more than one libel proceeding, with the resultant seizures, will cause it financial injury. But the commencement of litigation is often expensive or otherwise harmful to the defending party. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52. The grand jury's non-reviewable finding of probable cause may result in immediate arrest and imprisonment. This will

generally be true when the commencement of legal proceedings is accompanied by the seizure of property. In none of these situations will a court of equity in a separate injunction suit interfere with the normal processes of litigation by predetermining the issues in order to prevent injury *pendente lite*. Here, Congress has determined, through its establishment of the libel procedure, that the claimant and not the public must endure possible injury during the pendency of the litigation. See pp. 43-45, *supra*. Such a legislative determination should not be frustrated by permitting this type of injunction suit to be maintained.

B. The Statute and Its History Show That the Administrative Finding of Probable Cause Was Not Intended to Be Subject to Judicial Review

In addition to the general considerations just referred to, the history of the Federal Food, Drug, and Cosmetic Act shows that the administrative finding of probable cause was not intended to be subject to judicial review.

1. *The History of the Pertinent Statutory Provisions.*

As has been noted, under the Federal Food and Drugs Act of 1906, 34 Stat. 768, 774, goods that were adulterated or misbranded were subject to seizure wherever found, and multiple seizures were regularly made. The Act of 1906 was revised comprehensively in 1938. Long and careful consideration, extending from the 73d to the 75th Congresses, was

given to the redrafting of the section relating to libels and seizures, with particular reference to the problem of multiple libels. Bills originally proposed provided for *executive* seizures of articles "dangerous to health" [19] and placed no limitation on the number of libel suits that might be brought.

Subsequently, the legislation was redrafted to grant to the United States District Courts jurisdiction to restrain a multiplicity of seizures based upon the same alleged misbranding unless the misbranding involved danger to health or "gross deception," or unless it had been the basis of a prior judgment in favor of the United States.[20] That bill would have authorized suits of the kind here involved.

Still later, the Senate accepted an amendment which would have placed upon the administrative agency the duty to "show cause" in a United States District Court why multiple seizures were necessary.[21] This would have permitted a judicial determination of "probable cause" such as appellees have obtained in this case.

During the progress of the bill through the 74th Congress, after the addition of the requirement of

[19] S. 2000 and S. 2800, 73d Cong., 2d Sess., Sec. 16(a). These bills appear in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938), pp. 52, 71, which contains a complete statement of the legislative history of the Act. See also S. 5, Sec. 711, Dunn, p. 232, and S. Rep. 361, 74th Cong., 1st Sess., p. 29, Dunn, p. 263.

[20] S. 2800, as reported to Senate, February 6, 1934, 73d Cong., 2d Sess., Sec. 19(c), Dunn, pp. 105-106.

[21] S. Rep. 361, 74th Cong., 1st Sess., Part 2, p. 11; 79 Cong. Rec., 5230-5231, Dunn, pp. 389, 399, 467-469.

an administrative finding of probable cause, and the provisions for consolidation,[22] the provisions authorizing executive seizures and judicial "show cause" proceedings were dropped.[23] The House Committee in the 74th Congress also eliminated the provision of the Senate bill that would have granted the district courts jurisdiction to restrain a multiplicity of libel actions.[24]

The Senate bill at this stage only allowed multiple seizures (in the absence of a prior judgment) where misbranding rendered the article "imminently dangerous to health."[25] The House Committee rejected this limitation (Dunn, p. 528), and added a provision authorizing multiple seizures in cases where the Secretary had probable cause to believe that the misbranding was "in a material respect false, misleading or fraudulent"[26] The House Committee Report[27] stated with respect to

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[22] S. 5, as reported to Senate, January 3, 1935, 74th Cong., 1st Sess., Sec. 711(c), Dunn, 213, 233.

[23] 79 Cong. Rec. 8354, Dunn, pp. 505-506.

[24] H. Rep. 2755, 74th Cong., 2d Sess., p. 10, Dunn, pp. 529, 558. The Committee Report stated in this connection: "This subsection was struck out because it seemed to the committee to be either unnecessary or else susceptible of the possible construction that it might give each district court authority to issue injunctions which would operate throughout the United States."

[25] 79 Cong. Rec. 5230-5231, Dunn, pp. 467-469; S. Rep. No. 646, 74th Cong., 1st Sess., p. 13, Dunn, pp. 488-489.

[26] S. 5, as reported in H. Rep. No. 2755, 74th Cong., 2d Sess., May 22, 1936, 80 Cong. Rec. 7830, Dunn, pp. 546, 558.

[27] H. Rep. 2755, 74th Cong., 2d Sess., p. 9, Dunn, pp. 550, 558.

this modification, which in substance conforms closely to the Act as finally passed:

> There are two substantive changes made by this committee. One is that multiple seizures would be permitted in cases where the Secretary has probable cause to believe that the misbranding is in a material respect false, misleading, or fraudulent. This will permit protection of the public against such nostrums as a brew of weeds labeled as a treatment for diabetes and against innumerable other cheats and frauds which at best rob the consumer's pocketbook, and at worse rob him of health or life through his mistaken reliance upon them while his disease progresses unchecked. With this change the seizure section will continue to function as a means of "arresting the bullet in flight before it claims its victim", although the administrative agency will have materially less latitude, in making multiple seizures, than it has had under the present law for the past 30 years.

The Senate agreed to the House provision in a compromise bill,[28] but the bill did not pass the House at that session for other reasons.[29]

Substantially the same version of this provision was included in S. 5 as introduced in the 75th Congress (Dunn, p. 642), but the Senate Committee in reporting the bill omitted the language previously

[28] 80 Cong. Rec. 10514, 10518, 10520, Dunn, pp. 598, 613-614, 619.

[29] 80 Cong. Rec. 10674-10680, Dunn, pp. 620-633.

added by the House.[30] Prior to passage in the Senate, a clause was added permitting multiple seizures if the misbranding "is in a material respect false *and* fraudulent, or is labeled or advertised as a cure or remedy for cancer," and other named diseases.[31] The House, nevertheless, adhered substantially to the language which it had proposed at the previous Congress, which included, in addition to the phrase "dangerous to health," misbranding which was "in a material respect false *or* fraudulent."[32] The

[30] S. 5, as reported in 75th Cong., 1st sess., February 15, 1937, p. 14, 81 Cong. Rec. 1194, Dunn, pp. 655, 662; S. Rep. 91, 75th Cong., 1st sess., p. 4, Dunn, pp. 678-679.

[31] 81 Cong. Rec. 2007, 2013, Dunn, pp. 709-710, 725, 726.

[32] S. 5 as reported to House, April 14, 1938, 83 Cong. Rec. 5465, Dunn, pp. 780, 798; H. Rep. No. 2139, 75th Cong., 3d sess., p. 4, Dunn, p. 818; 83 Cong. Rec. 7790, 7903, Dunn, pp. 892, 963. H. Rep. No. 2139, p. 4, Dunn, p. 818, makes it clear that the object of the change from the Senate version was to make proof of intent to deceive unnecessary. The report states:

> Multiple seizures may be made on adulterations and on misbranding "when the Secretary has probable cause to believe that the misbranded article is dangerous to health or that the labeling of the misbranded article is, in a material respect, false or fraudulent." This represents substantially the administrative policy followed by the Department of Agriculture in the more than 30 years the old law has been enforced.
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> The language adopted by your committee differs from that of the Senate act in that in the provision above quoted, the words "false and fraudulent" rather than "false or fraudulent" are used. If a misbranding is sufficiently serious to justify the removal of the product from the market to safeguard the consumer against harm, then it is wholly immaterial whether the falsity of the labeling is a matter of gross carelessness or inadvertence, or whether it was grounded on a deliberate intent to deceive. Since the seizure procedure is peculiarly adapted to the enforcement of a consumer-protective law in that it arrests the illegal goods before the consumer is harmed,

conferee accepted the substance of the House proposal, substituting "in a material respect misleading to the injury or damage of the purchaser or consumer" for "in a material respect, false."[33] Representative Lea, in explanation for the House conferees, stated:[34]

> The object of that change was to make it clear that the misleading statement which it was intended to prohibit by seizure should be of such character as it might mislead a customer or purchaser to his damage. It has in mind consumer protection.

The language finally adopted conformed in substance to what the House had continually insisted upon. Although the Senate proposals had not gone as far, it is clear that the bill as passed included language which was deliberately selected so as to permit multiple libels with respect to products which were in themselves not dangerous to health but which because of their misbranding might be harmful to consumers.[35]

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your committee has been careful to avoid restricting this form of action in cases where there is actual need for its exercise to protect health or prevent fraud.

[33] See Conf. Rep., H. Rep. 2716, 75th Cong., 3d sess., pp. 5, 22, 83 Cong. Rec. 9089, 9094, Dunn, pp. 974, 992-993.

[34] 83 Cong. Rec. 9095, Dunn, pp. 997, 998.

[35] We have felt it necessary to set forth this legislative history in detail because of the repeated statements of Judge Clark during the proceedings below (R. 17, 579) that "That provision was slipped into the conference report; * * * * * * it was slipped in in conference. * * *. Nobody knew anything about the amendment." Judge Clark had as Senator

The Conference Report which reported the bill as finally passed inserted the words "without hearing" into the provision requiring the Administrator to make a preliminary finding of probable cause.[36] There was no explanation of this change, presumably because its meaning and purpose were obvious.

2. *No Review of the Administrative Finding of Probable Cause was Intended.*

(a) The above summary of the history of the libel provisions of the present statute shows that the bill at one stage specifically gave the United States District Courts power to restrain multiple seizures. But this provision was eliminated after the bill was amended to require an administrative finding of probable cause as a condition to the institution of multiple libel proceedings in the district courts. Thus Congress considered and rejected granting the district courts jurisdiction to determine by injunction whether multiple seizures should be allowed. The scheme whereby a preliminary finding of probable cause was required, and the consolidation of multiple suits permitted, was evidently thought to give the owner of the property adequate protection.

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been a member of the Conference Committee which, without dissent, approved the bill. H. Rep. No. 2716, 75th Cong., 3d Sess., p. 21, 83 Cong. Rec. 9094, Dunn, p. 992.

[36] H. Rep. 2716, 75th Cong., 3d Sess., pp. 5, 22, 83 Cong. Rec. 9089, 9094, Dunn, pp. 974, 992-993.

(b) The very fact that Congress provided that the preliminary determination of probable cause was to be made without a prior administrative hearing demonstrates that it was not intended to be reviewable at a subsequent judicial hearing. In the absence of an administrative hearing, there will be no record, in the usual sense, for a court to review. Judicial review therefore means, as the present case demonstrates, that, in order to determine whether there was sufficient basis for a preliminary finding, there may be a trial of substantially the same issues as would be canvassed at the libel trial on the merits. Since the reasonableness of the finding depends in large part upon whether the representations in question seem to be misleading, such review would usually, as here, become a *de novo* inquiry into the truth or falsity of the labeling. Furthermore, judicial reexamination of the preliminary administrative determination of "probable cause" might require testimony from the highest officials of the administrative agency as to what was before them and the reasons for their action (but compare *United States* v. *Morgan*, 313 U. S. 409, 422). Thus to allow review of a preliminary finding would in fact result in a full-scale trial in order to determine whether there was probable cause to institute a judicial proceeding which would in itself eventuate in a trial of perhaps considerably smaller dimensions. Clearly, there is nothing in either the text or the history of the

legislation which even suggests that Congress intended its provision for a preliminary finding of probable cause to result in one lawsuit to determine whether there should be another. The same considerations—avoidance of needless delay, adequacy of protection afforded to owner, etc.—which persuaded Congress to dispense with an administrative hearing, also militate against reading into the Act a provision for judicial review at that stage of the proceeding.

(c) When Congress intended administrative determinations under the Federal Food, Drug and Cosmetic Act to be judicially reviewable, it said so. Several sections of the Act authorize review of administrative action. (Sections 505(h), 701(e) and (f), 21 U. S. C. 355(h) and 371(e) and (f)). Section 701, in particular, provides for review of many types of administrative orders.[37] The absence of any such provision with respect to the preliminary finding of probable cause manifests a legislative intent that there be no review of such a finding, much more clearly than in the statute before the Court in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297.[38] The language of the Court in that

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[37] Section 701(f) authorizes judicial review by the United States courts of appeals of administrative action under Sections 401, 403(j), 404(a), 406(a) and (b), 501(b), 502(d), 502(h), 504, 506, 507, and 604 of the Act. 21 U.S.C. 341, 343(j), 344(a), 346(a) and (b), 351(b), 352(d), 352(h), 354, 356, 357, and 364.

[38] Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, in its introductory clause, excepts agency action from

case is peculiarly applicable here (320 U.S. at 305-306):

> That conclusion is reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act. There is no general provision for such review. But Congress has expressly provided for it in two instances. * * * When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent.

The deletion from the original bill here of provisions for injunctive relief against multiple seizures, after the probable cause finding was required, makes it clear that the failure to provide for review of the probable cause determinations was no more inadvertent in the Food, Drug, and Cosmetic Act than in the Railway Labor Act.

(d) The consequences of permitting judicial review of the finding of probable cause would to a considerable extent frustrate the purpose of the seizure provisions of the statute. That purpose

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its review provisions where "(1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion." Both conditions exist with respect to the probable cause determinations under Section 304 (a).

was not only to protect the consumer against products which are dangerous or branded in a respect which is harmful because materially misleading, but to do so immediately, prior to and not after the inevitable delays of litigation. Congress determined that where the Administrator had probable cause to believe that the public might be harmed or seriously misled, the potential injury to the public *pendente lite*, if distribution of the mislabeled product were allowed to continue, outweighed the harm to the purveyor of the article from the temporary detention of his property.

The sanction of multiple libels is essential to achieve the legislative purpose of arresting distribution of a dangerous product, a fraudulent product, or a materially mislabeled product "before it claims its victim".[39] This sanction provides the only practicable way in which dangerous, fraudulent, or seriously misbranded drugs already shipped in commerce may be removed from the market and held within the custody of law pending a determination of the alleged misbranding. Under the decision below, however, all distributors of food and drugs branded in a seriously misleading manner would have the right to challenge the Government's allegation in an injunction suit in the District of Columbia and to stay the arm of enforcement for months (or, as in this case, 1½ years) while the "probable cause" issue was in litigation.

[39] Quoted from H. Rep. 2755, set forth at p. 55, *supra*.

Indeed, the principal and unconcealed purpose of the instant litigation is to stay the institution of further seizure proceedings and thus permit continued distribution of the drug until after the validity of the appellee's labeling can be determined. It was precisely to avoid the evils of such delay that the Administrator was authorized to make the determination of probable cause without hearing. If the district court has the right to review the administrative decision, the beneficial effects of the expeditious procedure prescribed for administrative action would be nullified, the clear purpose of Congress would be thwarted, and great public harm could be done before shipments of contraband were reported for the institution of appropriate action.

More is involved here than the rights of the parties litigant. The public has an important stake in the determination of the jurisdictional questions. The question is not merely whether continued distribution of Nutrilite under the labeling heretofore used will be injurious or damaging to consumers, as we believe it will. The question is whether the effectiveness of the method devised by Congress for giving the public speedy protection against all nostrums believed to be harmfully misbranded shall be seriously impaired. For if appellee may seek to halt multiple seizures until a court may pass upon the correctness of the administrative determination of probable cause, so may all other distributors

whose products are thought to be so seriously misbranded as to warrant the commencement of more than one seizure proceeding. No means would then exist to protect the consumer from the injurious consequences of protracted proceedings. The damage to the public in such cases is direct and serious, not only in terms of money expended for a materially misbranded drug, but in hazards to the public health involved in self-diagnosis and experimentation with such products in the treatment of disorders requiring prompt and competent medical aid before it becomes too late.

For these reasons, the jurisdictional questions presented by this case are not mere technical matters, such as whether an issue should be tried in one forum or another. The jurisdictional questions here presented go to the heart of the effectiveness of the scheme established by Congress to protect the public health and welfare.

Adherence to the procedure set forth in the statute does not mean that a claimant such as appellee here will be denied a quick decision on the merits of his case. He has his choice of districts, and there is no reason why the libel cannot be tried as promptly as—and perhaps much more speedily than—an injunction suit in the District of Columbia. Here, the first libel against the appellee's property was filed on September 30, 1948. There is no reason to believe that the misleading character of appellee's labeling could not have been determined by one of the district courts long before this time if

appellee had not undertaken to bring the present case.

C. The District Court Lacked Jurisdiction in Equity to Review the Finding of Probable Cause

The district court also lacked jurisdiction, as a court of equity, because appellee had an adequate remedy at law.

Congress sought to establish a procedure whereby (1) when necessary for the protection of the public, distribution of seriously misbranded articles would be stopped *in limine* by seizure of the articles throughout the country, and (2) the owner of the product would not be unduly harassed by having to try a multiplicity of lawsuits.

Paragraph (b) of Section 304 contains special provisions to prevent the owner of the libeled product from having to try libel actions in different parts of the country. Where libels involving the same claimant and issues of misbranding are pending in two or more districts, they are to be consolidated for trial in "(1) any district selected by [the claimant] where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties"; or (3) in a district of reasonable proximity to the claimant's principal place of business, if so ordered by the court.

Not until April, 1949, did appellee make use of these provisions of the Act, and then only to seek consolidation in its home district (Finding 37, R. 768-769), a district not included within the districts in which a claimant is entitled as a matter

of right to obtain consolidation under the statute.[46] If appellee had obtained an order of consolidation

[46] The statutory provision permitting removal by court order to "a district of reasonable proximity to the claimant's principal place of business" (Section 304(b)) has consistently been held to mean "a district other than that of the domicile of the claimant." *United States* v. *600 Units*, 60 F. Supp. 144, 145 (W. D. Mo.); *United States* v. *Six Dozen Bottles*, 55 F. Supp. 458, 459 (E. D. Wis.); *United States* v. *26 Dozen Bottles*, 60 F. Supp. 626 (W. D. Mich.); *United States* v. *23 Gross Jars * * * Knea Cream*, 86 F. Supp. 824 (N. D. Ohio); *United States* v. *378 Dozen Small Size, etc., Emerson's Brand Seltzer*, (S.D. N.Y.), printed in Kleinfeld & Dunn, *Food, Drug, and Cosmetic Act, 1938-1949*, p. 1; *United States* v. *15 Cartons of Sekov Reducer*, (S.D. Tex.), printed in Kleinfeld & Dunn, p. 12. This conclusion is supported by the legislative history of the provision. An early version of the bill expressly contemplated removal to the district in which was located the claimant's principal place of business. S. 5, 75th Cong., 1st Sess., p. 13. House draft of March 10, 1937, Dunn, p. 780. A subsequent version of the bill changed the pertinent language to: "* * * the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district in a State contiguous to the State of the claimant's principal place of business." * * *" S. 5, 75th Cong., 3d sess., House draft of April 14, 1938, p. 53, Dunn, p. 798; see H. Rep. No. 2139, 75th Cong., 3d sess., p. 4, Dunn, p. 818. The debate in the House indicated that the object of this change was to provide for trial on "what might be called neutral ground," that "the position was that the claimant is entitled to a neutral court, and it might be disadvantageous for the Government to go into the State where the claimant resided, where the influence perhaps in favor of the manufacturing concern might make it impossible for the Government to get a fair trial." 83 Cong. Rec. 7791, Dunn, p. 895. (Statement by Representative Lea, a member of the Committee). See also 83 Cong. Rec. 7784-7785, Dunn, pp. 875, 878. The final change in this language, in conference, to "a district of reasonable proximity to the claimant's principal place of business" was obviously designed to continue to exclude claimant's home district, but to allow removal to any district of reasonable proximity to claimant's principal place of business, whether that district was in the same State or not. See H. Rep. No. 2716, 75th Cong., 3d sess., pp. 22-23, Dunn, pp. 975, 998. For proof that there was a reasonable basis for not requiring the Government to proceed in a claimant's home district, see the illustration given by Judge Knox in *A Judge Comes of Age* (Scribner's 1941), p. 243.

in the fall of 1948 and had endeavored to obtain an early trial with as much vigor as it has pressed this case, the legality of appellee's labeling would doubtless have been long since determined, after a single trial, by jury if requested. If appellee had prevailed, its products would probably have been returned to it long before deterioration would take place. See pp. 73-74, *infra*.

1. *Multiplicity.*

It is axiomatic that equity will not grant relief where there is an adequate remedy at law. This maxim applies when relief is sought in order to avoid a multiplicity of suits. This Court has defined the standards applied when this basis for equity jurisdiction is invoked. (*Di Giovanni* v. *Camden Fire Ins. Assn.*, 296 U. S. 64, 70-71, quoting from *Hale* v. *Allinson*, 188 U. S. 56, 72-77):

> ". . . the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness and *the inadequacy of the remedy at law* . . . Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, *the adequacy of the legal remedy*, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied: . . . The single fact that a multiplicity of suits may be prevented by this assumption of juris-

diction is not in all cases enough to sustain it. * * *" [Italics supplied.]

The *Di Giovanni* case, and also *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 774-780, imply that the possibility of avoiding more than one trial at law by other procedural devices would make resort to equity unnecessary.[41] Judge Parker, for the Fourth Circuit, has noted explicitly that the flexibility of modern procedures for consolidation of causes, combined with other factors, has greatly lessened the scope of the doctrine of multiplicity in the federal courts; in *Broderick* v. *American General Corporation*, 71 F. 2d 864, 870 (C.A. 4), he stated:

> In the federal courts, however, the question is simplified by section 267 of the Judicial Code, 28 USCA § 384, which gives congressional emphasis to the rule that suits in equity shall not be sustained where a plain, adequate, and complete remedy may be had at law; by section 921 of the Revised Statutes, 28 USCA § 734, *which*

[41] "The grounds for relief to a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear. See *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285, 286; *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, 700, 701. Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both; or unwilling to try first the suit in which they would be joint plaintiffs, or that in that case the judgment would not be *res adjudicata* in a subsequent suit, or in any case would not suffice to dispose of both; or that upon appropriate application the state court would not direct the trial of the controlling case first." [296 U. S., at 72.]

> *authorizes a consolidation of actions where they may reasonably be consolidated;* and by the Seventh Amendment to the Constitution, which requires the preservation in law actions of trial by jury. Whatever may be said in other jurisdictions as to the superior advantages of trying a number of actions at law as one suit in equity because some common question of law or fact is involved, there is little to be said in its favor in the federal courts *where the presence of such common question may furnish ground for consolidation*, so that even at law only one trial of the common question will be required. [Italics supplied]

The Eighth Circuit has held that the existence of a procedure for consolidation in a state court makes resort to equity inappropriate, saying (*Equitable Life Assur. Soc. v. Wirt*, 102 F. 10, 15):

> The plaintiff may compel the defendant to show cause in the state court why her actions should not be consolidated, and, if no such cause be shown, the several actions will be consolidated. § 20-703, Compiled Statutes of Nebraska, 1929. No reason is apparent to us why the actions brought by the defendant in the state court should not be consolidated, and, if they are consolidated, there is no practical necessity for enjoining their prosecution, since there would be then no multiplicity of suits and no unduly vexatious litigation.

That the doctrine of multiplicity may not be invoked when the cases in question can be consolidated

for trial is stated repeatedly in the exhaustive analysis in Pomeroy's treatise on *Equity Jurisprudence* (5th Ed., 1941),[12] which cites the authorities:

> Since the existence or exercise of the jurisdiction, in classes third and fourth, depends on defects in the legal rules as to joinder of parties, where the legal remedy is not thus defective, but permits the joinder of the numerous parties or consolidation of the numerous suits, equity will not take jurisdiction for the purpose of awarding substantially the same relief that may be obtained at law. [1 Pomeroy, 495]
>
> It should also be observed that if the pending actions at law are of such a nature or for such a purpose, that, according to the settled rules of the legal procedure, they may all be consolidated into one, and all tried together by an order of the court in which they or some of them are pending, then a court of equity will not interfere; since the legal remedy of the plaintiff is complete, certain, and adequate, there is no necessity for his invoking the aid of the equitable jurisdiction. [*Id.*, 506]
>
> In cases constituting the second branch of this class, the court *may* restrain numerous simultaneous actions against the plaintiff brought by the same defendant, all involving the same questions, for the purpose of having the whole decided by one trial and decree. The court will not interfere, however, when by the rules of legal procedure, all the actions can be consolidated by order of the court of law (see § 254). [*Id.*, 611]

[12] See to the same effect, McClintock on *Equity* (1936), 314

The treatise notes that in the cases in which courts have enjoined numerous prosecutions for violation of an invalid law, "the court [had] no power to consolidate the actions." *Id.*, at 507.

These authorities, holding that the multiplicity doctrine does not permit relief in equity when cases may be consolidated at law, were concerned with ordinary legal procedures for consolidating different cases. But their reasoning obviously applies when Congress has established a special and unusual procedure for consolidating a particular class of cases even when brought in many districts throughout the United States. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 774-781. For the provisions of Section 304 manifest both the Congressional awareness of the problem of multiplicity with respect to seizures under the Food, Drug, and Cosmetic Act, and the manner in which Congress intended to safeguard the competing interests of the public and the distributors of the products. Congress presumably did not regard the procedure which it so carefully devised as an inadequate remedy. Since this procedure enables the claimant of the libeled product to consolidate the cases for trial, there is no room for reliance upon the doctrine of multiplicity.[43]

[43] *National Remedy Co.* v. *Hyde*, 50 F. 2d 1066 (C.A. D.C.) does not support appellee's argument. That case was decided under the Food and Drugs Act of 1906, which did not afford a claimant the opportunity to consolidate multiple seizures, and hence no adequate remedy at law was available.

2. *Other injury.*

Appellee also claims, and the court below found (Fdg. 39, R. 769), that the seizures have caused irreparable injury by reason of (1) loss of morale among its agents and distributors, and a resulting drop in volume of sales; (2) the adverse effect of the publicity attending the seizures; and (3) loss of good will for the same reason. Such factors, which may accompany any legal proceeding in which a defendant is accused of wrongdoing, obviously do not furnish sufficient grounds for equitable intervention. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 778-780.

The injury from the necessity for hiring counsel and defending the various libel proceedings relates to the problem of multiplicity and need not be discussed further. Appellee need do no more than file a single piece of paper in each district where a libel is pending, requesting consolidation and removal of the case for trial to one of the districts in which it is entitled to have the case tried.[44]

The court below also found that appellee would suffer irreparable injury because the value of the property seized amounted to $6,822; and because "the product so seized will be unsaleable if returned to [appellee]." (Fdg. 39, R. 769). The only evidence supporting the latter portion of this finding was that some of the vitamins in Nutrilite cap-

[44] It would even seem unnecessary to hire separate counsel in each district, since appellee could file a claim and application for consolidation in each case in its own name.

sules deteriorate with the passage of time, so that if there was "prolonged storage", such as a "year or so," there would be some "loss of potency."[45]

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[45] The testimony of appellants' and appellee's witnesses on this point was not in conflict. Appellee's witness Truesdail stated in his deposition (R. 285-286):

Q. "Now, with your experience in the field of vitamins, biochemistry, and nutrition, do you have an opinion as to whether or not the lapse of time has any effect in the potency of a multiple vitamin product?"

A. "Yes, I do have an opinion on that."

Q. "What would your answer be?"

A. "Well, my answer would be that there would be a gradual loss of certain vitamin factors with prolonged storage of the product."

Q. "Would the length of time, the relative length of time, have an effect on the relative loss, that is, the longer the time, the more loss?"

A. "Yes, that would be true."

Q. "So that if a multiple vitamin product were kept without use, without being used, for a period of a year or so, you would expect to find loss of potency; is that correct?"

A. "I would expect to find some loss of potency over its original potency when it was made."

Q. "Now, do you and your laboratory have any policy with respect to the length of time that multiple vitamins should be kept on store shelves before used?"

A. "Only to the extent that we advise our clients in general to try and move their stock so that there will not be any on the shelves, if possible, any longer than six months. We feel that is a safety factor, and beyond that six months period there may be a substantial loss of certain of the more unstable vitamins."

Q. "Now, your statement to the effect that multiple vitamin products in your opinion should be moved to the consumer within six months, and I take it that means six months after compounding and manufacturing?"

A. "That is correct."

Q. "Do you apply that also to multiple vitamin products of similar nature to Nutrilite?"

A. "Well, we apply it to all vitamin products.

If appellee had proceeded promptly to consolidate the cases and request an early trial, and had been vindicated, the tablets would have been returned before their value had been impaired.[46] But, apart from that, and assuming harmful deterioration, the loss of value resulting from the fact that a product is subject to deterioration or is perishable (as must be the case for many types of food and drugs) is not a sufficient basis for departure from the statutory scheme.

D. The District Court Lacked Jurisdiction to Determine Whether Appellee's Labeling Was Misleading

The court below found that appellee's labeling was not misleading in any particular (Fdg. 12(f),

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Q. "Including Nutrilite?"
A. "Including Nutrilite."

Dr. Elmer M. Nelson, a witness for the Government, testified (R. 487-488):

Q. Doctor, on the basis of your experience and the supervision of your laboratory, do you have an opinion as to the deterioration rate of properly encapsulated vitamin preparations?
A. I have.
Q. And what is that opinion?
A. If vitamins are properly encapsulated there would be no measurable deterioration of vitamin A, vitamin D, riboflavin, or vitamin B-2, or of nicotinic acid, in a period of a year or even in two years.
With respect to vitamin C and vitamin B-1, there is some deterioration even in the best made preparations, and those that the Army purchased—multivitamin preparations that the Army purchased during the war—some of them showed a deterioration of the order of 5 percent per year—about 10 percent in a period of two years.

[46] It is true that if an appeal was taken the tablets would be retained for a longer time. But whether such an appeal would be taken is, of course, entirely conjectural and not sufficient foundation for a claim of irreparable injury.

R. 759-760). This was the issue which the statute commits to the courts in which the libel proceedings are to be heard.[47]

Much of what has been said in the preceding sections serves to demonstrate that the court below lacked jurisdiction to try that issue. The argument in Point II(C) (pp. 65-74, *supra*) as to lack of jurisdiction as a court of equity is, of course, fully applicable to this phase of the case as well, and need not be repeated. For the right to consolidate the libel proceedings in itself provides an adequate remedy at law and makes unnecessary a determination in equity of the issues to be tried in the libel suits.

Only a few additional observations seem necessary.

The procedure established by Congress obviously contemplated that the question whether the labeling was misleading would be tried in the libel suits or one of them. The injury to the owner of the products which often results when multiple seizures are begun was to be alleviated by consolidation, not by resort to a suit for injunction in the District of Columbia.

Of some significance is the provision in Section 304(b) that "on demand of either party any issue of fact joined in any such case shall be tried by jury." The Government, as well as the claimant,

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[47] The issue may also be determined, of course, in district courts in which the Government may institute other types of enforcement proceedings.

was thus given the right to insist on a jury trial. It is not difficult to think of circumstances in which the Government would consider that a jury, consisting of the type of persons to whom such representations are addressed, would be the proper tribunal for gauging their deceptive effect.

In addition, and perhaps of greatest importance, to permit the basic issue as to the deceptive character of the labeling to be decided in an injunction suit while the pending seizures were, at the command of the injunction court, held in abeyance, and while additional seizures were prohibited, would be inconsistent with the basic purpose of Section 304 to protect the public during the period of pendency of the seizure suits. The grant of a temporary injunction, as in the instant case, would reverse the policy which Congress deliberately adopted in the statute whereby, when it is believed that misrepresentation would be harmful to the public, the consumers and not the distributors were to be protected by seizure of the product in advance of trial.

III

If the District Court Had Jurisdiction to Determine Such Issues, It Should Have Found That the Facts Amply Support the Administrative Determination of Probable Cause and That Appellee's Labeling Is Misleading

If, contrary to our contention, the District Court had jurisdiction in the present case to review the validity of the administrative determinations that probable cause existed for believing that the labeling of appellee's product is materially misleading,

the scope of such review would, under settled principles governing judicial review of administrative action, be limited to an inquiry whether the determinations of probable cause, *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130-131; *Donaldson* v. *Read Magazine Co.*, 333 U. S. 178, 186; *Houston* v. *St. Louis Packing Co.*, 249 U.S. 479, 484-485 (no prior administrative record). We respectfully submit that the facts of record before the Administrator furnished ample support for the administrative findings of probable cause, and that the evidence adduced at the trial reinforced the correctness of the administrative determinations by proving that the labeling was in fact misleading.

Whether the labeling of appellee's product was misleading depended upon (1) the nature of the representations contained in such labeling, and (2) the truth or falsity of such representations. Each of the various officials who made the determinations of probable cause testified that his conclusion as to the character of the representations made on behalf of the product was based upon his own examination and analysis of the booklet "How to Get Well and Stay Well" (R. 315-326, 334-336, 374-378, 383-384, 395-405, 508-510, 512). These officials testified that they had found that the booklet represented to the average reader that Nutrilite would be effective in the prevention and cure of most common and serious diseases, which would

include such ailments as high blood pressure, heart and coronary disease, pneumonia, tuberculosis, and cancer (R. 326-327, 375-378, 396, 398-400). Having found such representations in the booklet, each official relied upon the findings of fact of his medical adviser that Nutrilite would not be effective in preventing or treating most such diseases and conditions (R. 313-315, 333-334, 395, 505, 512-514). Accordingly, each official concluded that he had probable cause to believe that the labeling would be in a material respect misleading to the injury or damage of the purchaser or consumer (Deft. Ex. 12, R. 1171, 314, 315-318; Deft. Ex. 13, R. 1173, 333, 334; Deft. Ex. 15, R. 1216, 408, 395; Deft. Ex. 23, R. 1532, 518, 509, 514).

To be sure, none of the officials had before him facts showing actual physical injury or damage to any particular purchaser or consumer (R. 330, 385, 406, 507). But each based his determination on the ground that there was probable cause to believe that many consumers and purchasers, relying upon the representations made in its behalf, would use Nutrilite to treat diseases for which it was ineffective as a preventive or cure (R. 315-319, 335-336, 376-378, 395-405, 509-510). It was also testified that, in some cases the labeling of appellee's product would cause delay in obtaining competent diagnosis and treatment for serious diseases, with perhaps irreparable damage to health (R. 318, 403-404).

The evidence presented by appellee did not seriously challenge the medical findings of fact upon which the probable cause determinations were made. Indeed, there was no substantial difference between appellee's medical witnesses and appellants' as to the basic medical facts. There was agreement that Nutrilite and vitamin products generally would be useful in helping persons suffering from dietary deficiency resulting from insufficient vitamins. (R. 86, 351, 373-374.) The medical evidence presented in the District Court was also essentially in accord as to the ineffectiveness of Nutrilite in the prevention and cure of the various specific ailments referred to above. The findings of fact submitted by Dr. Butz to the administrative officials were that a product containing the ingredients of Nutrilite would not be effective in preventing or treating most common diseases, and that most common diseases do not result from dietary deficiencies (Deft. Ex. 12, 13, 15, 23; R. 1171, 314; 1173, 333; 1216, 408; 1532, 518). This was confirmed not only by the statements of three medical doctors testifying for appellants (R. 342-343, 344, 348-350, 351, 354-360, 362, 364-365, 432-434, 437, 472-478), but by appellee's medical witness, Dr. John Myer, who admitted that, with regard to such illnesses and diseases, a vitamin and mineral product like Nutrilite could not be regarded as a specific preventive or cure, and that Nutrilite was useful only as adjunctive

therapy (R. 103, 106-107, 112, 113, 131-132, 163). Nor did the findings of fact made by the District Court contradict or challenge the medical findings submitted to the administrative officials as to the usefulness of Nutrilite in the prevention and treatment of common diseases. The crux of the District Court's findings relating to the lack of factual justification for the probable cause determinations is contained in Finding 12(e) (R. 759):

> (e) The three pamphlets (Pl's Exs. #1, 2 and 3), when read as a whole and fairly interpreted, without lifting statements therein out of context, do no more than represent that Nutrilite is a vitamin-mineral food supplement designed and intended to build up the bodies of human users thereof in order that it may aid nature to help the users enjoy better health through better nutrition. Said pamphlets do not represent to the minds of ordinary, reasonable and prudent persons that all of the symptoms, conditions and diseases of the human body necessarily or generally result from dietary deficiencies alone, or that all of the symptoms, conditions and diseases of the human body can be prevented, cured or treated by the use of Nutrilite, and said pamphlets do not represent, suggest, or imply that Nutrilite is a medicine or drug, or that it is efficacious or beneficial in the prevention, treatment or cure of all diseases.
>
> These pamphlets represent the product only as a food supplement containing vitamins and minerals beneficial to building up health and

> bodies and in alleviating, in some but not in all instances, symptoms resulting from vitamin and mineral deficiencies in the diet. Purchasers and consumers do not understand from these pamphlets that Nutrilite is a treatment or cure for any disease. * * *

It is clear from this passage that the court below did not believe that Nutrilite would be generally effective as a means of preventing or curing disease.

The District Court's objections to the probable cause determinations were based upon its view that the administrative officials were entirely unjustified in believing that any of the three editions of the pamphlet "How to Get Well and Stay Well" represented that Nutrilite had any such effect. Indeed, at various stages of the trial the members of the District Court strongly expressed their view that no reasonable man could read the booklet as containing any such representations (R. 115-117, 124-127, 149-150, 152, 161, 221, 242, 376, 381-382, 397, 400). A reading of the record will clearly show that this view of the District Court permeated the entire proceeding held before it.

The critical question is whether the administrative officials could reasonably have reached the opposite conclusion, that the booklets would deceive the consuming public. It becomes necessary, therefore, to analyze in detail the contents of the booklets.

The administrative officials testified that the booklet employed a familiar technique capitalizing on the average person's fear of death and illness. (R. 316, 334-335, 509). They regarded as significant the booklet attempt to make illness, malnutrition, and vitamin and mineral deficiency seem practically synonymous terms (R. 913-915), and the description of Nutrilite as a treatment for dietary deficiency disease, accompanied by the explanation that dietary deficiency disease is now being recognized in the newer branches of science as the root of the common ailments which result in premature death. (R. 323, 326, 330, 400-402). These officials knew also that, as Dr. John Myers, a witness for appellee, testified (R. 147), a person "would not be likely to buy an expensive preparation like Nutrilite" for a "simple" condition but only when "his condition got very much worse." They recognized the emphasis upon Nutrilite's "secret base" and its alleged extraordinary merit as characteristic of claims that were prevalent in the heyday of patent medicines and quack nostrums.[48] (R. 316, 334, 400).

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[48] Compare *Secrecy in "Patent" Medicines,"* Journal of the American Medical Association, Nov. 3, 1917, reprinted in Vol. II, *Nostrums and Quackery*, 800 (Cramp Ed. 1921), where the following statement is made:

> "Practically every 'patent medicine' manufacturer leads the public to believe, either by direct statements or by implication, that his preparations possess some marvelous and esoteric powers—due either to a peculiar combination of well-known drugs or to the presence of some mysterious

The 58 page edition of the booklet involved in the first four libel proceedings unquestionably represented that Nutrilite was effective in the treatment of "severe abdominal pains" (R. 827), "splitting headaches" (R. 827), "terrific pains" in joints and hips (R. 827), "heart catches" (R. 827), "extreme fatigue" (R. 835), "sneezing and weeping" (R. 831), "nervousness" (R. 835), "tuberculosis" (R. 835), and "dizzy spells" (R. 836). These representations were in the form of testimonials given by persons who stated that they obtained relief through the use of Nutrilite. The administrative officials were entitled, on the basis of their experience, to conclude that representations in the form of such testimonials are most effective in impressing the average reader. In *United States* v. *John J. Fulton Co.*, 334 F. 2d 506, 507, the Court of Appeals for the Ninth Circuit observed that sales pamphlets containing such testimonials have "a more persuasive appeal to

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drug about which the rest of the world is ignorant—not to be found in official products or in unofficial products made by competitors. Such claims, of course, are the sheerest humbug."

No evidence was offered as to the method of preparing the "secret base" of Nutrilite or as to its final composition. Claimant's expert witness testified that the base has something that makes it more valuable than ordinary vitamins and minerals (R. 87), but on cross-examination, while stating that the base contained something "specific" and "essential", he admitted that he did not know how the base was prepared or how it fit into the curative picture. (R. 163-164). The evidence offered in support of plaintiff's case dealt not with the base and its merits, but only with the beneficial effects of vitamins and minerals.

the credulity of sufferer from these diseases than if the representations thus implied were made directly upon the authority alone of the proprietors, and for that reason they are not less, but more, obnoxious to the law." [49]

As stated, *supra,* appellee revised its 58-page booklet, first by deleting therefrom pages 37-58, and later by issuing a new 42-page edition. Both the 36-page and the 42-page editions, while eliminating the testimonial material contained in the 58 page edition, contain numerous passages which the administrative officials correctly found to be representations on which "credulous persons", suffering from serious diseases would rely to their possible injury or damage "despite subtle qualifying phrases". Cf. *Reilly* v. *Pinkus,* 338 U. S. 269, 274. The booklet must be read in its entirety in order fully to appreciate its impact upon the average reader. The theme is simple and is developed in logical sequence, leaving the following impressions on the reader: [50] (a) Almost everyone in the

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[49] The court below stated on several occasions (R. 149-152, 376, 382) that the representations in the testimonials could not be attributed to appellee and refused to permit appellants to cross-examine (R. 152) or introduce evidence (R. 382-383) for the purpose of developing their contention that the testimonials were deceptive. This was serious error.

[50] The following analysis is of the 42-page booklet (Pl. Ex. 3, R. 883-927). The 36-page booklet is almost identical with the first thirty-six pages of Pl. Ex. 3 (R. 844-882). However, on page 35, it includes a more direct statement of what is meant by "common diseases". The statement, which was eliminated from the 42-page edition, is (R. 881):

> Most of our common diseases, with the exception of germ diseases, but including some of the most painful,

United States is either ill or about to become ill, (b) almost every common illness, including those most responsible for premature death, is due to vitamin deficiencies, (c) the average American diet is deficient in certain vital food factors including both known and unknown vitamins and minerals, which are called "nutrilites" by biochemists, (d) to prevent and cure such illnesses, these food factors must be put into the body to bring it into chemical balance, for illness is merely the result of chemical imbalance in the body and health is the result of chemical balance, (e) to attain chemical balance, and thus to get well and stay well, one should use Nutrilite, which contains not only the known vitamins and minerals but also the unknown ones.

Pages 1 through 6 (R. 886-891) instill the seeds of fear. The reader is asked provocative questions (page 1):

"ARE YOU A VICTIM?"
"ARE YOU SUFFERING FROM HIDDEN HUNGER?"
"ARE YOU SLOWLY STARVING TO DEATH?"

He is asked to look around at the members of his family, his neighbors, friends and relatives, and himself. "Can you find even three or four who are

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the most common causes of death from illness, those with the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies."

The 58-page edition (Pl. Ex. 1, R. 783-843) is the 36-page edition plus 37-58. The later pages are largely comprised of testimonial material.

absolutely and completely well? Are you enjoying perfect health?"

"On the other hand * * * note how many are weak and lacking in energy, having trouble digesting their food or suffering with actual stomach pains, with decaying teeth, trouble with their hearts and other important organs, and with aches, pains and discomfort in various parts of their bodies. * * * And finally think of people you know, your age and younger, who have died in the last year, prematurely." On pages 1 and 2 (R. 886-887) the reader is asked to check himself against five criteria of good health. These are so defined as to insure that almost everyone will discover at least one respect in which he lacks good health. This section concludes: "Now—what do you think? How many of the people in your family meet these health requirements? How many of your friends measure up to these standards? Do you? Don't you think the facts point to the need for something?"

Page 10 (R. 895) continues the thesis that almost everyone suffers from a deficient diet and almost all illness results from such a deficiency. The booklet states that the "result is that almost all members of our families have bodies which are malnourished, and show evidences of the malnutrition which causes most of our common deficiency ailments." "Deficiency ailments" are defined as including "most of our current and common ail-

ments." (Page 11, R. 896). The purpose of the booklet is explained on page 10 (R. 895) as:

> So the purpose of this book—and the objective of the person who lent you this book—is to bring you to the point where you will recognize the fact clearly that *your illness and the illness of your family, is, in almost every case, the result of a failure to supply your body and the bodies of the members of your family with the vital food factors.* You must realize that if you wish to preserve your health and the health of your wife or husband, have healthy, happy children, fight off the common deficiency diseases yourself, and enjoy vibrant health and an active old age, YOU MUST PUT INTO YOUR BODY ALL THE FOOD FACTORS REQUIRED BY IT.
>
> This book tells you how to do this, and it supplies the answer to the enigma of modern medicine—why some people get sick so easily, and get well with such difficulty. [Italics supplied]

The term "nutrilites" in lower case is used to denote all the necessary food factors.

Pages 16-19 (R. 901-904) are devoted to a discussion of the functions of vitamins and their interrelation in preventing and treating diseases. On page 19 the "medical approach" to illness is described as consisting of combating those diseases which are caused by the entrance of foreign matter into the body "(germs and poisons, for example)". It is indicated that this "medical approach" is old-

fashioned. "The new facts are that many physical ailments and diseases are not the result of the penetration of the body by something foreign, but THE FAILURE TO PUT INTO THE BODY needed factors and materials, resulting in nutritional deficiencies." (Page 20, R. 905).

On page 20 (R. 905), it is stated that one can fight a particular disease with medicines or by "forgetting all about the symptoms and their medical names, and putting back into the body the materials the body needs for health. In this way, you are not fighting any foreign element in the body, or trying to cure anything. You are adjusting your diet so your body can restore itself to normal."

On pages 20 and 21 (R. 905-906), the reader is advised that whenever he has "an ache or pain, a weakness, wasting, unsatisfactory feeling, a lesion, a sympton, or loss of physical capacity—in short, when he is ill, there are three courses of action open * * *." The first course suggested is for the sufferer to add to his diet the essential food factors. "Then he can wait long enough to give the body a chance to rebuild, and see if that is all he needs." If the "physical ailment seems to be acute" the sufferer is advised in large capital letters to rebuild his body with nutrilites, and in small letters also to consult a physician. Page 21 (R. 906) states:

> This procedure should be acceptable to all concerned. First, if the ailment is chronic rather than acute, no harm can come from the use of the process of physical rebuilding through food and the nutrilites, since the ail-

ment has likely been plaguing the person for considerable time and the sufferer is still alive. A few months devoted to rebuilding the body can hardly make things worse.

A person following this advice will be likely to avoid seeing a doctor until an ailment becomes acute. With many afflictions, such as cancer, this will be too late even if "the sufferer is still alive." See R. 318.

Pages 23-40 (R. 908-925) are concerned with a discussion of the enemies of health, namely, depleted soil, improper cooking, processing, and storage and shipping delays which deprive the public of needed food elements—all designed to show that most persons are not properly nourished—and with the presentation of the apparently simple solution to this serious problem.

On page 28 (R. 913) appears this statement:

> * * * the result of diet deficiencies may show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's, whereas we should live in good health and vigor, and with full possession of our faculties, to the age of 90 or 100.

A ray of hope is offered on the same page:

> Chemical and biological sciences have established the fact of the chemical nature of the life process and that living things of all kinds must be in chemical balance to be normal. Most of the ills and diseases of human beings are un-

> necessary—they are the result of chemical starvation of our bodies for substances vitally necessary to life.

In short, the impression is given that "adverse physical conditions" (p. 28, R. 913) "most responsible for death in our 40's and 50's," no matter what their medical names, result from failure to obtain the nutrilites and thus to keep the body in "chemical balance". "When your body gets out of chemical balance, you are ill. When you get into chemical balance and stay there, you are well." (Page 30, R. 915.)

On page 33, after stating falsely (see page 92, *infra*) that a recent study shows that "only one in a thousand is not suffering from deficiency—from malnutrition", the booklet declares "either we are now experiencing some deficiency disease, or we are ready to come down with one." (R. 918)

On pages 39 and 40 the word "Nutrilite" in upper case is used for the first time. Here, at last, the solution is presented; all the essential food factors—even those that are unknown—are found in Nutrilite Food Supplement (R. 925):

> The sufferer with dietary deficiencies and deficiency ailments has the problem of getting into his body all the basic food factors which either were never in his food to start with or which have been partially removed in some way. If you are such a sufferer, how can these basic food factors be added to your food? We believe that NUTRILITE Food Supplement is at least one answer.

> The man, woman or child who is reasonably well, and who wishes to stay that way and if possible improve, has also the problem of keeping his body supplied with all the vital food factors. If you are in this group you too have a problem, in this civilized age of devitalized and imitation food. And here again, you can turn to—NUTRILITE Food Supplement.

Finally, the fourth edition of the booklet (but not the earlier ones), on its final page (page 42, R. 927), contains warnings that a food supplement only improves "your nutritional status", that "if there is any evidence that a doctor should be consulted, you should do so" and that "you may have other conditions that require the services of a physician, in which event you should consult a doctor immediately. It is a sound health rule to see your dentist twice a year and to have a regular periodic check-up by your physician."[51] This could hardly be expected to counteract all which preceded it.

The evidence adduced at the trial also proved that several material representations in the booklets were clearly false. Documentary evidence offered by appellants to show such falsity was not contradicted by appellee. Five specific instances may be cited:

(1) On pages 3 and 4 of the booklet is a fragmentary and incomplete quotation from a New York Times article for June 29, 1945, which in its

[51] The 58 and 36-page editions recommend that a physician be consulted only if the condition is acute (R. 805-806, 866-867).

context attributes to vitamin and mineral deficiencies the high rejection rate for women applying for the W.A.C. (R. 888-889). Defendants' Exhibit 4, a photostat of the article, shows the specific causes of rejection, which do not include vitamin and mineral deficiencies. (R. 1059, 234).

(2) On Page 4 of the booklet appears a statement that a survey by a large eastern college showed that only 2 out of 2511 persons studied in Pennsylvania were receiving the vitamins, minerals, and proteins they needed (R. 889). Defendants' Exhibit 17 is a copy of the official report of that survey conducted by the Pennsylvania State College (R. 1225, 456-457). It does not support the claim in the booklet (R. 457-458, 1247).[52]

(3) On Page 6 of the booklet appears the statement that 32% of draftees in World War II were rejected and that 52½% had some disability (R. 891). These statements are presented in a context which was intended to and does, in fact, force the reader to conclude that these rejections and disabilities are the result of vitamin and mineral deficiencies. Defendants' Exhibits 5, 19,

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[52] The report states that "only two boys * * * were uniformly high in all of the tests given to them" (R. 1247). Examination of the report as a whole (R. 1225-1248) shows that the quoted passage does not by any means justify the appellee's assertion that all of the other persons covered by the survey "lacked the proper nutrition" and were "not receiving the vitamins, minerals and proteins they needed!" (R. 889). Appellee apparently relied upon an inaccurate newspaper summary of the report (R. 1249).

and 20 are copies of official selective service statistics on causes for rejections during World War II; vitamin and mineral deficiencies accounted for a very negligible percentage of such rejections. (R. 1061, 1250, 1391, 465, 1063, 1068-1074, 1086-1099, particularly 1098, 1264-1274, 1404-1411.)

(4) Pages 7, 8 and 9 of the booklet contain statements that Carl Rehnborg, the discoverer of Nutrilite, "majored in biochemistry in an eastern university"; that he "specialized in the chemistry of foods"; that he took part in "early vitamin research experiments"; and that he "returned to the United States in 1927" and "began a six-year period of intensive study and experimentation." (R. 892-894). Defendants' Exhibit 24, a stipulation concerning the education and background of Carl Rehnborg, proves conclusively the falsity of these statements (R. 1542, 520).

(5) Page 11 of the booklet explains that common deficiency ailments include most of our current and common ailments (R. 896). Page 28 claims that "common deficiency diseases" include the diseases "most responsible for death in our 40's and 50's." (R. 913). Defendants' Exhibit 25 gives the leading causes of death from 1945 to 1947 as diseases of the heart, cancer, tuberculosis, pneumonia, nepliritis, diabetes, and intracranial lesions of vascular origin. (Deft. Ex. 25, R. 1543-1545, 529. Vitamin deficiency diseases accounted for only 973 out of 1,445,370 deaths reported in 1947. (R. 1551).

Exhibit 26, which would have shown that the same was true for deaths of persons in the 40's and 50's, was excluded by the court below (R. 529-530).[53]

This summary and analysis of the representations contained in the booklets, in the light of the conceded medical facts as to the inability of Nutrilite to cure or prevent most common diseases, demonstrate that the booklets were designed to give readers a false impression that Nutrilite would prevent or cure all but acute ailments, and that almost everyone needed it in order to avoid a dietary deficiency. There was thus ample basis for the determinations made by the administrative officials that they had probable cause to believe that the labeling was materially misleading. The officials were not required to find that every statement was literally false. The statutory standard which they applied, and properly so, in making their determinations, has been defined by this Court in *United States* v. *95 Barrels * * * Vinegar*, 265 U. S. 438, 442-443, as follows:

> The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or de-

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[53] Such official statistics would seem in any event to be judicially noticeable. They show that the proportion of deaths in the 40's and 50's resulting from vitamin deficiency diseases was insignificant. See "Vital Statistics—Special Reports, National Summaries—Death and Death Rates for Selected Causes by Age, Race, and Sex, United States, 1947. Volume 31, Number 11."

> ceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

This principle was reaffirmed by this Court in *Donaldson* v. *Read Magazine*, 333 U. S. 178, 188-189, in which the Court stated:

> Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead. * * * Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. * * * People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. "Laws are made to protect the trusting as well as the suspicious." *Federal Trade Comm'n* v. *Standard Education Society*, 302 U. S. 112, 116.

If the booklets be tested in the light of these standards, there can be no question that they are materially misleading. And since the result might be to induce consumers to use Nutrilite for symp-

toms of common diseases as to which delay in effective treatment might be dangerous, if not fatal, it is clear that the misbranding would be injurious to consumers.

With respect to the lawfulness of the finding of probable cause—if it is reviewable at all—the only question is whether the administrative finding is one which could be made by a reasonable man, not whether the court would reach the same decision. We submit that the evidence more than satisfies this burden. Indeed, the record demonstrates as a matter of fact that the booklets were unquestionably misleading. Consequently, even if this Court should conclude that the ultimate issue as to the character of the labeling is before it, i. e., whether the "labeling is false or misleading in any particular",[54] we submit that it should hold that the labeling is misleading and that the conclusion of the court below to the contrary is clearly erroneous.

Appellee's good faith, if any, is irrelevant. One further matter deserves discussion, since it apparently misled the court below and influenced both its decision and its rulings on evidence to a substantial degree. The court below concluded that appellee acted in good faith in preparing and using the pamphlet (Fdg. 12(f), R. 759-760). Even if

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[54] Federal Food, Drug and Cosmetic Act, Sections 403(a), 502(a), 21 U.S.C. Sec. 343(a), 352(a). Only in reference to the preliminary finding of probable cause does the statute impose a more stringent standard and require that misbranding be "in a material respect misleading to the injury or damage of the purchaser or consumer" (Section 304(a), 21 U.S.C. 334(a)).

true, this was irrelevant. As the passage quoted at page 56, n. 32, *supra*, from the House Committee Report demonstrates, Congress deliberately eliminated intent as an element for this type of offense. This Court squarely so held in *United States* v. *Dotterweich*, 320 U. S. 277, 281, saying:

> Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U. S. 250. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . ." *United States* v. *Johnson*, 221 U. S. 488, 497-98.

Apart from this, and despite the holding of the court below, we submit that appellee's good faith is highly questionable. It is true that whenever apprised of the fact that the Food and Drug Administration was investigating its practices, appellee consulted counsel, sought to confer with officials of the Administration, and toned down the exaggerations contained in its booklets. But this does not manifest good faith, but merely an attempt to

keep out of trouble. The original booklet, upon which the criminal prosecution was based (Def't. Ex. 7, R. 1104, 298), represented much more affirmatively than the later versions that Nutrilite would prevent and cure serious diseases. See pp. 6-7, *supra*. It seems highly unlikely that these representations could have been made in good faith. Appellee's repeated modifications of the booklet, without ever changing the impression which it was designed to make on the average consumer, shows merely that appellee was seeking to avoid prosecution by the Government, not to be honest and above-board in its dealings with the public.

IV

Reversible Error Was Committed by the Court Below in Limiting Cross-Examination and in Ruling on the Admission and Exclusion of Evidence and on Appellee's Rights to Pre-Trial Discovery.

We have argued that the District Court lacked jurisdiction to review the findings of probable cause or to determine for itself whether appellee's labeling was misleading, and also that in any event the testimony of record demonstrates that the administrative finding was adequately supported and that the labeling was misleading. Only if the Court should decide all these contentions adversely to the Government will it be necessary to deal with the errors committed by the District Court in the course of the trial.

Some of these errors have a significant bearing upon the decision of the factual questions for sev-

eral reasons. Thus, to the extent that cross-examination was improperly restricted and evidence offered by appellants excluded, the record considered by the court below was deficient. This Court cannot know what would have appeared in the record if cross-examination had not been limited. The improper restriction of cross-examination is a recognized ground for reversal. *E.g., Reilly* v. *Pinkus*, 338 U. S. 269.

1. *Curtailment of Cross-Examination.* The trial court unreasonably restricted the cross-examination of Casselberry and Dr. John Myers, the principal witnesses for the Company. They were allowed on direct examination to express broad opinions as to what the booklets convey to the public, and to say, without discussing any specific parts of the labeling, that there are no false or misleading claims made in the booklets (R. 51-53, 85-86). This type of direct examination enabled the witnesses in very brief testimony to vouch for the truth of all statements made in the 136 pages of printed matter that comprised the three editions of "How to Get Well and Stay Well."

Both in order to determine the meaning of the representations in the booklets and to test the veracity and candor of the witnesses' testimony that the booklets were in no way misleading, appellants sought to cross-examine Dr. Myers and Casselberry at length by confronting them with a great many passages from the booklets and eliciting the wit-

nesses' understanding of them. It is not at all inconceivable that if forced by vigorous and persistent cross-examination to justify a great many of the statements in the booklets, such as those quoted in the preceding Point, their testimony would have been discredited. Only through such an examination, which the court below did permit, was Dr. Myers compelled to express his understanding of such phrases used in the booklets as "common illnesses" (R. 94-95), "common diseases" (R. 96-122) and the like, and to concede that in all of the "common diseases" he had mentioned, vitamin pills alone would not help or cure (R. 112, 127), that Nutrilite would not cure any of the common diseases (R. 106-107), that he was unable to name any common dietary deficiency diseases that cause death in the 40's and 50's (R. 133-139), that if common symptoms were treated with Nutrilite it would be useless unless, as sometimes may happen, those symptoms in the particular case were due to vitamin deficiencies (R. 145-148), and that he treats no specific disease with Nutrilite (R. 163).

The court refused to allow further cross-examination of Dr. Myers with respect to the accuracy of the statements in the booklets on the ground that further questioning would be repetitious and that the cross-examination had already taken much too long (R. 169, 173, 181-183). But the subject to be explored was a difficult and important one—and the right to explore it had not been lost by the prolonged questioning necessary to get truthful

and adequate answers on another subject. The court also refused (R. 151-152) to permit cross-examination as to the testimonials found in the 58-page booklet (Pl. Ex. 1, R. 783, 272), because of its erroneous view (see pp. 83-84, *supra*) that false impressions conveyed in testimonials quoted by appellee could not be attributed to appellee.

The cross-examination of Casselberry was similarly curtailed. Although Casselberry had testified on direct-examination "positively that they are not false and misleading" (R. 231),[55] Judge Clark ruled that his testimony could not be challenged through cross-examination upon identified statements in the booklets because it was up to appellants to disprove Casselberry's statements as a part of their own affirmative case through their own witnesses but not through cross-examination, because the examination was argumentative, and because the booklets as written documents spoke for themselves (R. 231-233).[56] The forbidden cross-exami-

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[55] The quotation is from Judge Clark's characterization of Casselberry's testimony.

[56] In order that the record might indicate the scope of the cross-examination contemplated, counsel for appellants stated his intention to go through the entire booklet in an attempt to have the witness explain the purposes of the many statements therein regarding diseases (R. 232). The court admonished counsel to desist and stated: "The Court will sustain objections to any such questions. You can embody them in an offer of proof if you want to" (R. 232). The court refused to allow counsel to identify for the record the passages in the booklet as to which he wished to inquire, stating: "The Court is not going to waste time letting you go through the booklet. You can make your offer of proof in writing and the Court will consider it." (R. 233). But when the written "offer of proof" was presented, the court rejected it on the

nation might well have undermined the direct testimony of appellee's two main witnesses, as well as basic claims as to the meaning of the booklets. Unless this Court is of the view that the booklets themselves so clearly prove their own innocence that no evidence at all with respect to their meaning and purpose was admissible, this was serious error, for it went to the heart of the case. And in any event the subject should not have been open to appellee's counsel on direct examination but closed to appellants' on cross-examination.

The right to full and complete cross-examination of adverse witnesses is essential to a fair trial. *Alford* v. *United States,* 282 U. S. 687; *District of Columbia* v. *Clawans,* 300 U. S. 617; *Reilly* v. *Pinkus,* 338 U. S. 269. We respectfully submit that the trial court abused its discretion in limiting and cutting off proper cross-examination.

2. *Objections at Trial to Questions Propounded in an Oral Deposition.* The court ruled, over appellants' objection, that the appellants were precluded from objecting to testimony contained in the deposition of Lee Myers because objection had not been saved at the time the deposition was taken (R. 252, 254). This was directly contrary to Rules 26(e) and 32(e)(1) of the Rules of Civil Procedure.

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ground that the questions had not been asked orally and passed upon by the court (R. 520-528). And though Casselberry was then present, the appellants' request that he be recalled so that the questions in the offer of proof might be asked orally, and a separate ruling obtained on each question, was denied (R. 527-528).

Rule 26(e) provides that objection may be made at the trial to the receipt in evidence of any deposition or part thereof which would require its exclusion if the witness were then present and testifying. And Rule 32(c)(1) provides:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of objection is one which might have been obviated or removed if presented at that time.

The court, without suggesting that it was acting under the last clause quoted, ruled that appellants' objections at the trial were too late. Cf. *Laird* v. *United Shipyards* (S.D. N.Y. 1941) 1 F.R.D. 772.

3. *Exclusion of Official Statistics Showing Causes of Death.* The trial court excluded Defendants' Exhibit 26, an official publication entitled "Vital Statistics—Special Reports, National Summaries—Death and Death Rates for Selected Causes by Age, Race, and Sex: United States 1947, Volume 31, Number 11" (R. 529-530). The court had previously admitted a similar report (Deft. Ex. 25, R. 1543, 529) which differed mainly in that it did not show causes of death by age groups, but, according to Judge Clark, this was admitted "in the interests of saving time" and "because it has no probative effect one way or the other" (R. 528-529). Exhibit 26 was relevant to the claims made

in "How to Get Well and Stay Well" that diet deficiencies were causes of premature death, and that common deficiency diseases are among the diseases "most responsible for death in our 40's and 50's." (R. 913.)

The exhibit was excluded because the court assumed without reading it that it was "a self-serving declaration" (R. 529), in that it was a publication of the National Office of Vital Statistics, Public Health Service, a constituent of the Federal Security Agency. But there is no circumstance that makes the data untrustworthy in this action. Certainly there is no reason to believe that the pendency of the present case gave the Federal Security Administrator cause to direct the publication of untrue vital statistics.

In any event it has long been settled that official public records of this type are admissible. Cf. *Evanston* v. *Gunn,* 99 U. S. 660, 666. These statistics are required by law to be compiled and published. 13 U.S.C. 101 and 42 U.S.C. 245. It obviously was impossible for the appellants to prove the causes of the 1,445,370 deaths reported in the publication by any more satisfactory means.

4. *Erroneous Admission and Exclusion of Medical Writings.* Appellants offered in evidence a medical publication entitled "Deficiency Diseases in the Cincinnati Hospital; a Ten Year Study" (R. 425), through its author, Dr. Marion A. Blankenhorn, an outstanding medical expert in the

field of nutrition (R. 422-425). This article was highly relevant as a means of showing that dietary deficiency diseases, such as were emphasized in appellee's booklets, are rare to non-existent at the present time. The article was excluded as hearsay (R. 425-426), although the author was on the witness stand and subject to cross-examination (R. 425). It is well established that a learned treatise is admissible in evidence if its author is present and subject to cross examination. Wigmore, *Evidence*, 3rd Ed., § 1690 and cases cited; *La Count* v. *General Asbestos and Rubber Co.*, 184 S. C. 232, 241-242, 192 S. E. 262, 266-267; *Brown* v. *Inter-State Business Men's Assoc.*, 57 N. D. 941, 943-944, 224 N. W. 894, 895; *Rudd* v. *Hendrickson*, 176 Minn. 138, 222 N. W. 904. This was error.

The court admitted in evidence, however, a compilation of excerpts from medical publications, when offered through appellee's witness Casselberry, who was not a physician. This was admitted to show appellee's good faith, a factor which Congress clearly made irrelevant in the Food, Drug, and Cosmetic Act (R. 50, but see R. 219). See pp. 96-98 *supra*. Such excerpts, so introduced, clearly were inadmissible to prove the truth of the facts asserted. *United States* v. *One Device* * * * Colonic *Irrigator*, 160 F. 2d 194 (C. A. 10); *Union Pacific Railway Co.* v. *Yates*, 79 Fed. 584 (C. A. 8).

5. *Inconsistent Rulings as to Testimony of the Effect of the Booklets upon the Public.* The court

permitted two of appellee's witnesses, Attorney Myers and Dr. Myers to express opinions as to the impression the labeling would leave with the public (R. 85, 258-259). Even the doctor obviously had no special expertise as to the impression which the booklets would make on minds not medically trained. But the court held Mr. Crawford, Associate Commissioner of Food and Drugs, and an expert of many years' experience in food and drug regulation for the protection of consumers, incompetent to testify regarding such impression (R. 382-383).

6. *Inconsistent Rulings as to Testimony on Medical Facts.* The court below permitted Casselberry and Attorney Myers, both of whom were without qualifications as experts in the field of nutritional disease, to offer expert testimony as to medical facts (R. 32-35, 37, 50, 258). This also was error. Recognizing the rule that a determination of the competency of an expert lies within the sound discretion of the trial court (*Clarke* v. *Hot Springs Elec. Light & Power Co.*, 55 F. 2d 612 (C. A. 10)), certiorari denied 287 U. S. 619, we believe it a clear abuse of discretion to accept expert medical opinion testimony from witnesses who qualify only as attorney and psychologist.[57] Only those persons with

[57] Casselberry holds B.A., M.A., and Ph. D. degrees. His experience has been that of credit manager, real estate salesman, teacher, research worker for delinquent boys, vocational counselor, and consulting psychologist. His doctoral thesis was "Symptomatic Factors in Delinquency" (R. 32, 183-186).

training and experience in medicine or nutrition are competent to give expert opinion testimony as to the medical facts within those specialized fields. Cf. *Spring Co. v. Edgar*, 99 U. S. 645; *Aetna Life Ins. Co. v. Kelley*, 70 F. 2d 589, 592 (C. A. 8); and *United States v. McCreary*, 105 F. 2d 297, 299 (C. A. 9).

The court refused, however, to allow Dr. Elmer M. Nelson, Chief of the Nutrition Division, Food and Drug Administration, who was not a medical doctor but was an expert in the field of nutrition, to make comparisons between the daily dosage of Nutrilite and the minimum daily requirements for the several vitamins and minerals contained therein as established pursuant to law by the Federal Security Administrator (R. 488-490). This testimony was excluded both because Dr. Nelson was not a physician, and because "The Food and Drug Administration is on trial in this case, and it doesn't seem that their standards ought to be taken as the standards of scientific research" (*ibid.*).

Plaintiff's Exhibit 7 (R. 100, 51), which Casselberry (R. 51) and Attorney Myers (R. 249) said was a part of the material relied upon in the revision of the labeling, is a copy of a final order promulgated by the Federal Security Administrator establishing labeling statements required to be made on food for special dietary uses. 21 C. F. R. Section 125. Finding 12 (a) (R. 758) is based in part upon this administrative order. But

appellants were not allowed to show the relationship between Nutrilite and the standards set forth in the regulation, and thus to rebut the appellee's claim of reliance upon the regulation.

7. *Error in Allowing Discovery of Administrative Records and Interrogation of Administrative Officials.* The court erred in denying appellants' motion to quash subpoenas *duces tecum* served in connection with the oral interrogation of the Federal Security Agency defendants.[58]

The motion to quash raised two basic points: whether the administrative officials properly could be interrogated as to the details of their decisional processes, and whether the appellee could require the appellants to deliver to it all of the records of the Food and Drug Administration relating to the Company, its predecessors, and the manufacturer of Nutrilite without showing good cause under Rule 34.[59] (R. 746).

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[58] This question, though important, could not have been presented to this Court at any earlier time.

[59] None of the reasons advanced by appellees or the court below constituted "good cause". The hearing on the motion was held on April 19, 1949, before Judge Clark. Counsel for appellee justified the all-encompassing coverage of the subpoena by insisting that he did not know what was contained in the Government's files (R. 672-675); that he "would like to know so we can meet it at the trial" (R. 675); and that "it might give me a lot of leads to the oppressive things they have done, why they have done them, and who is back of them" (R. 676). Judge Clark said that this case "is outside of the general rule" (R. 673); that though depositions of administrative officials were pending, "they . . . [are] entitled to have the basis of what the oral depositions would probably be" (R. 673); and that they "cannot know . . . what they want to find" (R. 673). He concluded that ap-

United States v. *Morgan*, 313 U. S. 409, 422, holds that it is not the judicial function to probe the mental processes of the administrative officials. Cf. *De Cambra* v. *Rogers*, 189 U. S. 119, 122.

And *Hickman* v. *Taylor*, 329 U. S. 495, holds that discovery has necessary boundaries, which under Rule 34 is a showing of good cause. See *Alltmont* v. *United States*, 177 F. 2d 971 (C. A. 3) and *North* v. *Lehigh Valley Transit Co.*, 13 Fed. Rules Serv. 26 b. 211, Case 5 (E. D. Pa.). The trial court completely disregarded the rule in denying the motion to quash.

These are the most prominent of the trial errors which we believe were committed in the course of the proceeding below. Only a reading of the entire record, however, can give the court a really accurate impression of what transpired.

It may be that the Court would not regard any one of these errors as in itself sufficiently important to require reversal of the judgment below. In their cumulative effect, however, they seriously prejudiced the defense of this case in the trial court.

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pellee had a "right of deposition to discover the position of the government and to determine whether the reports on which the government has operated is relevant or not . . ." (R. 678), and that appellee is "entitled to look at all the documents in the discovery process . . ." (R. 679).

CONCLUSION

For all of the above reasons the judgment below should be reversed, with directions to dismiss the complaint.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS

v.

MYTINGER & CASSELBERRY, INC., A CALIFORNIA CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR APPELLANTS

The brief filed by appellee contains a great many inaccurate, half-accurate and misleading statements, some of which relate to possibly significant aspects of the case although most do not. In their totality, however, these misstatements may result in leaving a very erroneous impression of what actually occurred. Accordingly, it seems desirable to call the Court's attention to a number of such

statements both in order to set the facts straight in part and to show the general unreliability of appellee's brief.

1. *Reference to wrong section of bill.* The Government argued in its brief that the deletion from a part of the bill which became the Food, Drug, and Cosmetic Act of a provision for injunctions against multiple seizures was one of the factors which suggested that Congress did not intend the district courts to grant such injunctions (Government's main brief, pp. 53-54, 58). Appellee asserts (Br. pp. 6, 140-142), that we failed to quote a passage from a House Report which refutes this contention Appellee has not noted, however, that the passage to which it refers relates to an entirely different provision of the bill.

Our brief was concerned with the section of the bill specifically authorizing the district courts to restrain multiple seizures—the last paragraph (first (g) and then (f)) of Section 711). See S. 5, 74th Cong., as reported to Senate March 22, 1935, Dunn, *Federal Food, Drug, and Cosmetic Act*, p. 234. This paragraph was deleted by the House Committee, as indicated in our main brief. See Dunn, pp. 529, 558. Appellee's brief (pp. 139-140) refers to Section 702 of S. 5, the general judicial review provision. It was this general provision, which had novel features, which the same House Report eliminated, with the statement (quoted at pp. 141-142 of appellee's brief), that no new remedy

was necessary and that the remedy in equity would be available to correct unlawful and arbitrary administrative action. Subsequently a different provision for review of regulations by district courts was reported to the House as Section 701(f). (S. 5, 75th Cong., 3d Sess., as reported April 14, 1938, Dunn, p. 810), which in turn was superseded by the present Section 701(f), which provides for review by courts of appeals.

The history of the specific provision which would have allowed injunctions against multiple seizures, with the full quotation from the Committee report as to the reason for its deletion, is accurately set forth at pages 53 to 54 of the Government's main brief.

2. *Improper use of interrogatories.* In stating the "facts" of the case, and throughout its brief, appellee has treated its own answers to written interrogatories as evidence which must be taken to be true because offered by the appellants (appellee's brief, especially pp. 13-18, 24-27). Its excuse for this is that at the close of the trial counsel for appellants asked to have the written interrogatories asked of appellee and the answers thereto "read into the record" (R. 530-531).

Even if this be regarded as an introduction of the interrogatories as evidence—which it does not appear to be—it would not convert appellee's colorful accusations into facts, admitted or otherwise. For, as appellee's brief fails to state, the long list of

answers upon which it relies (Br. 24-26, 15-18, 52) were merely responsive to the question (R. 531):

> (1) In what way *is it claimed by you* that these defendants or any of them have abused their power in violation of the due process clause of the Fifth Amendment? [Emphasis added.]

Appellee's answer to this question merely presented a statement of appellee's claims, as in a bill of particulars.[1] Introduction into the record of the question and answer together would admit at most that such were appellee's claims, not that the claims were factually true. Obviously, the Government was not, by the process of reading the question and answers into the record, admitting such charges as that it had rendered "three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading" (R. 532). The answers to the interrogatories are replete with legal conclusions and argumentative characterizations—"secret", "deliberate", "arbitrary", "unreasonable", "untrue", "oppressive" —which are not supported by any evidence in the record.

Apart from the fact that the answers on their face stated claims, not facts, such self-serving statements and conclusions would not have been binding upon the adverse party in any event. Federal Rule

---

[1] Appellants were seeking merely to determine what issues they would be required to meet at the trial. Cf. *Hickman* v. *Taylor*, 329 U.S. 495, 501.

of Civil Procedure 33, as amended in 1946, provides that answers to interrogatories "may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party". Rule 26(d)(2) permits the use against a party of his deposition or that of an officer of a corporation which is a party. Rule 26(f) then provides:

> (f) EFFECT OF TAKING OR USING DEPOSITIONS. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, *but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule.* At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [Italics supplied.]

See 6 Cyc. Fed. Proc. (2d Ed.) § 2558.

Obviously the answer to an interrogatory by one party, by whomever introduced, is not to be treated as an admission by his adversary, any more than the use by one party of the deposition of another. Although Rule 33 does not specifically state that interrogatories are controlled by Rule 26(f) as well as by Rule 26(d), the same principle must obviously govern.

For these reasons the assertions of appellee's claims in its answer to appellants' interrogatory is not evidence of anything, and if it were it would not be binding upon the adverse party. To the extent that appellee's statements are not supported by references to *evidence* in the record, as distinct from these interrogatories, they should be disregarded.

3. *Misstatements as to availability of Kingsley and Butz.* Appellee asserts that the Government's two "most essential" witnesses, Acting Administrator Kingsley and Dr. Butz, who testified by deposition, were not shown to be unavailable[2] at the time of the trial. (Appellee's brief, p. 20). The attempted implications are not only that the depositions were improperly admitted but that the Government was afraid to call them as witnesses. A comparison of appellee's statements with the record is revealing:

Appellee's Brief	*Record*
p. 20 "But Kingsley was not called as a witness and was not claimed to	R. 516-518. In a colloquy as to whether Kingsley's deposition was par-

[2] Kingsley's deposition was introduced not only because Kingsley was in Europe at the time of the trial but because appellee had read part of his deposition into the record (R. 269-270), which in itself made it proper for appellants to introduce the remainder. See Federal Rule of Civil Procedure 26(d)(4).

Appellee's Brief

be unavailable to Appellants * * *."

Record

tial or complete, the following occurred:

"MR. KLEINFELD: It isn't partial. This is the deposition that Mr. Rhyne took. He never asked us to go any further. Mr. Kingsley was available that day up to the time he left the country.

* * *

"MR. RHYNE: * * * The only time it was ever discussed between counsel after that was when Mr. Kleinfeld, when this matter was originally scheduled for trial, asked that I waive the personal appearance of Mr. Kingsley and I didn't do it. Since then they advised me that he was in Geneva.

"MR. KLEINFELD: That is right.

"MR. RHYNE: And I believe that is all the information I have on it, and because of that

visit, I haven't tried to complete the deposition.

* * *

"MR. GOODRICH: May I explain the dates of Mr. Kingsley's absence, when he left the country? He left sometime in August. * * *

* * *

"Those are the dates involved. So several months intervened between the time the records were made available and Mr. Kingsley left the country.

"MR. KLEINFELD: Mr. Rhyne has never asked at any time to take a further deposition of Mr. Kingsley. If he had, we would very gladly have put Mr. Kingsley at his disposal."

It was also public knowledge that Mr. Kingsley had been elected Director General of the International Refugee Organization, with head-

Appellee's Brief *Record*

quarters at Geneva, and that he was to assume duties on July 31. *New York Times,* July 9, 1949, p. 4, columns 3-4; *Washington Post,* July 9, 1949, p. 7, columns 1-2.

p. 20 Appellants "* * * then advised the Court. that they *would not* call Butz as a witness (R. 391-392) although his address is given in a deposition taken for discovery purposes as Silver Spring, Maryland (R. 1175), and they did not say that he was unavailable to them as a witness. * * *"

R. 366:

"MR. GOODRICH: Your Honor, as I started to say, we told Mr. Rhyne that Dr. Butz had transferred from our organization into the Department of the Army, and is now not in Washington.

"The last time we heard from him, he was in Brook General Hospital in San Antonio, Texas."

4. *Misconception of Dr. Butz's function.* Appellee asserts that the findings of probable cause by the various administrative officials were based solely on Dr. Butz's findings. But the evidence shows that in coming to their conclusions, Crawford, Dunbar, Larrick and Kingsley also relied on their own consideration of appellee's booklets to determine what claims were made. (See Government's main brief, pp. 17-21, and pp. 15-18, *infra*). The attack on Dr. Butz and the importance attributable to him manifest appellee's

misconception—as well as that of the court below—as to the function of the medical officer in making the finding. It was his duty to inform his superiors as to the medical facts, i.e., what a product containing the ingredients of Nutrilite would or would not do. He found that such a product "would not be effective in preventing or treating most common diseases" (R. 1172), a fact which we do not understand appellee to dispute, and which is unquestionably true whether they deny it or not.

After receiving Dr. Butz's findings, the administrative officials personally examined the booklets to determine whether the appellee was representing to the public that Nutrilite would be effective in preventing or curing most common diseases. The decision as to what impression the booklets would make on the reader, a non-medical question and apparently the primary question in dispute, was not committeed to Dr. Butz.

5. *Appellee's concession of no general curative effect confirms Dr. Butz.* Appellee asserts (Br. p. 80) with respect to Dr. Butz, that "when his deposition was taken he very definitely repudiated many of the statements in the findings attributed to him (R. 762)."[3] A reading of Dr. Butz's testimony (R. 1175-1215) will demonstrate the error

[3] The finding cited (R. 762) states merely that "In the deposition he repudiated some of the statements in said findings." Although this, in itself, is erroneous, it does not support appellee's substitution of the word "many" for the word "some" used by the court.

in this contention.[4] But in any event, since Dr. Butz's ultimate finding was that Nutrilite would not prevent or cure most common diseases, a finding not retracted or refuted in the slightest, and since appellee and its witnesses have not claimed to the contrary in this litigation, the point seems academic. The following excerpts from the record and appellee's brief should be sufficient to show appellee's position:

> Dr. John A. Myers, appellee's medical witness (R. 106-7):
>
> A. There are many common diseases. Once they have been precipitated we do not offer to alleviate them. Vitamin deficiency disease is preventive medicine, not curative medicine. As we have mentioned all the way through the book, it does not effect a cure.

---

[4] In the court below appellee argued that Dr. Butz's first finding that Nutrilite "would not be effective in the treatment of" a long list of ailments had been impeached by his admissions that, when a patient had a vitamin deficiency, Nutrilite might be helpful in dealing with some of the ailments listed (e.g. R. 1214-1215), and that symptoms listed sometimes manifested a vitamin deficiency (e.g. R. 1192). But his testimony as a whole shows that such symptoms and ailments much more frequently had other causes, that vitamin deficiency diseases were not common, and that as a general matter treatment by Nutrilite would be ineffective. (R. 1202-3, R. 1207-8, 1214-1215). He summarized his "general position" as follows (R. 1202): "For instance, if you had a feeling of low vitality due to B-1 deficiency and you gave B-1, it might improve that. If it was specifically due to B-1. However, my general position in this is this, that the Nutrilite purports to treat a general subjective feeling of a large majority of the people that they have from time to time, and suggests to them if they take Nutrilite they will be better, which is not true."

Q. Do I understand your testimony now to be that this product won't cure any of these common diseases?

A. That is right.

[After being questioned as to numerous diseases]:

(R. 112):

I will sum that up for you, Mr. Goodrich, by saying that every one of the conditions that you have mentioned, I would say that vitamin pills alone will not help or cure.

(R. 127):

JUDGE CLARK: The doctor has testified, as to most of these things, that vitamin deficiency had nothing to do with them as to this time it has developed, and that taking vitamin pills wouldn't do any good to them. Isn't that your testimony as to most of these specific diseases?

The WITNESS: Yes, sir.

(R. 221):

MR. KLEINFELD (to witness Casselberry): Do you find anything in the medical excerpts before you that convinces you that Nutrilite would prevent or cure most common diseases?

MR. RHYNE: I object to that because he has never testified on direct or any other time that it would. * * *

JUDGE CLARK: I understand, Mr. Kleinfeld, but this book which is the subject of controversy doesn't make any contention that it will prevent or cure.

* * * * * * * *

Excerpt from letter from appellee's attorney, Lee J. Myers (R. 1031-1032):

"Nutrilite Products are foods for use as a supplement to the regular diet; they do not cure, and are not offered as a cure for anything; their chief purpose is that of a food—to nourish the body and to provide it with materials for its proper growth and function."

Excerpt from letter from appellee's attorney, Charles Rhyne (R. 1168):

You will search in vain in my client's booklet "How to Get Well and Stay Well" for any such claim that Nutrilite is effective in preventing or treating most common diseases.

Appellee's brief, p. 28:

Appellee has always contended that purchasers and consumers would not place the interpretation upon its pamphlets that Nutrilite is offered as a "cure" of diseases contended for by Appellants (Appellant's Brief 19, 20, 94). The pamphlets do no more than discuss diet and nutritional deficiencies due to the lack of vitamins and minerals in ordinary diets (Fdg. 12(e) (R. 759).

(p. 167):

* * * Dr. Myers said, in line with all the other credible testimony in the case, that Nutrilite is not represented in the pamphlets as a "cure" for any disease (R. 87).

It is clear that appellee was forced to disavow any curative effect for Nutrilite—despite the in-

consistent claims in the first two booklets, in particular (R. 1155-1156, 826-836)—because of its inability to substantiate such claims. In view of the Government's contentions, as to the meaning of the booklets, it is obvious that appellee would have defended on the ground disclaimed if it had dared to do so.

These disclaimers of curative effect for Nutrilite should be contrasted with Dr. John Myers' testimony that a person "would not be likely to buy an expensive preparation like Nutrilite or some other expensive preparation until his condition got very much worse" (R. 147)—which, of course, meant that he would only take it as a cure for something serious.

6. *Dr. Butz not merely a psychiatrist.* Appellee repeatedly refers to Dr. Butz as "a psychiatrist" (Br. pp. 20, 57, *inter alia*), in order to give the impression that he was unqualified in any other field. Although Dr. Butz had previously "specialized in psychiatry" (R. 328), he testified that he had an "MD degree" (R. 1475), that while in the Army "I was general medical officer part of the time, and I was assigned to neuropsychiatry a great deal of the time, which includes general medicine" (R. 1176); and that he had examined "several thousand" patients to determine whether, *inter alia*, they had vitamin and mineral deficiencies (R. 1178-1179, 1181).

7. *Extent to which officials read the booklets.* Appellee attempts (Brief, pp. 46-50, 21) to minimize the extent to which the four administrative officials read the booklets.

Commissioner Dunbar testified:

(R. 315):

> Q. Did you read all of the 42-page booklet?
>
> A. At that time I did not. I read many parts of the booklet and discussed the entire booklet with Mr. Murray, my assistant who had made a thorough review of the whole document, and who gave me a number of pertinent facts about the method of distribution, the sales technique, and also briefly on the previous seizure actions and what had occurred in the way of revision of booklets following those further seizure actions.

(R. 316):

> I then took the booklet, and without reading the entire 42 pages in detail, considered it—considered various pages to which Mr. Murray called my attention, as well as some that I was interested in myself in reading.

Associate Commissioner Crawford testified:

(R. 334):

> I scanned through the first part of the booklet up to something like page 36, I think it was, which was the prelude, we might say, to the final pages in the booklet beginning with

"What is the solution". I read from there on out, not in a scanning way at all, but thoroughly.

(R. 384):

Q. Your testimony is you merely scanned the first 36 pages?

A. Yes, but enough to get the meaning of it and the gist of it.

Associate Commissioner Larrick testified:

(R. 395):

Q. In reaching your determination of probable cause under the statute, did you read the entire 36-page booklet?

A. I did, in its entirety.

Acting Administrator Kingsley, who appellee repeatedly asserts (Br. 49, 50, 79) read "only one" version of the booklet, testified:

(R. 504):

I have read a pamphlet, "How to get well and stay well," which I have here, which is marked Exhibit A. * * * I may have read some other version of that at some other time, because it has gone through revision.

(R. 505):

I am uncertain as to what version I read, as a matter of fact, at the time at which Dr. Dunbar came to see me in January, whether it was his version or some other version——

(R. 513):

> Q. Mr. Kingsley, I note that you signed three decisions. Why was that? A. I believe the primary basis for that was change in the character of the labeling, that originally we had a 57-page pamphlet, that after the first seizures were made, and while the action was still in the court, a 36-page pamphlet was issued, of some other number, I have forgotten the number of pages, and more recently this 42-page one has been issued, which changed the facts to some extent, although not in my judgment in any material way.
>
> Q. Did you have all three of those before you at the time you signed this decision? A. I assume I did. I cannot say for a fact one way or the other. But I had some such pamphlet and I assumed that they were the right ones.

It should be noted that the first 36 pages of the three editions of the booklets involved were substantially the same.

8. *A comparison.*

Appellee's brief, (p. 43):	Appellee's 58- and 36-page booklets, p. 35 (R. 820, 881):
"For hour after hour, the Appellants took equally extreme positions in their cross-examination on other incurable diseases having scary unpronounceable	"Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness, those with

names which only the doctors ever heard of. (R. 92-183.) These names are not mentioned in the pamphlets, were undreamed of by its authors and no ordinary purchaser or consumer could possibly think the pamphlets promised that Nutrilite would 'cure' the diseases mentioned."

the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies."

9. *The "surveys."* Appellee refers to the "surveys of purchasers and consumers" conducted by the Food and Drug Administration (Br. pp. 19, 4; but cf. pp. 55-56). These "surveys" consisted of a report by one Food and Drug investigator of his interviews with seven persons (R. 929-940). This report is described at page 24, note 10, of our main brief.

10. *Misstatement as to delaying tactics.* Appellee accuses the Government of "delaying, obstructive, punitive and other tactics outlined here which have delayed a decision for a year on the first motion to consolidate" (Brief, p. 96) and of "having tried every possible delaying technicality" (Brief, p. 83). There is no basis whatsoever for these statements. The condemnation suits were instituted between October 6, 1948, and January 4, 1949. The original complaint in the instant suit was filed

December 30, 1948 (R. 689). The delay in trying any of the condemnation or other suits against appellee has resulted from the pendency of the present litigation. Appellee has not moved for expedition, and the Government has not opposed expedition.[5]

Appellee's charge is apparently based upon the Government's refusal to *stipulate* to remove the cases to Los Angeles for a consolidated trial. It has been the Government's position that, as a matter of law, appellee was not entitled to have the cases tried in its home district (see Government's main Brief, p. 66, note 40),[6] and that, as a matter of general enforcement policy, it was not willing to consent to trial before a jury in that district. The Government has always conceded that under the statute appellee could as a matter of law consolidate in any of the districts in which condemnation proceedings had been instituted; the Government

[5] In the criminal proceeding pending with respect to appellee's first booklet, the Government did, on or about October 18, 1948, request postponing the determination of appellee's motion to dismiss until after the decision of this Court in the *Kordel* and *Urbuteit* cases (335 U.S. 345, 355), which had been argued on October 14, 1948, and which were decided on November 22, 1948 (R. 535-536, 264-265).

[6] The appellee suggests that Section 1404(a) of the new Title 28 allows a case to be transferred to its home district. (Br. 95). But that statutory provision only authorizes transfer of an action "to any other district or division where it might have been brought". As *United States* v. *23 Gross Jars * * * Enca Cream*, 86 F. Supp. 824 (N.D. Ohio) holds, articles found in one district cannot be seized in another district, and accordingly Section 1404(a) is inapplicable. Section 1404(b), which makes provision for transfer of proceedings in rem, "permits transfer of cases between divisions" of the same judicial district. See Reviser's Notes and case just cited.

has also been willing to stipulate for trial in a district adjacent to appellee's home district (R. 764, 1051). The Government's refusal to waive its statutory right not to consent to trial in the home district can hardly be regarded as an obstructive and delaying tactic.

11. *Misstatement as to "smearing publicity".* Appellee's brief refers to "the smearing publicity Appellants have released [as] grist for this defamation mill" (p. 85), "the publicity released by Appellants which accompanied these seizures" (p. 83), "the weapon of publicity" (p. 92), the "stigmatizing publicity actions of Appellants" (p. 159).

The only statement in the record relating to publicity is the following testimony of Casselberry (R. 66):

> Q. What about the publicity released by the Food and Drug Administration, what effect did it have?
>
> A. To answer that question, I must say that we can't be sure that the publicity was actually released by the Food and Drug, but publicity did follow in many cases where seizures were made, with the result that everybody in the community who was using Nutrilite learned that the product was being seized. They naturally assumed that the Government was right and we were wrong, so that led also to loss of many customers.

The fact that the institution of the condemnation suits received publicity hardly supports appellee's

statements. There was no evidence of any publicity released by the Food and Drug Administration at all.

12. *Misstatement as to testimony about "trace" elements.*

Appellee's Brief (pp. 134-135)

"The expert testimony *for both parties* below recognized that this base contains what has been termed 'trace' elements and that *the same are essential in human nutrition* (R. 163-4, 480, 1199, 1524). [Emphasis supplied.]

Record

DR. JOHN MYERS, Appellee's witness (R. 163-164):

"These people have attempted to put into it not only the crystalline vitamins that the experimentalists have found to be helpful in specific cases, but have added a concentrate of parsley, alfalfa, and watercress, very carefully concentrated to produce those things that we do not know about. They are so small that we cannot trace them. We know that they are specific and essential, but we do not know how or why they fit into the picture."

The testimony of appellants' witnesses at the pages cited was as follows: The closest per-

tinent passage on R. 1199 would seem to be the following:

DR. BUTZ:

"Q. Do you know that there are new vitamins being discovered all the time and that some of those could be contained in the base without your knowing it or my knowing it?

"A. That is true. That part of it is true."

DR. WALTER MYERS (R. 480):

"* * *

"Q. Have you ever heard of the trace vitamins and minerals?

"A. Yes, sir.

"Q. Do you know that they are contained in alfalfa, watercress and parsley?

"A. Yes, sir.

"Q. Do you think that they have no value in human nutrition?

"A. They have value, but we get them from other sources, when we

eat a reasonable diet of vegetables.

"Q. But your testimony is that you gave that base no value in your answers; is that right?

"A. I said it would not cure these various disorders."

DR. NELSON (R. 1524):

"Q. Is it possible that this base of alfalfa, parsley and watercress, which Nutrilite has and which is not contained in the other two products which you list in your affidavit, could mean that Nutrilite is more valuable in human nutrition than those other two products?

* * *

"THE WITNESS: I don't know. It may be a possibility."

Clearly, appellants' medical witnesses did not state that the so-called trace elements, which might be found in the base, were essential in human nutrition. And appellee's witness, who thought they

were, indicated that no one knew much about the elements in question.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

568

OSCAR R. EWING, Federal Security Administrator, et al.,
Appellants,

vs.

MYTINGER & CASSELBERRY, INC.
Appellee

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, Federal Security Administrator, et al.,
Appellants,

vs.

MYTINGER & CASSELBERRY, INC.
Appellee

BRIEF FOR THE APPELLEE

STATEMENT

The leave to amend Appellee's complaint contained in Judge Pine's order of March 4, 1949 (R. 724) was not limited to "attack the constitutionality of Section 304(a) of the (Food, Drug and Cosmetic) Act"[1] an impression Appellants seek to convey on page 12 of their brief, but was leave to amend generally. Unfortunately the argument at the time the form of order was settled before Judge Pine on March 4 is not in the Record but the order certainly speaks for itself (R. 724). Appellee's amended complaint sets forth many additional acts of misapplication of the multiple seizure provisions to it by additional facts showing

[1] 52 Stat. 1040, 1044 (1938); 21 U. S. C. 301, 334(a).

arbitrary, capricious and oppressive acts as well as the claim that the multiple seizure provisions of the Act are unconstitutional as applied to Appellee.

Appellee disagrees with Appellants' statement in their brief of the facts of this Case. Appellants in their statement of facts to a great extent either state and rely upon testimony of their witnesses rejected by the Trial Court on the basis of its observation of the demeanor and veracity of witnesses on the stand or state facts not supported by the Record. The major misstatements are pointed out in the argument on the facts herein, although such misstatements are so numerous and so obvious at various points it would unduly prolong this brief to discuss them all. The Findings of Fact of the Trial Court are an accurate and concise statement of the facts herein and Appellee adopts them as its statement thereof (R. 756-770).

Appellee is not herein stating what it hopes to prove, as in the argument on the Petition for a Writ of Prohibition and/or Mandamus. Appellee has now proved all these facts and is here with findings showing all 3 trial Judges in unanimous agreement that such proof was made at the Trial.

QUESTIONS PRESENTED

Aside from jurisdictional and procedural questions raised by Appellants, the two major questions presented are:

(1) Were Appellants' actions herein authorized by the words contained in Section 304(a) of the Food, Drug and Cosmetic Act which read as follows:

> "That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

(2) If such actions were authorized by those words of that Section, does the section, as thus construed, violate the due process clause of the Fifth Amendment of the Constitution of the United States?

SUMMARY OF ARGUMENT

I

Appellants acted arbitrarily, capriciously and oppressively in making their determinations authorizing multiple seizures without reading pamphlets they found to be misleading in a material respect to the injury or damage of the purchaser or consumer; without considering facts in official surveys in their files compiled pursuant to the statute and favorable to Appellee showing that purchasers and consumers under customary conditions of purchase and use did not conclude that Appellee's pamphlets are misleading (*Kwock Jan Fat* v. *White*, 253 U. S. 454, 464, *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 338-339); with *no* facts or complaints before them showing injury or damage to any purchaser or consumer from Appellee's labeling or its product (the statute requires that such determinations be based on "facts found," Cf. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91); by deliberately planning their 11 seizures on a far-flung nationwide geographic pattern with a time schedule designed to inflict the greatest possible punishment (Cf. Mr. Justice Brandeis' dissent in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 433) by injury to Appellee's business reputation; by planning seizures to keep "pressure" on Appellee (as outlined in Appellants' "Pressure" memorandum) until the injunction herein (evidently anticipated by them) was granted; by acting secretly *ex parte* to uphold prior unlawful decisions of subordinates through consideration of their biased views only; by rejecting Appellee's two requests for an opportunity to present the true facts when no emergency or situation of compelling public interest required summary action; and by doing all the other unfair and unreasonable acts set forth in the Findings of Fact herein.

II

There are four separate and distinct provisions of the Act which are not questioned here under which multiple seizures of products may be made when there is a charge of (1) adulteration, (2) danger to health, (3) fraudulent labeling, or (4) where a prior judgment condemning the particular labeling has been obtained. The provision authorizing multiple seizures in exceptional circumstances when labeling is misleading was not intended to apply to factual situations like that involved in the instant case. The Congress never intended to authorize what Appellants have done here. *Waite* v. *Macy*, 246 U. S. 606, 608-609; *Gegiow* v. *Uhl*, 239 U. S. 3, 10. Appellants did not comply with the statute by acting in the manner referred to in Part One of this Summary of Argument, the decision makers did not act as reasonable men and therefore did not have probable cause to believe Appellee's labeling misleading, and their decisions are void on their face. Appellants made their authorizing decisions and secured the embargoes for punishment purposes rather than protection of the public. Appellants' actions therefore violate the statute's mandate.

III

A trial of the issues involved in any one of the libel seizure actions in a libel court offers no remedy against Appellants' arbitrary, capricious and oppressive actions herein because: (1) libel courts have no jurisdiction over Appellants in their individual capacities; (2) a libel court cannot stay further seizures *pendente lite* and Appellants could ruin Appellee almost overnight by carrying out their "Pressure" memorandum scheme of making seizures by use of mimeographed forms and telegraphed instructions against which plan consolidation for one trial is no remedy as it is the *seizures* and not the trial which causes the irreparable injury; also, further seizures would be made by Appellants while the cases are being consolidated and tried

and the libel court cannot stop seizures during all of that time. Appellants have used delaying tactics to prevent consolidation and trial of any of the libel actions herein so they could carry out their "pressure" punishment plans until an injunction is granted in the instant case or the indictment trial is held in California; (3) the libel courts *can never* consider whether the determinations authorizing multiple seizures were made arbitrarily, capriciously and oppressively, as the only issue before those courts is whether labeling is "misleading in any particular." This means that never in a libel court would there be any consideration of Appellants' actions herein or relief against such action regardless of how illegal or unfair they are; (4) libel courts cannot stop damage *pendente lite* or give relief for damages suffered; and (5) there is no way the libel courts can avoid a multiplicity of actions. (6) The hearing in the libel court does not offer a remedy which protects Appellee's constitutional rights under the facts herein.

IV

The Administrative Procedure Act provides a review of the six determinations authorizing multiple seizures because such determinations are final decisions in every respect on the authorization of the use of multiple seizures, and such authorization is not an issue which can be tried in the libel courts. Without such authorizing decisions more than one seizure cannot be made. Also, contrary to Appellants' contention, the Court as a court of equity had jurisdiction to determine whether public officials, like Appellants, have acted unlawfully. *Garfield* v. *Goldsby*, 211 U. S. 249, 262. Further, and also contrary to Appellants' contentions, the legislative history specifically indicates that equity courts were intended to have their traditional jurisdiction to stop illegal action under Section 304(a). This is made clear in a Congressional report *not* quoted by Appellants in their brief. The three-judge court statute gave

the Trial Court jurisdiction to decide all issues involved in the case "in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission* v. *Brashear, Freight Lines,* 312 U. S. 621, 625; *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175. The text of the statute, its legislative history, and decisions of this Court so hold. Therefore, the Trial Court had jurisdiction to determine the ancillary issue of whether Appellee's pamphlets violated the Act. Such an issue is not confined by the statutory scheme to libel courts as the statute contains no such confining language. Federal courts considering injunction and criminal actions are intended to have jurisdiction to pass on the same issue and courts considering issues in other types of litigation are not prohibited (as they were, for example, in the price and rent control statute) from deciding such an issue if it is involved in the litigation as in the instant case. Appellants' entire defense was in fact based on that issue. Both parties presented their full cases on the issue and Appellants lost as all they presented was the biased opinions of the decision makers while Appellee offered evidence of the impressions of purchasers and consumers *compiled by Appellants* which refuted Appellants' opinions. "A court of equity ought to do justice completely and not by halves . . . a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that would not otherwise be within the range of its authority." *Camp* v. *Boyd,* 229 U. S. 530, 551-552; ". . . it should dispose of the entire case and its incidents, and not remit any part of it to a court of law." *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499, 520; ". . . where, as here, the equitable jurisdiction of the Court has been properly invoked for injunctive purposes, the Court has power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which

might be conferred by a court of law." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 399.

V

If the words "without hearing" or any other language contained in Section 304(a) under which Appellants claim their action herein is authorized, is construed as giving authority to do the arbitrary, capricious and oppressive actions complained of, that Section as thus applied to Appellee violates the due process clause of the Fifth Amendment of the Constitution of the United States. In the absence of an emergency or a situation of compelling public necessity requiring immediate action, Appellee may not be deprived of its property and irreparably injured in its business reputation and good will without a hearing containing an opportunity to present its facts showing the deprivation and other injury is unlawful. Appellants' actions in this case demonstrate a lack of that fundamental fairness required by the due process clause, so if the language questioned really authorizes what Appellants have done it violates that clause.

ARGUMENT

1. The Nature of the Appellee's Product and Business

Appellee is the exclusive national distributor of a vitamin product known as "Nutrilite Food Supplement," consisting of 16 vitamins and minerals formulated in a base prepared from extracts of alfalfa, parsley and watercress (R. 757, Plaintiff's Ex. 8, R. 54-55, on file with clerk). This food supplement is sold to consumers on the basis that ordinary diets are deficient in vitamins and minerals and Nutrilite will help make up such deficiencies (R. 758-759). It is the unique base of alfalfa, parsley and watercress which sets Nutrilite apart from all other vitamin and mineral products (R. 131, 163-164, 1182). This base is formulated by a process whereby one ton of alfalfa, parsley and watercress is reduced to approximately 4 to 10 pounds of this base (R. 55). The base contains vitamins and minerals known as "trace" elements which have not yet been fully identified by the scientific research in the field but these elements are known to be essential and beneficial to human nutrition (R. 131-132, 163-164, 480).

Nutrilite contains no substances or materials or combination of substances and materials harmful or detrimental in any manner to human users (Complaint and Answer Par. 4, 726, 749). Nutrilite does contain substances and materials which have been demonstrated by scientific tests and by actual experience of users to be beneficial to the health of human beings and Appellants admit that Nutrilite is harmless (R. 749) and that its vitamin and mineral contents are valuable in preventing those vitamin and mineral deficiencies in the diet of human beings (R. 275). No claim has ever been made by any Federal, state or other governmental agency that Nutrilite is adulterated or harmful in any manner to the health of the users thereof (R. 55, 757).

The need for the addition of vitamins and minerals to the diet flows from absence of these food factors in the

diet due to depleted soils and the canning and refining processes whereby the vitamins and minerals are taken out of ordinary foods (R. 74). This Court has had occasion to consider the development of enriched foods and the reasons therefor in other cases.[2] So well established are these facts that Counsel for Appellants advised the trial court that the efficacy of vitamins and minerals is not involved in this case (R. 49, 51, 54-55, 80-81, 286), for Appellant's admissions had foreclosed any contrary position (R. 274-283). Appellant's brief states: "There was agreement that Nutrilite and vitamin products generally would be useful in helping persons suffering from dietary deficiency resulting from insufficient vitamins." (p. 79).

The product now sold as Nutrilite was first manufactured in California in 1933 (R. 56) and the great bulk of the product is now and always has been sold in California. There

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[2] See the Findings of Fact of the Federal Security Administrator appearing in the Transcript of Record in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 224-225. The following findings appear on page 617 of the Transcript of Record:

> "33. Recent investigations of the diets of persons in various sections and in various income groups have shown that in many cases the food consumed does not furnish sufficient amounts of certain necessary nurtitional elements to maintain health. The deficiencies are more prevalent in the case of persons with low incomes. Such persons usually supply a larger part of their energy requirements from flour and self-rising flour than the average person because of the cheapness as a source of energy.
>
> "34. Among the most serious and widespread deficiencies, in children as well as in adults, are those of vitamin B_1, riboflavin, nicotinic acid, and iron. Deficiencies of these vitamins tend to occur in the same individuals.
>
> "35. A deficiency of calcium exists in certain groups of the population. A deficiency of vitamin D exists in large numbers of infants and children."

Nutrilite contains all these elements and all others found to be beneficial in human nutrition in the amounts recommended by the National Research Council—the admitted authority in this field—and experts on the subject (R. 131-132, 163-164, 757).

are now more than 5,000 persons engaged in the distribution of the product throughout the Nation (R. 56, 1030, 66) and sales exceeded $500,000 per month prior to Appellants' multiple seizures of the product (Pl. Ex. 14, R. 1029, 66).

2. No Attack Here on High Purposes of Food, Drug and Cosmetic Statute—Act Has Four Other and Separate Multiple Seizure Provisions Not Affected by Seizure Provision Involved in This Case—Constitutional Issue Narrowly Confined to Unique Facts

At the very outset, Appellee wants to make it clear that its attack is not upon, and it does not here seek to frustrate or obstruct, the high purposes of the Food, Drug and Cosmetic Act of 1938. The attack herein on illegal action of Appellants if sustained on the unique and unusual facts of this case, which are contained in the Findings of Fact of the Trial Court will not lessen the public protection intended by the Act. Such shocking facts as condemnation without reading,[3] action admittedly with no facts when action must be based on "facts found" and the other unusual facts herein will probably never reappear in any future case.

Appellee's constitutional attack is a narrow one directed to about 50 words of the Act composing a minor part of one section thereof as applied to Appellee under the unique facts herein. If the decision upholding the attack on the arbitrary, capricious, oppressive and unlawful acts of Appellants is sustained, the Constitutional question is thereby avoided.[4]

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[3] Items 4, 5 and 6 *infra* page 15.

[4] *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Crowell* v. *Benson*, 285 U. S. 22, 62; *Brandeis J.* dissenting in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; *Ex parte Endo*, 323 U. S. 283, 299-300; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129, 136-137; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 *et seq.*

The constitutional issue is confined specifically to the facts [5] of this case (the major 22 actions complained of are set forth in the next section herein) and if decided in Appellee's favor it will also not lessen the protection of the public intended by the Act. The statutory language herein questioned and the Constitution do not confer upon Apellants the right to make unlimited seizures of Appellee's product. All powers of Appellants, if any, flow from the "exception" in Section 304(a) of the Food, Drug and Cosmetic Act allowing multiple seizures under *exceptional* circumstances.

Four provisions of Section 304(a) of the Act *which are not involved in this case* allow multiple seizures to protect the public in cases where products are (1) adulterated, (2) sold under labeling previously condemned by a Federal Court, (3) dangerous to health, or (4) sold under fraudulent labeling. The issues herein are thus narrowed to the following provisions of the Act as applied [6] to Appellee under the unique facts of this case: [7]

> "(2) When the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that . . . the labeling of the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

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[5] This Court has repeatedly referred to the helpfulness of a full development of the facts in determining constitutional issues. *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 548; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-548. Read, *The Consideration of Facts in Due Process Cases*, (1930) 30 Col. L. Rev. 360.

[6] Cf. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 601-602.

[7] Although Appellee does not ask that this provision be held invalid on its face, the separability section of this Act (Sec. 901) leaves the balance of the Act unaffected in such cases. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434.

Appellants justify their actions upon the "misleading" labeling charge only and Appellee's product is (1) *not* adulterated, (2) there is *no* prior judgment, (3) the article is *not* dangerous to health and (4) its labeling is *not* fraudulent.

If the statutory language here questioned authorized Appellants to do the arbitrary, capricious and oppressive acts revealed by the findings of fact herein, then it is Appellee's position that these few statutory words violate every idea of fundamental fairness for which the due process clause stands. Appellants, in effect, contend this statute allows them to exercise uncontrolled and uncontrollable arbitrary, capricious and oppressive power because it happens to have the unusual words "without hearing" as part of its text. If the statute really does that, because of those or any other words it contains, it is Appellee's position that the due process clause offers Appellee a constitutional protection paramount to any such power Appellants can acquire by the statutory provisions here involved.

3. The 22 Major Arbitrary, Capricious and Oppressive Acts of Appellants

Since the Appellee's whole case turns on whether Appellants violated the statutory words here involved by a series of arbitrary, capricious, oppressive and unlawful acts, or whether those statutory words are unconstitutional because they authorize such acts, it is deemed advisable at the outset to state 22 of the major acts of Appellants complained of while at the same time referring to the Findings of Fact and the 25 items set forth, *infra*, pp. 24-26 which give other acts almost equally unjust and unfair. The 22 are:

1. Deliberately planned and executed the seizures of Appellee's product in the following nationwide geographic pattern and time schedule (R. 729-751):

Belleville, New Jersey	October 6, 1948
New York, New York	October 19, 1948

Buffalo, New York	October 28, 1948
Hastings, Nebraska	December 1, 1948
Belleville, New Jersey	December 15, 1948
Spokane, Washington	December 23, 1948
Seattle, Washington	December 30, 1948
Clarkfield, Minnesota	December 31, 1948
St. Petersburg, Florida	January 4, 1949
Chicago, Illinois	January 3 and 4, 1949

with each seizure designed to inflict the greatest possible publicity punishment upon Appellee, knowing full well that because of the issues in each being the same the Appellee has a right to consolidate the seizures for trial into one case so punishment would be the only result of each seizure beyond the first.[8]

2. Each of the six decisions authorizing multiple seizures on the ground that the labeling *"is" or* "would be" misleading *in a material respect* to the "injury" *or* "damage" of purchasers and consumers,[9] was made with *no* facts showing "injury" or "damage" to *any* purchaser, user, or consumer from Nutrilite or its labeling.[10]

3. The decision makers had no facts before them showing *one* complaint from any purchaser or consumer,[11] although prior to the decisions Appellants conducted one of the most searching investigations

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[8] Finding 22, R. 763-764; Finding 39, R. 769. (Never *once* in their brief do Appellants mention the geographic location of the eleven seizures.)

[9] Each of the 6 decisions conclude: ". . . there is probable cause for me to believe and I do believe, that the labeling of this article *would be and is* in a material respect misleading to the injury *or* damage of the purchaser or consumer." (Italics supplied.) R. 1172, 1174, 1218, 1534, 1535, 1541. Not once do Appellants in their brief mention the very highly important verb "is"—they avoid it for the obvious reason that they know this lack of facts indicates extreme capricious action. The alternative finding of "injury" or "damage" has not been explained by Appellants.

[10] Finding 17, R. 761, Crawford; Finding 29, R. 765, Larrick; Finding 30, R. 765, Dunbar; Finding 35, R. 767-768, Kingsley; R. 532, (Item 6).

[11] *Ibid.*

ever made in this Nation, of Appellee, its distributors and its customers—interrogating the latter admittedly "unreasonably." [12]

4. Concluded multiple seizures should be made of Nutrilite upon the 58 page pamphlet after reading *only* the last 20 pages of the pamphlet.[13]

5. Concluded the 42 page pamphlet was misleading after reading only the parts pointed out by the author of the famous (in this case) "pressure" memorandum.[14]

6. Read but *one* unidentified pamphlet but signed decisions concluding that *three* involved herein were all misleading.[15]

7. Made 5 of 6 decisions after completion of an official Food and Drug Administration survey of purchasers and consumers to determine their impression of Appellee's pamphlets but refused or failed to consider findings of that survey which were 100% contrary to all six decisions and to the contentions of all the libel papers.[16]

8. Made all 6 decisions and did their other acts herein knowing that Nutrilite is beneficial and harmless,[17] that its label complied with the law,[18] and that there was no question of adulteration, danger to health or fraudulent labeling and that no prior judgment against Appellee's labeling had been rendered in any court.[19]

9. Rejected Appellee's two specific requests for an opportunity to present the true facts, listened only to biased subordinates bent on defending their prior decisions, and their counsel (R. 503), and backed up these subordinates' decisions by signing decisions identical

[12] R. 532, Item 9 (offered by Appellants as a part of *their* own evidence, R. 531). See *infra* pages 24-27.

[13] Finding 17, R. 761, R. 384-385.

[14] Finding 30, R. 765. Finding 32, R. 766-767. Text of "Pressure memorandum," R. 1030 a, 67; admission it states true facts, R. 413.

[15] Finding 35(b), R. 767.

[16] Plaintiff's Exhibit 4, R. 929-937, 38-47, Finding 30, R. 765, Finding 35(b), R. 767.

[17] Findings 4, 5, 12, R. 757-759.

[18] Finding 6, R. 757, Defendant's admission, R. 273-274.

[19] Finding 12(f), R. 759-760.

therewith knowing the disastrous effect of such action[20] and knowing no emergency existed requiring this refusal to talk to Appellee.[21]

10. Refused to talk to Appellee about its labeling until *all* litigation completed;[22] thereby offering Appellee as the only course of action it could take, the fighting of a multiplicity of actions or closing down of a business upon which more than 5,000 persons depend for their livelihood and stopping the sale of a product which thousands obviously find beneficial or they would not buy it.

11. Made their decisions authorizing multiple seizures in furtherance of a plan to keep a sustained pressure on Appellee and to inflict punishment rather than to protect the public.[23]

12. Unleashed their terrific nationwide far-flung geographic plan of multiple seizures[24] without notice or warning when Appellee's product and labeling had been under Appellants' surveillance since 1939.[25]

13. Arrogantly brushed aside and ignored Appellee's good faith requests for an opportunity to correct any labeling which Appellants might question.[26]

14. Kept their decisions authorizing multiple seizures secret from Appellee to prevent discovery that the first three were unlawfully made.[27]

15. Claimed to have relied upon a psychiatrist for medical "facts" knowing he was unqualified in the field of vitamins and minerals, this man's lack of qualifications being openly admitted by Appellants' refusal to call him as a witness in the trial despite repeated warnings by the Trial Court that an unfavorable inference would be drawn from such refusal.[28]

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[20] Finding 35(d), R. 767-768.

[21] Finding 42, R. 770.

[22] Finding 40, R. 769, R. 419-421, 534 item 25.

[23] Plaintiff's Ex. 16. Text of "pressure" memorandum outlining this scheme R. 1030(a), 67, 69; admitted to be true R. 413.

[24] See *supra* pp. 63-64.

[25] Finding 8, R. 757.

[26] Finding 13, R. 760; Finding 20, R. 763; Finding 29, R. 765.

[27] Finding 34, R. 767 on decisions unlawful; Finding 17, R. 761; Finding 29, R. 765; Finding 30, R. 766 on findings kept secret.

[28] Finding 18, R. 761-762.

16. Deliberately violated an agreement to make no further seizures in exchange for a continuance in the indictment case.[29]

17. Gave "untrue information"[30] to secure embargoes upon Appellee's product in widely scattered parts of the United States, said embargoes being deliberately planned to inflict the maximum irreparable injury and damage.[31]

18. Gave unfavorable opinions and injurious information to private persons and organizations concerning Appellants' actions against Appellee.[32]

19. Unreasonably volunteered information to magazines and newspapers in a way which would most injuriously damage Appellee.[33]

20. Made deliberate efforts to have seized only "large" shipments of Appellee's product so as to make its losses as large as possible.[34]

21. Instituted seizure actions in places far removed from Appellee's principal place of business so as to necessitate the maximum amount of expense in defending and consolidating said actions, and also to prevent a trial in Los Angeles of their charges.[35]

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[29] Finding 24, R. 764 and R. 533 item (15) offered in evidence by Defendants at R. 531. See also R. 264-266.

[30] R. 533, item (11), offered as Defendants' evidence, R. 531.

[31] Finding 38, R. 769, R. 533 item (10).

[32] Finding 39, R. 769, R. 533 item (17).

[33] *Ibid*, item (18).

[34] R. 533, item (20).

[35] Finding 22, R. 763-764; Finding 37, R. 768; Finding 39, R. 769. It was only on Sept. 22, 1949, when they decided their obstructive tactics on the motion to consolidate the libel actions were doomed to fail that they filed an injunction action in Los Angeles including the same issues as those in the libel cases. See *infra* page 88. Appellant's claim on pages 75-76 of their brief that the instant case prevented a trial by jury obviously indicates they never intended to try this Los Angeles injunction as that action is under Section 302(a) of the Act which unlike the section on libel courts (304(b)) does not provide for a jury trial. On appellant's stalling and delaying tactics see *infra* page 83-88. Contrary to what Appellant's say (p. 65 brief) the removal motion also asked for trial in a district of "reasonable proximity" to Appellee's principal place of business—the statutory language (R. 1042-1058).

22. Gave instructions that the Buffalo seizure action be moved no closer to Appellee's principal place of business in California than the Midwest,[36] and throughout all the litigation carried out a deliberate plan of avoiding, in any of the litigation, a trial of the merits of the charges against Appellee's labeling.[37]

In their brief Appellants do not pretend to defend or explain these 22 actions and the innumerable other unfair and unjustifiable actions they have carried out against Appellee, all as set forth in the Findings of Fact of the Trial Court, *because they have no defense.*[38] Nearly every one of the findings on these actions is on *uncontradicted* evidence, evidence offered by Appellants, or *admissions of* Appellants. As explained *infra* pp. 30-33, Appellants devote most of their brief, as they did their evidence at the trial, to the ancillary issue of Appellee's labeling rather

[36] R. 533, item (16).

[37] Finding 24, R. 764, Finding 32(c), R. 767. The pressure memorandum shows no interest in actual trial of any libel case (consolidated or otherwise) as it mentions only the criminal case and the instant injunction action and does not mention any trial of the libel cases (R. 67, 1030A, 69).

[38] This Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, held at the Government's urging that evidence of activities both prior and subsequent to a particular transaction in question may be relevant as reasonably tending to show the purpose and character of particular transactions under scrutiny. It was stated by this Court at page 705:

> "The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purposes and character of particular transactions under scrutiny."

Appellants' actions both prior and subsequent to their decisions are thus relevant as they show the purpose and character of the decisions.

than to the issues raised by these 22 actions. They do argue on the law that the Court had no jurisdiction to protect Appellee against such acts.

4. The Trial—Nearly Every Question of Fact Foreclosed Against Appellants by Discovery and Admissions —Unusual Offer by Appellants of Damaging Facts Against Themselves

Appellants seem to think it indicates weakness in Appellee's case to say that it was composed largely of admissions and papers from Appellants' records. (P. 14, Appellant's Brief). As disclosed by the Record herein, prior to the trial herein, Appellee, made extensive use under the Federal Rules of Civil Procedure of (1) depositions, (2) interrogatories, (3) requests for admissions, and (4) other discovery processes to develop every fact known to Appellants. All of this process was bitterly fought by Appellants (R. 11-22, 286, 669-680, 746, 747) but in the end most of the information was ordered produced by the Court. And the record also shows that Appellee used only a small portion of the great volume of depositions, interrogatories, admissions and documents. Appellee needed to use only a small portion of each to prove its case and carefully selected the parts essential to its case in the interest of conserving the time of the Court by eliminating non-essential evidence. Appellee is proud of the fact that Appellee's case is made up almost entirely of admissions by and documents received from Appellants. Such action by Appellee is believed to be the very purpose contemplated by the Federal Rules of Civil Procedure. Many other admissions are made in Appellants' answer (R. 748-753) to the complaint (R. 725-737), such as in paragraph 18 (a) the 2 requests for a hearing (R. 732) and denial thereof (R. 752).

The surveys of purchasers and consumers under ordinary conditions of purchase and use (R. 929-939, 38) which came from Appellants' own files, constituted a direct con-

tradiction of the chief objection raised by Appellants to Appellee's advertising pamphlets. It was from Appellants' own lips that the admissions were wrung most reluctantly that they made their decisions authorizing multiple seizures with not one fact before them showing injury or damage to any person, no complaints from any person,[39] and that the "pressure" memorandum stated true facts (R. 413).

Appellants based their entire case upon certain findings which they claimed a psychiatrist Dr. Butz had made (R. 333-334, 395, 315, 505). They then advised the Court that they *would not* call Butz as a witness (R. 391-392) although his address is given in a deposition taken for discovery purposes as Silver Spring, Maryland (R. 1175), and they did not say that he was unavailable to them as a witness. Appellants' other most essential witness was the Acting Administrator of the Federal Security Agency, J. D. Kingsley, who made the last three (and only presently effective) decisions authorizing multiple seizures (R. 1532-1541), and under which Appellants threaten to make further seizures. But Kingsley was not called as a witness and was not claimed to be unavailable to Appellants, although he had given an incomplete deposition and had said he did not know just which "version" of the Appellee's pamphlets he read before making the three decisions condemning three different pamphlets but he read only one version (R. 504, 505, 512-513).

Because of the admissions, and the unusual action referred to shortly wherein Appellants offered many facts against themselves, Appellee offered only four of the 17 witnesses whom it advised Appellants it might call.[40] William S. Casselberry, President of Appellee, gave a detailed account of contacts between Appellee and Appellants, together with an outline of the care with which the pamphlets

[39] R. 269-270, 271, 329-330, 385, 507.

[40] R. 532. Question 10, answered R. 535, item 10.

condemned by Appellants were prepared (R. 28-72). Dr. John A. Myers of Baltimore, a specialist in vitamin, mineral and nutritional subjects, then gave expert testimony supporting all of the statements contained in the pamphlets as true, accurate and not misleading from a medical viewpoint (R. 72-91). Mr. Roger A. Truesdail, an expert chemist, then gave his opinion (R. 283-286) that the product held by Appellants would be unsalable when returned to Appellee because of deterioration in potency of some of the contents (R. 286). Mr. Lee J. Myers, a member of the bar of California and an attorney whom the Appellants refer to as an expert specialist in this field, (R. 1026, 1029, 65, 269) then gave his opinion that from a legal viewpoint the pamphlets complied in every respect with the Act. (R. 247-267). His background and experience are of such a nature that he was as well qualified as Dunbar, Larrick, Crawford and Kingsley to give an opinion on the character of Appellee's labeling. He is the attorney who supervised the rewriting of the pamphlets and who repeatedly asked Appellants to tell him if they found anything wrong with the pamphlets so that it might be corrected (R. 1026, 64-65).

The Findings of Fact set forth the foregoing so concisely that it is believed unnecessary to go into more detail about Appellee's evidence and Appellants' many other admissions.

The Appellants' witnesses were so confined in their testimony by the admissions previously referred to that the testimony of Appellants Dunbar, Crawford and Larrick merely reiterated what they read, *or failed to read,* in making their decisions authorizing multiple seizures, and the facts surrounding the making of their decisions already referred to herein. See *supra* pages 13 to 18. On the medical side, Appellants called Dr. Jeghers, whose testimony was so in favor of Appellee's position that Appellants then sought other medical testimony. He agreed (R. 368) that Dr. Wilder of Mayo Clinic, who has written much

that confirms what Appellee says in its pamphlets, (R. 957-958, 50-51) is an expert in this field (R. 957-958) thus contradicting Dr. Nelson, another of Appellants' witnesses. (R. 495, 1509).[41] Appellants' next witness was Dr. Blankenhorn. When counsel for Appellants asked questions about the statements in the so-called findings of fact attributed by Appellants to Butz, Dr. Blankenhorn created a major explosion in the courtroom by saying he could not answer the questions yes or no in the way Appellants' Counsel wanted him to (R. 438). Appellants then immediately took Dr. Blankenhorn off the stand in great consternation and confusion (R. 438).

Appellant's final medical witness was Dr. Walter K. Myers (it is only fair to advise the Court that none of the three Myers who testified in this case are believed to be either related or acquainted in any way). He testified that Counsel for the Appellants told him Nutrilite "was being sold with a claim for curing the disorders that have been mentioned." (R. 479). Those mentioned were the ones listed in the findings attributed to Butz (R. 472-478). Apparently deciding that this gave a bad impression, he then said that he got some of his information from his patients and from advertisements of Nutrilite which he had seen in newspapers and magazines. (R. 483). When confronted with the fact that Nutrilite has never been advertised in any newspaper or magazine he, in an embarrassment obvious from the record, said he would have to change his testimony as he had seen no advertisements. (R. 484).

The final witness for Appellants was a Dr. Nelson, a chemist, not an M.D., and head of the vitamin division of the Food and Drug Administration. He first admitted that his attention was initially called to Nutrilite by the American Medical Association and then sought to change his story on this. (R. 1502, 499-500.) Evidently the Appellants placed no reliance upon him themselves, because he testified that

[41] Nelson there testified that Wilder was unqualified.

none of them consulted him before they made their decisions condemning the pamphlets herein (R. 500), although such questions normally came under his jurisdiction (R. 1496). He had to admit that he had given an *untrue* statement *under oath in this case* in support of Appellants' motion to dismiss when he had said that the value of Vitamin K had not been established (R. 490-491). As already stated, he disagreed with Appellants' witness Dr. Jeghers about the qualifications of Dr. Wilder of Mayo Clinic as an expert in the field of vitamins and minerals, and disagreed with the outstanding expert in the United States on the mineral content of soils as affecting mineral content of plants (R. 498).[41] In general his testimony was such that in view of his admitted untruth when trying to help Appellants to get Appellee's complaint dismissed, the Appellee asked the Court to disregard his entire testimony.

Another remarkable thing about the trial, other than Appellant's failure to call Butz and Kingsley, was the fact that Butz named four medical doctors with whom he consulted in the Food and Drug Administration about vitamins and minerals (R. 1179-1180) (but not about Nutrilite), and none of these "experts" were called by Appellants.

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[41] Further evidence refuting Dr. Nelson's testimony that mineral content of soil does not affect mineral content of plants is found in an article entitled "Home on the Grapefruit Range" in the February, 1950, issue of READER'S DIGEST, where the following statement appears:

> "One last problem remained. Even in fertile Florida, where all you have to do is drop a seed and leap out of the way, there were green pastures where cattle stayed skinny and a lot of them starved to death. Scientists of the state university's Agricultural Experiment Station studied grasses and soils from such pastures and discovered that they lacked essential body-building minerals. When the scientists added iron, copper sulphate and cobalt to the diet of the sick and starving cows, the cows got well. Today minerals are mixed with the seeds of new tropical grasses and sprinkled from airplanes over miles of freshly cleared land. Grasses thus grown contain the minerals."

The most astonishing phase of the trial, however, was *Appellants'* action in closing their case by offering in evidence 25 separate items of arbitrary conduct compiled by Appellee prior to the trial as an answer to an interrogatory (R. 531-535). This evidence—all most damningly against Appellants—having been most amazingly offered by them is certainly evidence for all purposes in this case and having offered it Appellants must admit it is true as they offered nothing to contradict one word of it. This evidence states that Appellants acted arbitrary, unlawfully, oppressively, unreasonably, in excess of their powers under the Food, Drug and Cosmetic Act, and for the purposes of harassment, by the following:

"(1) The rendering of three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading;

(2) The carefully concealed fact from plaintiff that such secret decisions had been unlawfully made by the defendants, such fact being first revealed to plaintiff on January 17, 1949;

(3) The inflicting of irreparable injury on plaintiff by such decisions;

(4) The deliberate increase in plaintiff's irreparable losses by the unreasonable failure to procure the dismissal of all but the first libel for condemnation or seizure action after all but the first thereof had been judicially declared void and illegal;

(5) The denial by the Acting Administrator of the Federal Security Agency of plaintiff's requests for opportunities to be heard upon the question of whether the labeling of plaintiff's product is misleading in a material respect, to the injury or damage of purchasers or consumers;

(6) The further rendering *ex parte* by the Acting Administrator of the Federal Security Agency of unlawful decisions that the labeling of plaintiff's product is misleading, to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact, the case;

(7) The rendering of such *ex parte* decisions by the

Acting Administrator of the Federal Security Agency that the labeling of plaintiff's product was misleading, with full knowledge of the total and ruinous consequences to plaintiff of such decisions;

(8) The deliberate and arbitrary refusal of defendants to stipulate to the removal of the pending libel for condemnation or seizure actions to the district in which plaintiff does business;

(9) The unreasonable interrogation by defendants, or their agents and employees, of many of plaintiff's distributors and customers with the resulting damage to plaintiff's business and good will thereof and interference with and retardation of the efficiency and morale of plaintiff's sales and distribution organization.

(10) The placing, or causing to be placed, of embargoes upon plaintiff's product in widely scattered jurisdictions of the United States so deliberately planned and calculated as to injure plaintiff;

(11) The giving of untrue information to secure said embargoes;

(12) The carefully designed geographic pattern of the libel seizure actions so as to unnecessarily punish plaintiff;

(13) The deliberate and unnecessary punishment of plaintiff by inflicting unnecessary expense through the institution of numerous libel for condemnation or seizure actions in widely separated and far-flung jurisdictions in the United States;

(14) The oppressive and unreasonable threats by defendants to institute still further libel seizure actions in other widely separated and far-flung jurisdictions in the United States;

(15) The deliberate violation of defendants' agreement not to make multiple seizures of plaintiff's product, upon the ground that such agreement only applied to seizures of plaintiff's product in Los Angeles;

(16) The issuance of instructions to allow the Buffalo seizure to be removed no further than the midwest;

(17) The rendering of opinions and the provision of unfavorable and injurious information by the defendants to private individuals and organizations with respect to the labeling of plaintiff's product, without either prior or subsequent notification to plaintiff;

(18) The unreasonable volunteering to magazines and newspapers of information in a way which would most injuriously damage plaintiff;

(19) The repeated violation of implied agreements to advise plaintiff of instances in which defendants deemed the labeling used by plaintiff to be in violation of the Federal Food, Drug, and Cosmetic Act and the regulations issued thereunder;

(20) The deliberate efforts of defendants to seize only 'large' amounts of shipments of plaintiff's product, so as to make plaintiff's losses as large as possible;

(21) The deliberate punishment of plaintiff by requiring the employment of attorneys and the provision of cost bonds in those far-flung jurisdictions in which seizures were made of plaintiff's product, knowing full well that plaintiff could consolidate all of such actions and the only accomplishment of said numerous actions would be the loss of such monies so expended by plaintiff;

(22) The secret infiltration of plaintiff's organization by defendants' agents and employees in entrapment attempts in order that information respecting plaintiff's operations might be constantly and instantly furnished defendants;

(23) The threat to incarcerate plaintiff's Seattle, Washington, distributor over the 1948-1949 New Year holiday if certain goods were not immediately produced by said distributor;

(24) The calculated action of defendants in refraining from instituting libel proceedings in the Southern District of California of products known to defendants to be in the possession of the Post Office Department and other common carriers for interstate shipment through which plaintiff was prevented from exercising its absolute right to remove the multiple seizure actions to such Southern District of California;

(25) The refusal and failure of defendants to indicate to plaintiff wherein the labeling of Nutrilite was claimed to be misleading, or to provide an opportunity to revise such labeling, all of which led plaintiff to the belief that the labeling was, in fact, acceptable to the Food and Drug Administration."

When Appellants closed their case with these 25 admissions Appellee called no rebuttal witnesses and immediately closed its case (R. 537).

Under these conditions is it any wonder that Appellants do *not* assert lack or insufficiency of evidence to support the Findings of Fact herein? They simply cannot do so.

5. Appellants' Own Investigations Reveal That Under Customary Conditions of Purchase and Use Purchasers and Users Are Not Misled by Appellee's Pamphlet

(a) The Statutory Test

The statutory test to be applied to Appellee's pamphlet—and this pamphlet constitutes the sole objection of Appellants to Appellee's business (Fdg. 7, R. 757, Fdg. 42, R. 770) is the interpretation placed upon it by purchasers and consumers under customary conditions of purchase and use.

Section 201 of the Act on the construction of labeling refers to "under such conditions of use as are customary or usual." Section 403 (f) refers to the requirement that labeling be in "such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." Sections 503(c) and 602(c) contain identical language. Appellants Dunbar, Crawford and Larrick, and J. D. Kingsley, who acted for Appellant Ewing, all cited this as the test in making their claim that the pamphlets represented Nutrilite as a cure for serious diseases. (Crawford, R. 375; Dunbar, R. 311; Larrick, R. 395; Kingsley, R. 507). "In making that survey of labels (labeling) it is always my effort to place myself in the position of the individual who is going to read that label (labeling) and attempt to determine what impression . . . that labeling will make on the person—the customer or purchaser—who reads that label (labeling)" (Dunbar R. 310-311). The testimony of the others is in substance

the same as to the test of customer and purchaser reaction which must be applied.

Appellee has always contended that purchasers and consumers would not place the interpretation upon its pamphlets that Nutrilite is offered as a "cure" of diseases contended for by Appellants (Appellant's Brief 19, 20, 94). The pamphlets do no more than discuss diet and nutritional deficiencies due to the lack of vitamins and minerals in ordinary diets (Fdg. 12(e) R. 759). The chief causes of this deficiency are given as soil depletion and canning and refining processes (R. 908-911). The pamphlet then discusses the need to add a product like Nutrilite as a supplement to the diet to overcome these deficiencies of vitamins and minerals. Appellants ordered the Minnesota survey (R. 39-47, 929-939), already discussed herein, made for the specific statutory purpose of obtaining from purchasers and consumers their impressions of the pamphlets under customary conditions of purchase and use. Inspector Anderson of the Food and Drug Administration made the survey in Minnesota by talking to purchasers and users of Nutrilite who had bought the product after reading the pamphlet. The survey reveals that consumers unanimously reject the contention that Appellee's pamphlet is misleading to them (R. 929-939.)

(b) "None of Them Thought That Nutrilite Was a Cure for Anything But Merely Vitamins and Minerals Which Would Build Their Bodies Up"

This is what the official Inspector of the Food and Drug Administration reported back in part as to the impressions of purchasers and consumers of Appellee's product who read the pamphlet before buying the product (R. 40):

> "All people I talked to including Mr. Quale, the (Appellee's) Distributor, were very friendly and cooperative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals

which build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type."

Of one purchaser and user the Inspector reported (R. 42):

"She said at the time she signed up for the course Mr. Quale gave her the booklet, 'How to Get Well and Stay Well' and she had read this booklet and given it back to him. When she started using Nutrilite she did not think she was getting a cure. . . .

"I asked Mrs. West if she thought Nutrilite was a cure-all or something wonderful, and she said she believes it has helped her very much but does not know if it will cure anything. It would appear that Mr. Quale did not make any wild claims to Mrs. West and that she was not led to believe that the product was anything more than vitamins and minerals which would help to build her body up.

"James E. Anderson, Inspector."

The reports of other interviews with purchasers and consumers are of like import, all specifically refuting Appellants' "cure interpretation" opinions as each purchaser interviewed was specifically asked whether the pamphlet gave him the impression Nutrilite was a "cure" and all said *no* (R. 41-47).

If Appellants' "unreasonable"[42] interrogations of Appellee's customers and distributors and Appellants' other investigations (including "secret infiltration of Plaintiff's organization by Defendants' agents and employees in entrapment attempts in order that information respecting plaintiff's operations might be constantly and instantly furnished defendants")[43] described in the record had revealed any evidence disputing this Purchaser survey, it is a reasonable inference that after Appellee offered the Purchaser survey Appellants would have offered this other

[42] R. 532, item (9).

[43] R. 533-534, item (22)—admittedly true as Appellants themselves offered it in evidence (R. 531).

evidence to rebut the conclusions of their own Inspector. Cf. *Baltimore and Ohio R. Co.* v. *United States*, 298 U. S. 349, 381. If the Inspector could have cast doubt on his own report one can be sure Appellants would have had him testify.

We therefore have Appellants recognizing the test which should be applied to Appellee's labeling, applying that test and finding it against them, then arbitrarily and capriciously ignoring these facts in Appellee's favor—which were all the facts Appellants had—and ordering that havoc be wrought upon Appellee's business by oppressively carrying out multiple seizures of its product on a far-flung nation-wide basis.

6. The Appellants' Brief Chiefly Devoted to an Ancillary Issue Rather Than Main Issues in Case

In sum, the Appellants' brief argues that the statutory words here involved authorize them to do the "unfair," "drastic," "harsh" and "shocking" things they have done in this case,[*] but that the statute is nevertheless constitutional as the due process clause does not prohibit their unlawful, arbitrary, capricious and oppressive conduct thus allegedly authorized and set forth in detail in the Findings of Fact of the trial Court.

Appellants quarrel in substance with only one of the 43 Findings of Fact. The Finding singled out for special attention is No. 12 (R. 758-760) wherein the Court found that the three pamphlets involved in this case are not misleading, saying in part:

> "The beneficial effects of vitamins and minerals for nutritional deficiencies is a well established medical fact. Many of the statements in the pamphlet about the beneficial effects of particular vitamins and miner-

[*] The quoted words are those of Judge Pine. See Finding 34, R. 767.

als for nutritional deficiencies are confirmed by the admissions of the defendants herein (R 273-283).

"The three pamphlets (P's. Exs. No. 1, 2 and 3), when read as a whole and fairly interpreted, without lifting statements therein out of context, do no more than represent that Nutrilite is a vitamin-mineral food supplement designed and intended to build up the bodies of human users thereof in order that it may aid nature to help the users enjoy better health through better nutrition. Said pamphlets do not represent to the minds of ordinary, reasonable and prudent persons that all of the symptoms, conditions and diseases of the human body necessarily or generally result from dietary deficiencies alone, or that all of the symptoms, conditions and diseases of the human body can be prevented, cured or treated by the use of Nutrilite, and said pamphlets do not represent, suggest, or imply that Nutrilite is a medicine or drug, or that it is efficacious or beneficial in the prevention, treatment, or cure of all diseases.

"These pamphlets represent the product only as a food supplement containing vitamins and minerals beneficial to building up health and bodies and in alleviating, in some but not in all instances, symptoms resulting from vitamin and mineral deficiencies in the diet. Purchasers and consumers do not understand from these pamphlets that Nutrilite is a treatment or cure for any disease. The defendants' own survey to determine the impression gained by purchasers and consumers of the representations contained in these pamphlets under customary conditions of purchase and use reveals that the users interviewed uniformly came to these conclusions and understandings of the statements in the pamphlets."

Having devoted practically their whole case to an attempt to establish the contrary of these facts by opinion testimony, as compared with actual facts on consumer impressions offered by Appellee, and having lost on the merits, Appellants now say the trial court should not have con-

sidered and decided this matter as an incidental or ancillary issue to the two major issues in the case.

Appellants, knowing the findings of fact are all against them after a careful consideration of the evidence by the trial Court, from the outset to the end of their brief attempt to twist meanings of words, draw unfair inferences from words, excerpt phrases, parts of sentences and words out of their setting, argue that mere illustrations (clearly not intended otherwise) are unfair representations when a fair reading indicates the contrary,[45] and in general they attempt to mislead the Court into disagreeing with the Trial Court on the evidence on this one ancillary issue of the character of the pamphlets and attempt to get this Court to "try the case *de novo* on the record." *United States* v. *Yellow Cab Co.*, 70 Sup. Ct. 177 (Dec. 5, 1949). Never do Appellants, except in one little footnote,[46] admit that from their own files there came the most damning of evidence as to the *actual* reaction of consumers and purchasers to these pamphlets.[47] As explained *supra*, pp. 27-28, consumer reaction is the test whereby all such labeling is to be measured under the Act. Never do Appellants reveal in their brief that this official survey which *they ordered made pursuant to the statute*[48] proves that all their unfair arguments *are 100% wrong.*[49]

Under Rule 52 of the Federal Rules of Civil Procedure the Findings of Fact of the Trial Court should be upheld "unless clearly erroneous." *United States* v. *Yellow Cab*

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[45] See quoted part on their contention the product is sold as a cure for cancer, *infra*, pp. 42-43.

[46] Footnote 10, page 24, Appellants' brief.

[47] Plaintiffs' Exhibit 4, R. 38-47, 929-939.

[48] See *infra* page 54.

[49] See *infra*, "Who Is Acting Honestly, Fairly and in Good Faith in this Case?", p. 40.

Co., supra.[49a] Reference to the entire record herein shows only a rejection of unreasonable arguments and opinions of Appellants—not of any facts because all the facts are against them and the Court so found. And insofar as the merits of the pamphlets actually involved in this case are concerned, the Findings of Fact are in favor of Appellee by an acceptance of Appellee's testimony and a rejection of Appellants. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 659. Appellants offered *no* testimony to contradict their own survey of consumer reaction, just referred to,[50] so the only facts in the record were left uncontradictedly in Appellee's favor.

The Findings of Fact insofar as the arbitrary, capricious and oppressive conduct of Appellants is concerned are mainly based upon *uncontradicted* testimony and admissions of Appellants. They do not and cannot quarrel with the Findings on that conduct. Never do Appellants in their brief even attempt to defend this conduct *because they know they have no defense* to such action. As major examples only of this unmentioned and undefended conduct (details and other such conduct are found in the Findings of Fact of the Court), Appellee has stated the 22 major acts in a preceding section herein (pp. 13-19).

7. Appellants' "Statement" in Their Brief Is Misleading as to the Facts and Issues

Appellants' legal arguments are considered herein under the appropriate sections of this brief.

Appellants in the part of their brief entitled Statement (pp. 5-25) in many instances misstate the facts of record and often state facts not supported by the record or re-

[49a] Rule 52 provides: "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses." On credibility see *infra* pages 40-41.

[50] *Supra*, note 47.

jected by the trial court because of lack of credibility of particular witnesses for Appellants. While many of the misstatements by Appellants are not serious in and of themselves, they combine to create a total impression of Appellee's business and the facts involved in this controversy which is completely erroneous and misleading.

Appellants in the first paragraph of their "statement" create the impression that Nutrilite is sold *entirely* by the use of the booklet "How to Get Well and Stay Well" by salesmen going from door to door. This is not so. The references in the record by Appellants certainly do not support this impression. In fact, the record reveals that the majority of sales are *not* made through the use of the booklet or door to door sales, (R. 56, 213-214), but rather through consumer recommendations and referrals. The trial court found that only about 40% of the *initial* sales to customers were made by use of the pamphlet (R. 757).

Appellants also create the erroneous impression that Nutrilite is sold on a contract basis, stating, in effect, that each customer enters into a "contract" to purchase two hundred dollars worth of the product. This is also untrue. While it is true that is is recommended that the use of the product be over an extended period of time in order to obtain adequate results (and the medical testimony bears this out (R. 107)), sales ordinarily are on a month to month basis (R. 213-214). The only testimony concerning a $200 contract is a statement by Appellant Dunbar as to what A. G. Murray *told* him (R. 315). (The attitude of Murray is reflected in Appellee's Exhibit 16, the so-called "Pressure memorandum", R. 1030a, 67-69). No evidence of unreasonable price was offered by Appellants in this case, and they know that for the 16 vitamins and minerals in Nutrilite, plus its unique base, the price is most reasonable. Yet, they create an opposite and untrue inference.

The second paragraph of Appellants' "statement" (Brief pp. 6-8) is devoted to a discussion of the pamphlet

claimed at one point in the record by Appellants' counsel to be involved in the California indictment of 2 of Appellee's officers (R. 297). Counsel for Appellee pointed out that this pamphlet was not before the Judge out there, but is merely a part of the evidence which the Government says it will offer when that case is tried[51] (R. 298). Appellants neglect to say that *this booklet is not involved in the instant case in any way, was not used as a basis of the decisions authorizing multiple seizures, and was in fact discontinued many months prior to the seizure actions which gave rise to this controversy.* Also, the claim (P. 6 Appellants' brief) as to the actual charge made in the indictment as "deliberately misrepresenting the therapeutic value of Nutrilite" is not supported by the record herein but is a gratuitous statement by Appellants of a kind they sprinkle freely all through their Brief.

Appellants offered no evidence that any of the Appellants herein ever knew of the indictment or the pamphlet they say the Government will offer in support of the indictment, or that any of their actions involved in this case were taken as a result of or were based upon the pamphlet or the indictment.

Appellants say the charge in the libel papers is "false labeling representations" (p. 9, Brief) and again the record references they cite do not contain these words at all, nor does any other part of the Record herein.

Appellee will consider the statements about Appellants Crawford, Larrick and Dunbar and the psychiatrist Dr.

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[51] The Federal Judge before whom this indictment is pending has not set the case for trial, after first continuing it at the request of the Government (Finding 24 R. 764) as the Judge says the trial would be a waste of money (R. 1037) since the pamphlet allegedly used there admittedly was discontinued months before the indictment was returned, 14 months after the hearing thereon. (Finding 9, R. 757; Finding 14, R. 760.)

Butz they now say they relied upon, *infra,* pages 57-60. Suffice it to say here that the brief's statements (pp. 18-21) about them are an almost complete misstatement of the evidence and findings of fact in this case. The Court's attention is called to the fact that they omit Kingsley entirely in their outline of the decisions; yet his are the *only presently effective decisions,* as Judge Pine invalidated those by Crawford, Larrick and Dunbar and they took no appeal from his decision. (Fdg. 34, R. 767.) Also, only the 42 page pamphlet is now in use (R. 52) yet Appellants base most of their discussion on the 58 page pamphlet, use of which was discontinued on October 11, 1948—18 months ago (Fdgs. 19-20, R. 762-763).

Appellants also attempt to create the impression that four libels were based upon the 58 page booklet, one libel on the 36 page booklet and five on the 42 page booklet. An examination of the references to the record cited by Appellants in support thereof not only fail to support these statements but the testimony of Appellant Larrick is to the effect that more than one seizure was based on the 36 page booklet he condemned *ex parte* (R. 408).

Appellants in speaking of the action denying their first motion to dismiss the complaint, state (p. 12) that "Judge Pine questioned the authority of Appellants Crawford, Larrick and Dunbar to act on behalf of the Federal Security Administrator in making the determinations of probable cause." This is a masterpiece of understatement. Judge Pine not only "questioned" their right to make the decisions but in fact held that they were *unauthorized* and *unlawful* (Finding 34, R. 767, 593).

Appellants state on page 13 that "on April 14 notices to take depositions were served" on named individuals. Their next sentence states that "the notices were followed by the service of subpoenas *duces tecum.*" This is in error. Appellee simply served notices and subpoenas commanding the named individuals to appear for the taking of deposi-

tions. The same subpoena, pursuant to Rule 45 of the Federal Rules of Civil Procedure, commanded the production of certain reports, and correspondence to be used during the course of the depositions. At no time did Appellee serve subpoenas *duces tecum* under Rule 34 of the Federal Rules of Civil Procedure.[52] (See R. 743-745.)

Appellant's statements about Appellee's evidence consisting of Appellants' own admissions are considered *supra* pp. 19-20.

Appellant's attempt in their brief (pp. 15-16) to undermine and twist the medical testimony of Dr. John A. Myers of Baltimore is particularly to be condemned. An examination of the record in this case will disclose that he was the outstanding medical expert at the trial.[53] At no time did Dr. Myers testify, as Appellants would lead this Court to believe, that "common dietary deficiency diseases" are "peptic ulcers, cold, sinusitis, colitis, eye trouble, ... pneumonia, cancer" etc. An examination of the record cited by Appellants on this point will disclose that they are guilty of a serious misstatement and that here as always they were asking what Dr. Myers as a doctor might conclude from certain lengthy medical terms, not appearing in the pamphlets but conjured up by Appellant's Counsel. For hour upon hour Counsel for Appellants sought to put such words in Dr. Myers' mouth but for hour after hour

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[52] Appellants cite the fact that a motion to quash the subpoenas was denied by Judge Clark, one of the three Judges. At no time did Appellants seek to have Judge Clark's order reviewed by the full three-judge court, yet Section 2284, Title 28, U. S. C., specifically provides for such an appeal from the action of a single judge. They therefore have waived this objection (it is of no merit anyway) by failing to exhaust their statutory remedy. See *infra* page 168.

[53] It is significant to note that Appellants produced four expert witnesses. Two of them admitted stating erroneous facts under oath (R. 482-484, 490-491); another could not agree with the findings by Butz (R. 438, 435).

he patiently explained how inapplicable such scary undreamed of diseases are to the product and pamphlets before the Court (R. 92-183). Never would any ordinary purchaser reading the pamphlets think of any of the diseases Counsel for Appellants cross-examined Dr. Myers on at great length, and certainly none of those diseases are mentioned directly or by implication in the pamphlet. See for example page 113 of the Record where Appellant's question Dr. Myers on endocarditis, pericarditis, angina pectoris, aneurism—on other pages of Dr. Myers cross-examination (R. 92-183) similar questions are asked on other such names no ordinary purchaser would know.

The references to Dr. Truesdail are erroneous (P. 14, n. 8, p. 43, n. 15) as he in fact testified at the very part of the record cited by Appellants that he recommends against sale of a vitamin product like Nutrilite after it had been packed for six months, not the year stated by Appellants (R. 285-286).

Reference is made to the deposition of Acting Administrator Kingsley (R. 501-518) stating "he had examined the editions of 'How to Get Well and Stay Well' upon which his determination was based" seeking to convey the idea that he read each of the three editions. Appellants are completely cognizant of the fact that Kingsley did *not* read the three editions of the booklet upon which his determinations were based but relied upon a *single unidentified* pamphlet, saying "I am uncertain as to which version I read" (R. 505, 513).

It is worthwhile to note that the Appellants who have violated all the rudiments of fair play seek to extol their years of "experience" and "utmost good faith" as conclusive evidence of their *inability* to act arbitrarily and capriciously. (Pp. 18-21 of Brief.) It is not uncommon for administrative officials to raise such a cry in defense when their actions are challenged.

Appellants attempt (pp. 23-25) to recite the basis for the

finding of the Court below that Appellants acted arbitrarily and capriciously in reaching their decisions of probable cause. Few, if any, of those facts were relied upon by the Court in reaching their conclusion. In a footnote Appellants refer to the "secret indictment" in California as being part of the arbitrary conduct of Appellants. (Page 25, note 11.) This, of course, is ridiculous and was not so considered by the Court below. Most of their other criticisms are of like character, and they did not discuss the actual Findings of Fact of the Trial Court in any attempt to show that under Rule 52 of the Rules of Civil Procedure they were "clearly erroneous." See *United States* v. *Yellow Cab Co.*, 70 Sup. Ct. 177 (Dec. 5, 1949), and *supra* note 49(a).

8. Appellants in 10 Years Surveillance Unable to Develop One Fact Justifying Seizures

One very remarkable thing which Appellee wants to call to the attention of the Court, without laboring the point, is that Nutrilite has admittedly been under the surveillance of Appellants since 1939, according to its own records (R. 387). Under Section 704 of the Act everything in connection with Nutrilite's manufacture and sale has always been subject to the most rigid inspection by the Food and Drug Administration, as are all similar products manufactured by other companies. Appellants' Counsel have stressed that they have made a most thorough investigation in this case (R. 16) and reference has already been made to the terrific and extensive interrogation of Appellee's distributors and customers.[54]

From all of this record it is most remarkable that Appellants who made decisions authorizing multiple seizures had before them no evidence of complaints and no facts of any kind critical of Appellee, its product or its labeling

[54] *Supra*, page 25.

(R. 269-271, 329, 330, 385, 507). We then come up to the time of the trial in the instant case with Appellants knowing for approximately 10 months that it would be necessary for them to show some facts justifying their actions herein, but again Appellants present nothing except arguments about words and inferences therefrom, which inferences they knew purchasers and consumers do not draw because their own survey of the impressions of purchasers and consumers had so informed them (R. 39-47), *supra* page 28.

9. Who Is Acting Honestly, Fairly and in Good Faith in This Case?

One further general comment on Appellants' brief is in order. At several places they question Appellee's honesty (p. 34, 98) and good faith (p. 97, 98). Six different Federal Judges have been most critical of Appellants and their actions affecting this case.[55] Yet Appellants seem to still feel they have a special license to impugn and smear us. In their Brief, as throughout this litigation, they make their charges with no evidence of any kind to support them. With some reluctance, but nevertheless, because of Appellants' tactics in their brief, Appellee calls the attention of the Court to three instances which, to say the least, cast some reflection upon the *honesty* of three of Appellants' chief witnesses:

> 1. Dr. Elmer M. Nelson, Chief of the Vitamin Division of the Food and Drug Administration whose duty it is to pass upon labeling of vitamin products (R. 1496) but who nevertheless was never consulted by any of the Appellants prior to their decisions herein (R. 500) signed an affidavit under oath in support of Appellants' Motion to Dismiss in this case stating that the need for Vitamin K in human nutrition had not been established. The other experts in this case testified

[55] R. 767 (Pine), R. 756-771 (Clark, Goldsborough, Tamm); R. 1051 (Fake), R. 1037 (Harrison).

to the exact contrary (R. 84-85, 355). Nelson himself has twice admitted his sworn statement was untrue (R. 491, 1519). If the lower court had sustained the motion to dismiss acting on the basis of this absolute falsehood just because told by Nelson, relying on his background and official position, a terrific injustice would have been inflicted. Is this honest?

2. Appellant Larrick signed an answer under oath to an interrogatory on behalf of all the Appellants stating that Appellant Dunbar *had* seen or heard of complaints against Appellee and after Appellant Dunbar denied this under oath (R. 329), Larrick was forced to retract this untrue statement (R. 406-407). Is this honest?

3. Witness Walter K. Myers of Appellants testified he received information about Appellee's product and labeling from "advertisements," then was forced to admit he had never seen any advertisements of any kind (R. 483-484). Is this honest?

When Appellants start writing about honesty and good faith in this case they should also recall the facts found by three judges in this case. A reading of those findings would never suggest honesty, fairness and good faith on the part of Appellants herein. These judges found these facts after observing the demeanor of three of Appellants on the stand, and after considering Appellants' refusal to put their chief scapegoat psychiatrist on the stand or to call as a witness J. D. Kingsley who did many of the things listed in the 22 points, *supra*, pp. 13-18, in the name of Appellant Ewing. Was their violation of an agreement they made to get a continuance of the trial of the indictment case an honest act? (Item 16 *supra* page 17.) Was their deception in adroitly leading Appellee to believe its labeling unobjectionable to them while secretly, at that very time, planning to unleash their pressure and punishment campaign of nation-wide multiple seizures an honest act? (Items 19 and 25 *supra* page 26.) Perhaps one should not say such things about Government officials, but when those

Government officials repeatedly attack the honesty and reputation of citizens to distract attention from real issues it seems high time that the truth is revealed.

In all the testimony of Appellants and in their brief they use the "scare" technique so ably explained by their *admitted* "expert" on the subject, J. D. Kingsley (R. 509). They tried to "scare" the Trial Court by conjuring up terrible sounding names of diseases which only doctors ever hear of and then twisting undreamed of impressions and general representations which no ordinary purchaser and consumer would ever have (R. 92-183) as is shown by Appellants' own survey of consumer reaction (R. 39-47).

Appellants' claim that the pamphlets offer Nutrilite as a cure for cancer because it is mentioned once in a disclaimer illustration in the pamphlet in the Foreward shows how extreme the interpretations of Appellants are. Judge Goldsborough asked Appellants' Counsel: "Your theory is that a reasonable mind would gather from the book that this medicine would cure cancer; is that what you have in mind?" The answer was: "Yes sir, absolutely" (R. 124). The language where cancer is mentioned is as follows:

> "Consider, for example, our title—HOW TO GET WELL AND STAY WELL. From this title do you conclude that we offer *every* person a means of getting well, whether he is breathing his last few breaths at the age of 110, on his death bed with cancer, in a diabetic coma or about to die of typhoid fever? If so, your conclusions are wrong. With the title of this book be sure to read the explanation on the title page, below the illustration. What we have tried to do in this book is show the average American, ill with the usual American deficiency ailments in the customary chronic manner, what may be the cause of his illness, and how he should proceed to get well and stay well.
>
> "Another example: When you read the title of this book do you assume that we are going to show you how to *stay* well, *in spite* of everything you do to the contrary? If so, it is also a wrong conclusion. You can

follow our suggestions contained herein, and still make yourself ill by drinking too much alcohol, by taking dope, by overdoing, by exposure or by denying yourself certain important items of diet, such as proteins or carbohydrates" (R. 885, 31).

The explanation on the title page is as follows:

"If your health is the result of dietary deficiencies, and IF you want to get well and stay well, be sure to read this book. Even IF you are sure your diet has nothing to do with your ailment, read this book now, because science is connecting more and more physical troubles with diet and nutrition. IF your health is good read this book and learn how to stay well" (R. 883, 31).

None of the so called medical findings attributed to Butz (R. 761-762), see *infra* pages 57-60, 73, claim that the Appellee's pamphlets offer Nutrilite as a cure for cancer and none of Appellents' medical doctor witnesses so testified, while Appellee's medical expert testified they made no such claim (R. 127). Yet Appellants cross-examined about cancer (R. 96-97, 160-162).

For hour after hour, the Appellants took equally extreme positions in their cross-examination on other incurable diseases having scary unpronounceable names which only the doctors ever heard of. (R. 92-183.) These names are not mentioned in the pamphlets, were undreamed of by its authors and no ordinary purchaser or consumer could possibly think the pamphlets promised that Nutrilite would "cure" the diseases mentioned.

While Appellants' actions throughout are shown by the record and the undisputed Findings of Fact herein to be a record of secret, furtive, carefully concealed actions deliberately designed to injure Appellee irreparably without an opportunity to eliminate suddenly sprung objections, Appellee earnestly believes that the Record and the Findings of Facts amply support the Court's finding of Appellee's

complete good faith, honesty of purpose and fairness throughout.[56]

Since Appellants' brief, as did their evidence at the trial, revolves chiefly around their charges about Appellee's labeling, this discussion of Appellee's honesty and good faith will be confined to that subject, although there are many other facts in the Findings of the Court which certainly establish such a conclusion as to Appellee with respect to its whole business—for example, the complete absence of any complaints where a business of large size is involved and where a most extensive and fruitless investigation has been made by Appellants to try and find unfavorable facts.

The record shows that prior to 1942 Nutrilite's labeling was regularly presented to the Food and Drug Administration for comment [57] and the record is devoid of any unfavorable comments. The Findings show that from 1942 to 1947 no change was made in Nutrilite's labeling.[58] In 1947 the Food and Drug Administration sent a notice to certain of Appellee's officers of a hearing under Section 305 of the Act relating to criminal actions, which notice specifically provided that it did not relate to action "involving the seizure of the article" in libel cases.[59] A hearing was held on this notice, at which certain general indications about Appellee's labeling were made by representatives of the Food and Drug Administration.[60]

Appellee was represented at the hearing by a lawyer whom the Director of the Litigation Section of the Food and Drug Administration has called an expert in this field (R. 1029, 65, 269) and this lawyer advised that the labeling would be rewritten under his direction to eliminate all pos-

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[56] Finding 12 R. 758-760, Finding 13 R. 760, Finding 19 and 20 R. 762-763.

[57] Finding 9, R. 757.

[58] *Ibid.*

[59] *Id.* R. 757.

[60] *Id.* R. 757.

sible objections.[61] This lawyer communicated with the Food and Drug Administration about the rewriting of the labeling and its contents.[62] Five months were taken to rewrite the labeling in a most comprehensive fashion (R. 38). The rewritten labeling was carefully checked with Food and Drug Administration regulations (R. 51), pamphlets specifically approved by the Food and Drug Administration, such as the pamphlet "Facts You Should Know About Vitamins," Appellee's Exhibit No. 5 (R. 941-955, 48, letter of approval R. 48-49), and expert medical and scientific literature in the field (R. 37-38, 47-53, 257).

Appellee began the use of its new labeling in January, 1948 (R. 217) and thereafter learned that the Food and Drug Administration was interrogating its distributors and customers (R. 57-58). Appellee then called upon the Food and Drug Administration to inquire as to whether or not there were objections to its new labeling (R. 58, 728, 750). Appellee was advised that the investigation was merely "routine" and was not advised that there were any objections to its labeling (R. 58). At that time it is admitted that Appellee did tell the Food and Drug Administration that if it had any objections to its labeling or to any phase of its business at any time, it was Appellee's desire to eliminate such objections and that a notice to Appellee of any objections would bring about any changes desired (Fdg. 13, R. 760, Complaint and Answer, par. 9, R. 728, 750).

Without notifying Appellee of any objections to its labeling, Appellants caused the first seizure to be made in Belleville, New Jersey in the manner outlined herein *infra* page 48. The very day that Appellee received the libel papers and learned that Appellants were objecting to the last 20 pages of its 58 page advertising pamphlet (R. 61), telegrams were sent to its top agents throughout the United

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[61] *Id.* 757-758.

[62] Finding 10, R. 758.

States ordering these pages cut out of that pamphlet.[63] Similar instructions were sent in writing to all of Appellee's distributors.[64]

A letter was dispatched to Appellants advising them of this deletion and a further request was made for an opportunity to comply with future objections if Appellants ever had any.[65]

Appellant Larrick then approximately two months later, without notifying Appellee that the 36 pages not questioned in the Belleville seizure papers were objectionable and knowing of the notice and request, authorized multiple seizures on the basis of those 36 pages not previously found objectionable without prior communication with Appellee (Fdg. 29, R. 765).

These facts showing Appellee's good faith are uncontradicted by any evidence offered by Appellants.

10. The Six Ex Parte Decisions of Appellants Were Arbitrary, Capricious, and Oppressive.

Of all the facts in this case, none are more firmly established by the voluminous record brought before this Court by Appellants than those facts which compel the conclusion that Appellants Crawford, Larrick and Dunbar as well as J. D. Kingsley, Acting Administrator of the Federal Security Agency, acted arbitrarily, capriciously and oppressively in arriving at their so-called administrative decisions which authorized the onslaught of multiple seizures of Appellee's harmless and, in fact, admittedly beneficial product.[65a] The circumstances under which the decisions in question were made, particularly in view of the tremendous and serious impact of those decisions upon the Appellee, are the epitome of unfair administrative action.

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[63] Finding 19, R. 762-763.
[64] Finding 19, R. 763.
[65] Finding 20, R. 763.
[65a] See pp. 9-10 *supra*.

While Appellants assign as error (P. 26 Brief) the Findings by the Court below showing that the decisions of probable cause were made arbitrarily, capriciously and oppressively as being "clearly erroneous," they present no specific argument in support of this alleged error evidently realizing all too well that they could not find any arguments and certainly no evidence to uphold what Appellants have done. An examination of the record in this case discloses, on the contrary, that the Court's findings on this point (R. 756-771) are the only proper ones from the admitted and established facts of record. The actions and admissions of Appellants are discussed, *supra* pp. 13-17, 19-27.

(a) Crawford and Dunbar Merely "Scanned" or Read Parts of the Pamphlets in Question, No Honest Attempt Being Made to Read or Interpret the Pamphlets in Their Entirety

No one would question that the device of multiple seizures of a harmless and beneficial product is, to say the least, drastic and harsh. Nor should it be questioned that an administrative officer given the power to authorize such action which works such an enormous irreparable injury should give the matter his honest, fair and deliberate consideration before taking action. This should be particularly true where the determination is reached *ex parte* and where the effect of an erroneous determination would result to the knowledge of the officer, as was the case here, in irreparable damage of incalculable magnitude. Inherent principles of fundamental fairness contained in the "due process" clause of the Fifth Amendment to the Constitution would seem to so demand.

It would appear, then, to be fundamental, that before administrative determinations of the character involved here, there should be some honest and fair effort on the part of the administrative officer so charged to analyze and interpret the labeling in its entirety without lifting sen-

tences and phrases out of context, particularly when the labeling is admittedly the only basis of objection. Appellants in their brief recognize that such labeling should be "read" in its entirety (Page 84). Such, however, was not the case here, for Appellants Crawford and Dunbar admittedly based their decisions on a mere "scanning" of isolated sentences and phrases and a reading of certain parts of the labeling in question.

Appellant Crawford testified that the booklet "How to Get Well and Stay Well" first came to his attention on September 28, 1948, when he authorized the seizure action of October 6, 1948, in Belleville, New Jersey (R. 332, 383). At that time, he did not read the first 36 pages but read the remaining 20 pages (Fdg. 17, R. 761). On September 30, 1948, two days later, Appellant Crawford signed his determination authorizing multiple seizures (Fdg. 17, R. 761). On this date, Appellant Crawford made no effort to read the booklet in its entirety but merely scanned the booklet and looked through the file and signed the conclusion right then (R. 384). This evidence clearly discloses that Appellant Crawford's determination was not a decision reached after fair consideration of all the labeling before him but rather a condemnation of the labeling based upon material taken out of context.

The determination by Appellant Dunbar on December 9, 1948, was made under similarly shocking circumstances. Appellant Dunbar was informed by an administrative assistant, A. G. Murray, whose patent bias and prejudice against Appellee will be noted *infra*, pp. 83-86, that "he was considering a number of seizure recommendations" (R. 311-312). Upon the basis of representations by A. G. Murray and without reading the labeling in its entirety, Appellant Dunbar concluded that the labeling had a "tendency to mislead" (R. 315-316, Fdg. 30, R. 765-766). On this basis, Appellant Dunbar signed his determination which authorized and resulted in further wide-spread seizures.

The actions of Appellants Crawford and Dunbar in authorizing the drastic use of multiple seizures without taking the little time necessary to read the labeling in its entirety clearly evinces an attitude which, under the circumstances, is the antithesis of "fair play." This Court in *Kassin* v. *Mulligan*, 295 U. S. 396, aptly stated at page 402:

> "Arbitrary or capricious appraisal of evidence . . . is in legal effect failure to consider."

With the ruin of a reputable private business, upon which more than 5000 people depend for their livelihood, and the product of which thousands of users have obviously found beneficial, Appellants Crawford and Dunbar certainly should have considered fairly the matter before them rather than indulging in "short cuts" and "rubber stamping" which are anathema to due process and enlightened administrative action. In *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305, in discussing "rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement," Mr. Justice Cardozo said:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored."

(b) Three Determinations on Three Separate Pamphlets Based Upon a Reading of ONLY ONE Unidentified Pamphlet

On January 28, 1949, at the request of Appellant Dunbar, J. D. Kingsley, then Acting Administrator of the Federal Security Agency, after listening to Dunbar and his counsel (R. 503) in an *ex parte* proceeding made three determinations identical in language with the determinations of Appellants Crawford, Larrick and Dunbar,[66] declared un-

[66] See Appellants' Exhibit 23, R. 1532-1541, 518.

lawful by Judge Pine (Fdg. 34, R. 767). Obviously, Dunbar and his counsel were biased in supporting the decisions previously made by Appellants Dunbar, Larrick and Crawford. J. D. Kingsley's testimony by way of an incomplete deposition (R. 501-516), which was put into evidence by Appellants clearly reveals that he knew three separate determinations were requested, each being based on different booklets (R. 512-513). Despite the fact that three determinations were made, Kingsley testified that he read *only one* version of the booklet and was uncertain and hazy as to which version that was (R. 504-505, Fdg., R. 767-768). As a matter of fact, Kingsley testified that he did not know whether all three booklets were before him [see] (R. 505, 513, Fdg. 35, R. 767-768).

It is absurd to contend that the determinations of J. D. Kingsley, which sought to authorize continuation of the multiple seizure program to "keep a sustained pressure" on Appellee, were made in an atmosphere and in a manner which reflects that the determinations were fairly reached. When the matter was submitted to him and he was informed that three determinations were requested, every sense of fair play would seem to dictate that an attempt should have been made to consider the labeling relating to each determination. This apparently was a matter of complete indifference to Kingsley.

J. D. Kingsley's palpable abuse of the powers vested in him is made even more so by the fact that prior to his determinations he was twice requested by Appellee that if he was asked to pass upon its labeling he grant it an opportunity to show him that the labeling in question was not misleading in any respect. Furthermore, he was advised that an erroneous decision on his part would put Appellee completely out of business by further multiple seizure ac-

[see] Appellants in offering Kingsley's deposition withdrew all their objections to questions asked of him that such questions were probing his "mental processes." (R. 506-508).

tions.[67] Despite these requests and the information contained therein, Kingsley made no honest effort to appraise each booklet condemned by him or to be sure that he had the right booklets before him. It is obvious from these facts, and others which will be discussed hereinafter, that J. D. Kingsley did not give the matter his considered judgment but took it upon himself to make only a cursory examination of the matter before him *despite full knowledge of the serious consequences of his decision* as Appellee's communication advised him specifically of these consequences.[68] His conduct in the matter is not dissimilar to what the law designates as "willful misconduct,"[69] rather than of an ordinary reasonable and prudent person.

These facts on Kingsley are thus a perfect picture of an arbitrary administrator, badly advised by his biased subordinates bent upon supporting the decisions they had previously made, brushing aside information in his own files and available from Appellee, issuing a paper which would to his knowledge destroy the economic existence of thousands. Appellants now say he is unstoppable regardless of how he acted.

(c) All Six Determinations Made With No Facts Before Decision Maker Showing Injury or Damage to Any Purchaser or Consumer

Section 304(a) of the Act prohibits multiple seizures "except" when as a condition precedent "facts" are "found" and a decision made on those facts authorizing such seizure. The Administrator must have probable cause to believe "from facts found" that Appellee's product was being sold

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[67] Complaint and Answer Paragraph 18(a), R. 732, 752. Finding 35, R. 767-768. See Appellants' Exhibits 8, 9, 10, and 11. R. 1163-1171, 298, 300.

[68] *Ibid.*

[69] See *Lacy* v. *Louisville & N. R. Co.*, 152 Fed. 134 (CCA 5th, 1907).

under labeling which is or would be "in a material respect" misleading to the injury or damage of the purchaser or consumer. The words "in a material respect," the word "injury" and the word "damage" must mean something. To have the volume of sales it has Appellee obviously has thousands of customers, and it is in evidence that it has more than 5000 distributors (P's. Ex. 16, 1030, 66-67). Appellants have conducted one of the most intensive and searching investigations of Appellee by interrogating its customers (R. 728, 750, para. 9). Even after this litigation started Appellants had nearly a year to dig up facts against Appellee yet they produced none at the trial and themselves offered evidence (R. 531) that Appellants were arbitrary and capricious in:

> "The further rendering *ex parte* by the Acting Administrator of the Federal Security Agency, of unlawful decisions that the labeling of plaintiff's product is misleading, to the injury or damage of the purchaser or consumer where no facts exist which show that such was, in fact the case" (R. 532, item 6).

And it is significant that Appellants Crawford, Larrick and Dunbar as well as J. D. Kingsley *admitted* that at the time they made their determinations they had no facts before them showing injury or damage to any purchaser or consumer of Nutrilite from its labeling, and they knew of no complaints from purchasers or consumers.[10] While not conclusive in and of itself as evincing a lack of probable cause on the part of those making the determinations, this total lack of consumer protests or complaints does become significant, however, when considered with the other actions of Crawford, Larrick, Dunbar and Kingsley in making their determinations and the circumstances surrounding the determinations. Consumer complaints against Nutrilite and

[10] R. 270, 385, 761 (Crawford); R. 271, 329-330, 765 (Dunbar); R. 270, 765 (Larrick); R. 269-270, 507, 767 (Kingsley).

its labeling obviously were non-existent and their absence should have put Appellants on some notice that the labeling was not misleading, despite the claims of prejudiced and biased subordinates. Although facts showing injury or damage were not known to any of those who made determinations of probable cause, all of those determinations recited that the labeling "*is* in a material respect misleading to the injury or damage of purchasers or consumers" (R. 1172, 1174, 1217-1218, 1534, 1535, 1541). It is inconceivable how such a determination could be justly made without at least some semblance of facts showing consumer reaction. Each of the Appellant's decisions say that Appellee's labeling "would be *and is*" misleading and "in a material respect." The shocking fact of this case is that the only consumer sampling conducted by the Food and Drug Administration revealed that the exact opposite was true, i. e., *that consumers were in fact not misled by the labeling* (R. 39-47), see *supra*, pages 28-30. The language of *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 is most appropriate:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of *evidence, and capriciously make findings by administrative fiat.* Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Italics supplied.)

Under the Act, the decisions authorizing multiple seizures must be based on "facts found" (Section 304(a)). The right to use multiple seizures thus was intended to depend on facts and Appellants admittedly had none. And as is stated

in the next section Appellants' only relevant facts were the opposite of their conclusions. Rule by edict and fiat has always been contrary to the principles upon which our Government is founded. Mr. Justice Frankfurter, concurring in *United States* v. *United Mine Workers*, 330 U. S. 258, 307-308.

Appellants were certainly not acting as reasonable and prudent men in making their decisions when the only facts in their files dictated the opposite conclusion to that reached.

(d) The Determinations Ignored and Were Diametrically Opposed to the Findings of Fact of Appellants' Only Known Official Investigation

Further evidence of the gross abuse of the extraordinary summary power vested in the administrative officials who made the determinations authorizing multiple seizures herein is to be found in the Findings of Fact of the investigation in Clarkfield, Minnesota, undertaken by a Food and Drug Inspector at the request of the Washington, D. C. office of the Food and Drug Administration.[71] The telegram of instructions dated November 18, 1948, ordered that "an investigation be undertaken . . . to determine scope and character of representations made orally, and by accompanying literature." The findings of fact of the Inspector on his investigation conducted pursuant to these instructions stated, in part, as follows:

> "All people I talked to including Mr. Quale, the distributor, were very friendly and cooperative. None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up. None of these people were the rabid health addicts that one so often comes into contact with in an investigation of this type" (R. 930, 40).

[71] The telegram requesting this investigation and the results of it are found in Appellee's Exhibit Number 4 (R. 929-939, 39). See also Finding of Fact 31 by the District Court (R. 766).

Attached to the Food and Drug Inspector's findings are certain memoranda of interviews with users of Nutrilite (R. 931-937). These indicate that none of those interviewed believed Nutrilite to be a cure. Appellants' whole case is based on their contention that purchasers and users under customary conditions or purchase and use would believe just the opposite. The survey thus destroys their whole case. See *supra*, pages 27-30.

The record shows that in about 10 minutes after the trial started Appellee practically dissipated the Appellants' entire case by offering in evidence this survey from Appellants' own files which refutes every contention made by Appellants. Is it any wonder the trial court was shocked to find that Appellants proceeded *against* the information in their own files.

Despite this survey and its findings which concluded, in effect, that no broad representations were being made (see *supra*, p. 54), a seizure was affected in that very locality shortly thereafter, although no other investigation was conducted (R. 937-939). As far as the record in the case discloses, and as far as Appellee has been able to discover, this report and the Nebraska survey of similar import (R. 15) are the only Findings of Fact in the possession of Appellants which tended to show consumer reaction to the labeling in question.[71a] It is obvious, however, that this finding was ignored by the administrative officials who made the determinations of probable cause. In view of the fact discussed in the preceding section, that Appellants had no facts showing injury or damage to purchasers or consumers or any forms of complaints before them when the determinations were made, it was certainly incumbent upon them to call for and consider what little the Food and Drug Administration files contained concerning consumer

[71a] The results of the Nebraska survey, also secured from Appellants' files, being merely cumulative in character, was not offered in evidence herein.

reaction to the Appellee's labeling, as consumer reaction was the very question before them. Each decision maker so stated (see *supra*, page 27). If in fact those files were considered, it is inexplicable how and why the Appellants reached the conclusions they did.

The drastic nature of the power sought to be exercised by Appellants would appear to command that the natural and available avenues of information be explored.[72] Yet all that Appellants based their actions upon in this case was either a hasty scanning of part of the labeling in question or no scanning at all, and the vague and ambiguous statements attributed to ar unqualified psychiatrist which have been casually labeled by someone for Appellants as "Findings of Fact." It is only reasonable to believe that Appellants knew of the survey of purchaser impressions and it was certainly arbitrary and capricious to condemn the labeling without considering it and without questioning the so-called findings of Butz. In fact all of those making decisions testified they did *not* even talk to Butz.[73]

The administrative determinations herein were certainly not of the character which should receive proper deference from courts. To hold that the manner in which Appellants exercised this power was not subject to the "inexorable safeguards" of due process would be to place in the hands of the executive branch of the government a power which the framers of our Bill of Rights justifiably feared and guarded against.

As will be noted *infra*, pages 76-78, "probable cause" is no more than nor less than "reasonable cause." The cases would appear to establish that "reasonable or probable cause" does not exist where a party ignores or fails to take advantage of "reasonable" sources of information which

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[72] See page 80 where authorities are cited on lack of probable cause under such circumstances.

[73] Finding 18(a) R. 761, R. 327-328, 385, 505.

might reveal facts which would have deterred the action taken. This is especially true where information naturally within the knowledge of a subordinate or employee is not inquired into. See *infra*, pages 80-81. Surely, Appellants Crawford, Larrick and Dunbar and Kingsley should have inquired as to what the official files contained concerning the labeling in question. There was no exigency which might have authorized the by-passing of deliberate and considered judgment and as "reasonable men" the Appellants should have made some further inquiry.

(e) Appellants Acted Arbitrarily and Capriciously in Placing Any Reliance Upon the So-Called Findings Attributed to a Psychiatrist Unqualified to Make Such Findings

All of the Appellants as well as J. D. Kingsley who made determinations of probable cause claimed in their testimony that they relied upon certain papers labelled Findings of Fact, and allegedly made by Dr. Robert C. Butz, a psychiatrist employed by the Food and Drug Administration.[74] These so-called findings were ostensibly accepted by Appellants and Kingsley without any consultation with Butz, or any attempt to verify or corroborate the conclusions reached by Butz or to connect the things named by the papers attributed to Butz with the pamphlets (Fdg. 18(a), R. 761). Appellant's statement that Crawford "re-examined the booklet to determine whether the booklet represented Nutrilite as an effective treatment for those symptoms and conditions" (Brief pp. 9-10) i. e., those named in the finding attributed to Butz, is entirely in error as reference to the record citations given by them clearly shows. Later herein, *infra* pages 72-74, Appellee points out this fact on non-connection between those alleged findings and the pamphlets in more detail. Furthermore, Appellant Dun-

[74] Finding 18(a) R. 761, R. 333-334 (Crawford); R. 395 (Larrick); R. 315 (Dunbar); R. 505 (Kingsley).

bar admitted that he accepted the findings of Butz, although he (Dunbar) was fully cognizant that Butz was a recent graduate from medical school and his experience was primarily limited to the field of psychiatry (R. 328). The others knew this or could have ascertained it if they had exercised reasonable prudence.

Ordinarily it might be assumed that the findings of a medical man should be accorded considerable deference. Not so in the instant case, however, for it was obvious not only from the deposition of Butz, but also from the testimony of Appellant Dunbar, that the field of nutrition was alien and foreign to Butz, and that his findings have little or no real relation to the pamphlets here involved. Also, Appellants' admissions directly contradict many of these so-called findings. Furthermore, Butz's deposition is replete with statements by him which contradict or so qualify the findings attributed to him that they are rendered worthless thereby [75] and he had obviously studied up on the subject just before the deposition was taken. In fact it was fairly obvious that he probably did not make the findings himself and this was probably one reason Appellants did not call him as a witness. It is also significant to note that Appellants' star medical witness in the trial below testified *that informed medical opinion could not say yes or no to the question as to whether the findings attributed to Butz correctly stated the present-day consensus of informed medical opinion.*[76] To say the least, this undermined Appellants' entire case as each finding attributed to Butz begins with the statement: "It is the concensus of informed medical opinion . . ." (R. 1171, 1173, 1217, 1533, 1534, 1540).

[75] Deposition of Dr. Butz admitted as Appellants' Exhibit 14, R. 1175-1216, 392. It is obvious that Appellants thought the deposition favored Appellee and was unfavorable to Appellants by demonstrating how unqualified Butz is because their Counsel stated (R. 393): ". . . we assumed that plaintiff would offer it in evidence and we weren't going to object to it."

[76] Testimony of Dr. Blankenhorn, R. 438.

Although Appellants sought to justify their actions on the basis of the findings attributed to Butz, and in a real sense attempted to make him the scapegoat for their arbitrary action, no effort was made by Appellants to call Butz as a witness or attempt to explain why he could not be called.[77] The importance of calling Butz or explaining his absence was noted time and time again by the Court below with indications that failure to call him to testify on his qualifications and the findings attributed to him would warrant an inference against Appellants on these facts (314, 333, 391).[77a] Yet counsel for Appellants stated that no attempt would be made to call him (391-393, 762). Appellee made lack of qualifications of Butz one of its major points in its case and Appellants knew of this long before the trial and heard of it constantly throughout the trial. In view of the importance attached by Appellants to the findings of Butz, the Court below properly found that Appellants' failure to call him or explain his absence gave rise to an inference that if Butz had testified his testimony would have been adverse to Appellants (Finding 18(e), R. 762). Here, indeed, silence became evidence of the most convincing character and the inference was rightly drawn by the trial court. See *Interstate Circuit* v. *United States*,

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[77] The address given by Butz in the deposition taken for discovery purposes by Appellee is 9107 Eton Road, Silver Spring, Maryland, which the Court can judicially notice is adjacent to Washington (R. 1175).

[77a] The Court stated at R. 393: "The Court is going to admit this deposition, but the Court feels that it should warn the Defendants that their failure to produce the witness Butz or to give any explanation for failing to produce him, will be very seriously against the defendants' case.

"He is the key witness in this trial and it seems as though the defendants are not producing the witness because they don't want to produce him.

"Mr. Kleinfeld stated, himself, in open court that he hadn't made any effort to procure the attendance of the witness Butz, although every line of investigation in this case goes back to Dr. Butz."

306 U. S. 208, 225, 226; *Clifton* v. *United States*, 4 How. 242, 247.

Section 304(a) of the Food, Drug and Cosmetic Act, in authorizing determinations of probable cause to be based upon facts found by any officer or employee of the agency, presupposes that the officer or employee finding such facts is qualified to make the finding. To use an extreme example, it cannot be imagined that Appellants could hide behind a finding made by an uneducated janitor—but is not their reliance on Butz almost as bad? To base a determination upon facts found by an unqualified employee, particularly in view of the severe consequences flowing from such a decision, would be to act in violation of due process of law. Appellants' reliance upon the so-called findings of an unqualified employee of the Food and Drug Administration is relevant evidence reflecting the arbitrary and capricious nature of their determinations herein.

(f) The Determinations Were Made Secretly Without Giving Appellee the Opportunity It Requested to Eliminate Objections

Conceding, *arguendo*, that Appellants had the right, under Section 304(a) of the Food, Drug and Cosmetic Act, to make the determinations in question without affording to Appellee the opportunity to be heard, that should not mean that Appellee was to be denied all the rudiments of fair play by being kept in ignorance of the determinations which had been rendered against it. Appellants, however, never disclosed to Appellee that the determinations questioning its pamphlets had been made until it became necessary for Appellants to file the same in this action (R. 274). The very nature of the determinations would seem to require that Appellee should have been given some notice of the impending "crackdown," especially since it had repeatedly asked for an opportunity to comply with all objections (Fdg. 13, 20, R. 760, 763). From this secrecy it can be im-

plied that Appellants knew there was something wrong with their determinations and wanted to hide them to prevent its discovery. Secrecy is particularly abhorrent to justice under law. *Re Oliver*, 333 U. S. 257, 264; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 464.

Secrecy provides a cloak for the misinformed and for the use of arbitrary fiat bent on oppressive injury. Here when the veil of secrecy was taken away, there was a shocking disclosure of condemnation without reading, without knowing what was read, of condemning when all the facts in their files were to the contrary, and all the other facts disclosed in the Findings of Fact herein. In *Bratton* v. *Chandler*, 260 U. S. 110, 114 this Court gave a statute a construction which would avoid "secrecy, prejudice and intrigue" by reading in a hearing requirement and saying any other intent should not be attributed to the legislature.

In July, 1948, Appellee had requested Appellants to advise it if ever any questions about any of Appellee's labeling arose so the labeling could be corrected at once, (Fdg. 13, R. 760). Yet no such advice was given before the decisions herein and in fact Appellants take the position that they will not even talk to Appellee about its labeling until all litigation is over, so all Appellee can do is fight or die (R. 419, 421, 534, Fdg. 15, R. 760, Fdg. 20-21, R. 763).

It should be noted again that Appellee, immediately after the first seizure, ordered the pages objected to removed from its labeling and informed the Food and Drug Administration that the seizure was the "first intimation . . . received . . . that any of the literature was objectionable" and that in the future a letter from "the Agency pointing out . . . objections would bring about a correction without the necessity of court action" (R. 763, Appellee's Exhibit 13, R. 1026, 64-65, 63). Appellants ignored this show of willingness to comply and thereafter made ten other seizures and five determinations of probable cause without notice to Appellee (R. 763-766). Appellant Larrick, who condemned

the 36 page booklet, even testified that he was cognizant at the time of his determination of the fact that the determination prior to his had only condemned the last twenty pages of the pamphlet, that these pages had been promptly removed and that Appellee's attorneys had requested an opportunity to comply with future objections (R. 414, 765). In spite of these facts, Appellant Larrick kept hidden from Appellee that he had authorized multiple seizures on the thirty-six pages which Appellant Crawford did not attack or find fault with in any way (R. 274, 765).

(g) The Conclusion of the Court Was the Only One It Could Reach Under the Facts of This Case and the Decisions of This Court

Without a detailed discussion of the other acts of arbitrary, capricious, oppressive and unlawful conduct of Appellants as set forth in the 22 major acts complained of *supra* pages 13-18, and the Findings of Fact herein, it is submitted that the conclusion reached by the Court below was not "clearly erroneous" but was the only conclusion on this record which would be consonant with those principles of statutory construction and due process as interpreted by the decisions of this Court.

Due process of law in administrative action requires not only that there be substantial evidence to support the decision but also commands that the decision be fairly reached. These requirements of substantive due process and procedural due process are separate and distinct and if either is wanting the decisions in question can justly be said to be "palpably wrong and therefore arbitrary." See *Leach* v. *Carlile*, 258 U. S. 138, 140.

Were the determinations in question fairly reached? Could it be said that a mere scanning of the labeling in question in view of the damaging effect of the determinations on Appellee's entire business was consonant with

those principles of fair consideration? The answer is found in *Kassin* v. *Mulligin, supra,* where the Court stated (p. 402) that "arbitrary or capricious appraisal of evidence is in legal effect failure to consider." Could it be said that Kingsley's three determinations based on three different booklets when he read only one, and that one is unidentified, reflected that spirit of fair consideration which due process demands?

What of the investigation conducted by the Food and Drug Administration to determine the impression of Appellee's pamphlets arrived at by purchasers and consumers who read the pamphlets and bought the product? The Food and Drug Administration certainly felt that a report of consumers' reaction was important for the telegram of instructions specifically stated that possible seizures rested on the outcome of the investigation (R. 929).

A similar situation to the instant case and this survey was presented in the decision of this Court in *Kwock Jan Fat* v. *White, supra,* where relevant, although not controlling, evidence was excluded from the record of an immigration proceeding and such evidence was not before either the Commissioner of Immigration or the Secretary of Labor when they each decided the case. This Court held that the suppression or omission of such evidence from the report amounted to a denial of due process. It was stated at page 464:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts . . . to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment."

The decision of this Court in *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, is also relevant to the present inquiry. In that case, the Secretary of Labor imposed fines against petitioner for bringing to the United States, in violation of the immigration laws, persons afflicted with certain diseases which might have been detected by competent medical examination at the time of foreign embarkation. In the case of one of the aliens brought in by the petitioner, evidence was submitted showing that the alien had been subjected to medical examinations prior to foreign embarkation and had been found in good health. The Secretary imposed a fine, however, on the basis of the certified medical opinions of physicians who examined the alien on arrival in the United States, the opinions reciting that the disease discovered "might have been detected by competent medical examination at the port of embarkation." It did not appear from the record whether the Secretary considered the examination conducted just prior to embarkation or whether the medical officers who examined the alien in the United States had been apprised of the foreign examination. The Court, speaking through Mr. Justice *Stone*, held that the Secretary of Labor acted arbitrarily and capriciously. It was stated at page 338 and 339:

> "The letter imposing the fine in the Fusco Case does not show definitely whether the Secretary considered the evidence submitted by petitioner. It recites in one place, 'The alien gave no history of the disease. Indeed, he was not questioned with regard thereto, and the only evidence in the record is the official certificate itself.' And in another, 'It is believed that the evidence placed in the record by the company is not sufficient to call into question the accuracy of the opinion expressed in the official medical certificate.' We need not inquire whether this ambiguity in the record of itself requires the administrative determination to be set aside. *Cf. Tod* v. *Waldman*, 266 U. S. 113, 119, 120, 69 L. ed. 195, 199, 45 S. Ct. 85; *Mahler* v. *Eby*, 264 U. S. 32, 43, 68 L. ed. 549, 556, 44 S. Ct. 283; *Kwock Jan Fat*

v. *White*, *supra*, 253 U. S. 454, 64 L. ed. 1014, 40 S. Ct. 566. For the same result must follow if the record is considered, whichever way the doubt is resolved. If the Secretary failed to consider evidence before him, he exceeded his authority. If he treated the protest and affidavits as evidence relevant to the discoverability of the immigrant's disease at the time of sailing, but, nevertheless, chose to rely upon the certified opinion of the examining physicians at Ellis Island, we think that more is involved than the weighing of the evidence, and that his determination cannot stand. For the medical opinions did not reveal the facts upon which they were based, and they were formulated by physicians who, so far as appears, were not apprised of the fact that three previous examinations of the nature described had been made. The detailed information as to those examinations which petitioner submitted to the Secretary in this case might reasonably have affected the expert judgment of the physicians at Ellis Island. In relying upon their opinion alone, without putting these additional facts before them, we think the Secretary acted arbitrarily and unfairly.

"The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands. Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal, has been held to be so unfair as to invalidate the administrative proceeding. *Kwock Jan Fat* v. *White*, *supra*; *Lewis ex rel. Lai Thacy Lem* v. *Johnson*, (CCA 1st) 16 F. (2d) 180. It is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts which might properly have influenced their opinion."

Previously, the opinion pointed out the scope and extent of judicial review of the action of the Secretary. It was said at pages 335 and 336:

"The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority . . . whether there was any evidence before him to support his determination . . . and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized."

In making the decisions in question, without reading the labeling in its entirety, by accepting the findings of the psychiatrist without question, in ignoring the fact that no facts showing injury or damage were presented to them, by ignoring the absence of consumer complaints in ignoring their own files which showed a negative result in an investigation of consumer reaction, in failing to give notice to Appellee who had expressed an honest desire to conform to the views of the administration, can it be said, in the language of the *Lloyd* case, *supra*, that the determinations satisfied "elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized"? The conclusion that the Appellants acted arbitrarily, capriciously and oppressively in making their determinations is inevitable and could not be otherwise.

11. Appellants Violated the Statutory Provisions Here Involved in Making Their Decisions Authorizing Multiple Seizures

(a) Appellants Have Statutory Power to Make Only One Seizure "Except" in 4 Specified Cases of Misbranding—They Can Make Unlimited Seizures of Products Charged to Be Adulterated

Section 304(a)[18] provides that Appellants have the power to make unlimited seizures in cases of adulteration,

[18] *Supra* footnote 1.

but "not more than one" seizure "based upon the same alleged misbranding"—"except" in 4 exceptional and specified instances. These are: (1) When the United States has won a judgment condemning the particular misbranding and when the Administrator has probable cause to believe from facts found, without hearing, that (2) the "misbranded article is dangerous to health," (3) the labeling is "fraudulent" or, (4) the labeling is or would be in a material respect misleading to the injury or damage of the purchaser or consumer. Here Appellants must show they were within one of the 4 exceptions as no charge of adulteration is made. The first three exceptions are admittedly inapplicable (R. 759-760). To satisfy the burden of getting within the 4th exception, the Appellants were required to make decisions based upon "facts found" that Appellee's labeling is or would be "in a material respect" misleading to the "injury or damage" of the purchaser or consumer, and Appellants say they made the six *ex parte* decisions already well identified herein. It is Appellants' actions in making these decisions directly *contra* to all the facts in their files and in the manner found in the Findings of Fact of which Appellee complains.

The statute here gives Appellee a *right* to be free of multiple seizures and says Appellants can acquire power superior to that "right" *only* by making a specified decision. Without the decision under the statute as applied to the facts herein, Appellee's right to be free of multiple seizures remains absolute. The Appellants have no "rights"—only carefully circumscribed "duties" and "powers" under this Statute.

(b) What Appellants Have Done Does Not Comply with the Statute

To say that what Appellants have done as set forth in the Findings of Fact herein (R. 756-770) complies with Section 304(a) does violence to all reasonable construction

of the provisions therein contained. Subsections (c) through (e) of this section discuss "probable cause." The next subsection (f) discusses Appellants' "use of multiple seizures as a punishment" as "a violation of the statute and the due process clause." This subsection considers other aspects of the statutory violation.

To impute an intention to the Congress that citizens would be treated in the arbitrary, capricious and oppressive manner herein revealed by Appellants' actions does not comport with logic. Is it any wonder that Appellants do not attempt to defend their conduct on the merits but resort to a claim that their actions are free from examination by any court. Congress certainly intended that all persons be treated fairly under the words of Section 304(a) here involved and by no stretch of the imagination can it be said, on the facts in this case, that Appellee has received that fundamental fairness which due process of law has always required.

The only provision of Section 304(a) involved in this case is the provision prohibiting multiple seizures except:

> "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency . . . that the labeling of the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Under the provision just quoted it is to be noted that the words "without hearing" *can* be applied *only* to "facts found" and that in any event the Administrator is *not* prohibited from granting a hearing. We believe that the fundamental fairness required by the due process clause of the Fifth Amendment should be read into this provision so as to require a hearing under the language of the Act where facts such as in the instant case exists. Since the Administrator is not *required* by the statute to make his probable cause decision, without hearing, the statute should

be read so as to avoid all constitutional questions and require that Appellee be granted an opportunity appropriate to the nature of the matter under consideration to present its facts to him before he makes decisions authorizing the use of multiple seizures under facts like those in the instant case. To have given Appellee an opportunity to present its side of the matter to him would have caused little delay, slight expense, no prejudice to the public interest, and at the same time would have protected against the kind of arbitrary action here proved. The opportunity need not have been a regular judicial hearing. *The Japanese Immigrant Case*, 189 U. S. 86, 100. In *American Power & Light Co.* v. *Securities & Exchange Comm.*, 329 U. S. 90, 108, the Court said:

> "Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that 11(b)(2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto . . .
>
> "But should the Commission neglect to follow the necessary procedure in a particular case, such failure would at most justify an objection to the administrative determination rather than to the statute itself. It would then be needless to do more than nullify the action taken in disregard of the constitutional rights to notice and opportunity for hearing."[79]

Coming then to the facts in the instant case other than the probable cause phases discussed *infra* pages 72-81, it is believed that Appellants exceeded the authority vested in them by statute by their arbitrary, capricious, and oppressive actions set forth in the Findings of Fact herein. Since

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[79] A hearing requirement was read in to save a Tennessee statute regulating real estate brokers in *Bratton* v. *Chandler*, 260 U. S. 110, 114, to avoid violation of due process by "secrecy, prejudice and intrigue." The same was done for a Georgia statute in *Toombs* v. *Citizens Bank*, 281 U. S. 643.

such actions have been fully discussed *supra* pages 46-66, they are not repeated here.

> ". . . to allow an administrative officer to destroy a profitable business on the ground of an alleged unlawfulness which is disputed, without allowing the owner a chance to know the charges and to meet them with evidence and argument, involves unfairness apparent to any eyes not blinded by dazzling conceptualism. To find that alert judges would permit such injustice would be amazing."[80]

On this record we find Appellants ignoring the absence of facts and complaints and ignoring the only facts they had in their files (those favorable to Appellee) and holding that Appellee's labeling was "in a material respect" of such a character as to be "misleading" to the injury or damage of the purchaser or consumer (R. 1171-1172, 1174, 1216-1218, 1532-1541). How it could be "in a material respect" misleading when all the facts were just to the contrary, and how it could be misleading to the "injury" or "damage" of the purchaser or consumer when they had no facts and no complaints and why they have no "facts" after all of their searching investigations raises but one possible inference. The absence of facts speaks louder than words in Appellee's favor. Appellants called not one single consumer or purchaser as a witness at the trial, yet they admittedly conducted a most exhaustive investigation of Appellee, its product, its distributors and its purchasers.

If the Appellants had developed any facts whatever in connection with the indictment in California, the injunction action in California, the ten libel actions throughout the United States, or in the course of their nation-wide investigation of Appellee's customers and distributors, they certainly would have offered such facts to show that

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[80] Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942), 51 Yale L. Rev. 1093, 1120.

their decisions had some reasonable basis in fact and their failure to do so can leave only one conclusion and that is they had no facts and have no facts.

Appellants knew that they would be called upon to justify their actions herein from December 30, 1948 on up to October 17, 1949, when the trial started. During that time Appellee had taken the deposition of every major employee or officer of the Food and Drug Administration and the Federal Security Agency who had anything to do with Nutrilite or its labeling. During that time Appellee filed numerous interrogatories and Appellants were forced to answer these interrogatories after their objections were overruled by the Court. During that time Appellee had called upon Appellants to make many admissions under Rule 36 of the Federal Rules of Civil Procedure, and again, after the Court had overruled their objections, the Appellants were forced to answer. Yet under all of these circumstances they came up to the trial in October, 1949, with a defense still lacking in any facts on injury or damage—they still lack any complaints—and all the credible evidence was against them. Appellee has thousands of customers (it must have to do the large volume of business it does) and Nutrilite has been sold for 16 years; yet, under the most punishing of investigations no facts showing complaints against Appellants were found—a most remarkable record for any business of this size. Further, if Appellants had any way to strengthen their decisions of probable cause they certainly would have written such facts into the Kingsley decisions made after this litigation began and, in fact, as a result of this litigation. Instead of stronger decisions he signed decisions identical in every word with those of Crawford, Larrick and Dunbar.

Could Congress be said to have contemplated that Appellant Crawford could condemn the 58 page pamphlet without reading the first 36 pages (R. 334-335, 383-385). Could Congress be said to have contemplated that Larrick, Dun-

bar and Kingsley would condemn the pamphlet with the purchaser survey finding in their files that such action was 100% wrong and have considered that any of them could have had "probable cause" that the pamphlet was misleading in "a material respect" to the injury or damage of the purchaser or consumer?

We also have the fact that when Appellants questioned pages 37-58 of the 58 page pamphlet they were immediately deleted and Appellee requested an opportunity to comply with any other objections ~~and avoid multiple seizures~~ (R. 59-65). Can Congress be said to have contemplated that Appellants would arrogantly refuse to tell Appellee what they thought was wrong with the remainder of the pamphlet and then two months later authorize further seizures by condemning these first 36 pages?

(c) J. D. Kingsley's Determinations of Probable Cause Are Void on Their Face

Section 304(a) of the Federal Food, Drug and Cosmetic Act allows multiple seizures of a product,

> ". . . when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency, that the misbranded article is . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

And as a result of Judge Pine's ruling that it is the Administrator who must make these determinations of "probable cause," J. D. Kingsley made three on January 28, 1949 (Dfs. Ex. 23, R. 1532-1541, 518). Each determination made by Kingsley (and those of Appellants Crawford, Larrick and Dunbar), was exactly the same and read in part,

> ". . . I conclude on the basis of the facts reported above by Dr. Robert C. Butz, an employee of the Food and Drug Administration . . . that there is probable cause for me to believe and I do believe, that the label-

ing would be and is in a material respect misleading to the injury or damage of the purchaser or consumer" (R. 1534, 1535, 1541).

The sole facts relied upon were the three so-called findings of fact allegedly made by Butz (R. 505). All three of these findings begin by stating, "It is the consensus of informed medical opinion that a product consisting of" (R. 1533, 1534, 1540) then follows a listing of various vitamins and minerals "would not be effective in the treatment of"; the first so-called finding names certain symptoms, conditions and diseases (R. 1533-1534); the second refers to "conditions mentioned directly or by implication in the statements quoted in Exhibit 'A' attached" (R. 1535). (Exhibit "A" contains excerpts allegedly picked from some unknown version of Appellee's pamphlet, R. 1535-1540); and the third refers only to "most common diseases" (R. 1541). These so-called facts were not connected or identified in any way with Appellee's pamphlet, nor were they associated in any manner with injury or damage to purchasers and consumers, yet from them *alone* J. D. Kingsley and Crawford, Dunbar and Larrick concluded they had "probable cause."

Since these determinations are a condition precedent to the institution of the "harsh" remedy of multiple seizures, they should state definitely and specifically adequate facts showing the basis of the determinations of "probable cause." These determinations on their face are indefinite and uncertain and are not related in any way to the pamphlets. They do not show clearly that either Butz or Kingsley read the pamphlets and, most important, there is no connection of any sort between the alleged finding of fact and the conclusion that the "labeling *would be and is in a material respect* misleading *to the injury or damage* of the purchaser or consumer."

Kingsley's three determination gave authority to go forward with new seizures and mimeographed papers were

prepared to enable seizures to be made quickly (Finding 32(c), R. 767). Also Appellants may contend these decisions put life into eleven seizures which have caused Appellee irreparable injury, and yet as the Court said in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 302.

> "From the standpoint of due process—the protection of the individual against arbitrary action—*a deeper vice is this, that even now we do not know the particular or evidential facts of which the commission took . . . notice and on which it rested its conclusion. Not only are these facts unknown; there is no way to find them out.*" (Italics supplied.)

The same analysis applies to the determinations of Kingsley, Crawford, Larrick and Dunbar. On their face the decisions do not comply with Section 304(a) and are void.

(d) The Determinations Are Not Conclusive Evidence of Probable Cause

Appellants contend (46 *et seq.*) that the six determinations are conclusive evidence that the decision makers had "probable cause." They compare the determinations with an indictment returned by a grand jury and cite *Ex Parte United States*, 287 U. S. 241, as their authority. It is respectfully submitted that Appellants are in error. First of all there can be no comparison of action by a grand jury composed of from sixteen to twenty-three impartial private individuals with action by the Administrator of the Federal Security Agency acting to uphold previous action of his biased subordinates as shown in the Findings of Fact herein.[80a] A grand jury is not required to act on "facts found"

[80a] Appellants in fact destroy their own analogy by recognizing at p. 50 ". . . the grand jury proceeding is a guarantee against arbitrary action. . . ."

and the whole purpose and nature of grand jury action and action pursuant to this statute are very different. A grand jury authorizes only one action on the same facts and law, not a seizure in 5,000 different places and one indicted is entitled to a speedy trial. The statute here involved provides for a hearing (Section 305) before criminal proceedings are started. And finally, even an indictment is not in every instance considered conclusive evidence of probable cause. In *Ex Parte United States, supra,* the Court held that an indictment was conclusive as to the existence of probable cause *only* to the court to which it is returned, while Kingsley's determinations were not returnable to any court and could only have been questioned in the court below. Moreover, in cases involving the problem of removing a person from one jurisdiction to another in which he had been indicted, this Court has held that an indictment is not conclusive evidence of "probable cause," but only *prima facie* evidence which may be rebutted.[80b] As this Court said in *Price* v. *Henkel,* 216 U. S. 488, at page 491:

> "That at least a *prima facie* case for removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district when put in evidence in a removal proceeding. *Bryant* v. *U. S.,* 167 U. S. 104; *Green* v. *Henkel,* 183 U. S. 249; *Hyde* v. *Shine,* 199 U. S. 62; *Beavers* v. *Henkel,* 194 U. S. 73. *But the evidence of probable cause afforded by the indictment is not conclusive.*" (Italics supplied.)

[80b] Rule 40 of the Federal Rules of Criminal Procedure does make an indictment conclusive evidence of probable cause in removal proceedings. The Advisory Committee in their notes to Rule 40 specifically recognizes that the rule is a modification of the previous procedure which developed as a result of the above decisions.

See also *Kassin* v. *Mulligan*, 295 U. S. 396, 401; *Haas* v. *Henkel*, 216 U. S. 462, 481. And in *Tinsley* v. *Treat*, 205 U. S. 20, 32, where the defendant offered evidence to rebut the indictment and the court refused to admit it, the Court said:

> ". . . the judge applied to to remove him from his domicil to a district in another state must find that there is probable cause for believing him to have committed the offense . . .
>
> "Appellant was entitled to the judgment of the district judge as to the existence of probable cause on the evidence that might have been adduced . . ."

Therefore, it cannot be argued that a determination of probable cause, having none of the safeguards of an indictment, such as not being under oath or being the determination by impartial individuals, which is not always considered conclusive evidence of probable cause, can properly be considered as conclusive evidence that J. D. Kingsley had "probable cause." *Ex parte* determinations in other instances are not conclusive (cf. *Lindsey* v. *Hawes*, 2 Black 554) and *ex parte* determinations under the facts herein certainly should not be.

(c) Kingsley Did Not Have Probable Cause Under the "Reasonable Man" Test

The term "probable cause" has been defined and expounded upon in many decisions of this Court involving different fields of law. However, these decisions have not treated the term differently in any particular field but rather have constantly relied on decisions in fields foreign to the one before the Court for their definitions. All of the decisions appear to establish that probable cause is no more or no less than "reasonable cause" and it exists where the facts and circumstances warrant a man of prudence and caution in believing that the particular offense or act has been committed.

One of the most recent definitions of probable cause is

found in the case of *Brinegar* v. *United States*, 338 U. S. 160, a case involving a search without a warrant. The Court there said (p. 175):

> "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act . . .
>
> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt' . . . And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *U. S.*, 7 Cranch, 339, 348. (A case dealing with seizures under the Collection Law.) Since Marshall's time . . . it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that' an offence has been or is being committed. *Carroll* v. *U. S.*, 267 U. S. 132, 162.) (A case involving search and seizure without a warrant.)[81]

As stated above, probable cause only exists where the facts and circumstances warrant a *reasonable and cautious man* in believing that the offense has been committed. This Court has stressed that good faith alone is not enough to constitute probable cause. In *Director General*

[81] To the same effect are cases involving: search warrants, *Nathanson* v. *United States*, 290 U. S. 41, 47; *Grau* v. *United States*, 287 U. S. 124, 128; *Dumbra* v. *United States*, 268 U. S. 435, 441; *Steele* v. *United States*, 267 U. S. 498, 504; false imprisonment, *Director General of Railroads* v. *Kastenbaum*, 263 U. S. 25, 27, 28; malicious prosecution, *Wheeler* v. *Nesbit*, 65 U. S. 544; malicious institution of proceedings, *Stewart* v. *Sonneborn*, 98 U. S. 187; and seizures, *Locke* v. *United States*, 7 Cranch 339, 348; *The Thompson* v. *United States*, 3 Wallace 155; *Wood* v. *United States*, 16 Pet. 342; *Stacey* v. *Emery*, 97 U. S. 642, 645.

of Railroads v. *Kastenbaum, supra,* the respondent brought an action for false imprisonment against the Director General, an official of the United States government. Certain quantities of butter, stolen from a railroad freight car, were found in a wagon which had collided with a trolley car, the drivers of the wagon escaping at the time of the collision. Railroad detectives, agents of the Director General, thought they had traced ownership of the horse which had been pulling the wagon to the respondent and he was immediately arrested. Respondent was finally released after "his horse proved to be one of another color." The trial court's judgment of $500.00 was affirmed by the Court which said at pages 27-28:

> "*The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of the defendant's knowledge,* not by his intent. It means that the absence of probable cause was known to the defendant when he instituted suit. But the standard applied to the defendant's consciousness is external to it. *The question is not whether he thought the facts constitute probable cause, but whether the court thinks they did.* Holmes on Common Law, 140. Probable cause is a mixed question of law and fact . . . Counsel for petitioners contend that, in an action against the sovereign government, it must be conclusively presumed that good faith existed on its part so far as it is responsible for the arrest, and therefore that a complete defense of probable cause on its part is always made out. *But as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the Director General's agent which in the judgment of the court would make his faith reasonable.*" (Italics supplied.)

Therefore, here it is of no importance if Kingsley and the others in good faith thought Appellee's pamphlet misleading. The question is rather whether the Court believes that he acted as a reasonable and prudent man and ground-

ed his determinations on facts and circumstances on which he had "reasonably trustworthy information" and the validity of his determination of probable cause must be measured by the state of his "knowledge, not his intent."

The facts before Kingsley which were not disclosed in his determinations were clearly brought out when his deposition was taken. Kingsley knew that he made three separate determinations because there were three pamphlets involved (R. 513), yet he admitted that he had only read one of the versions and he didn't know which one that was (R. 504-505).[82] Furthermore, even though he had concluded in each of his determinations that Appellee's labeling "would be and is in a material respect misleading to the injury or damage of the purchaser or consumer," when asked whether he had been presented with any facts showing that any purchaser or consumer had been injured or damaged or whether any purchaser or consumer had complained of injury from Appellee's product or its labeling he admitted he had not (R. 269, 507). Certainly the above shows that when the state of Kingsley's knowledge is measured, he had no facts or circumstances warranting a prudent and cautious man to believe that the labeling was misleading to the injury or damage of anyone.

Moreover, Appellee had twice requested an opportunity to present the true facts to Kingsley and each was refused (R. 732, 752). Certainly this, with the absence of any facts showing injury or damage and the failure to have any evidence of complaints was evidence which should have been considered by Kingsley as being in Appellee's favor. The only possible conclusion is that all of this was ignored and this Court has held that a failure to consider evidence in favor of the accused is a denial of due process. *Kwock Jan Fat* v. *White, supra; Lloyd Sabaudo Societa Anonima* v.

[82] Kingsley testified "I am uncertain as to what version I read . . . Whether it was this version or some other version I am not entirely certain." (R. 505. See also R. 513.)

Elting, supra; Kaskin v. *Mulligan, supra; Tinsley* v. *Treat, supra.*

Also Kingsley either ignored the favorable evidence to Appellee disclosed in the investigation conducted of purchasers at Appellants' request (Pl. Ex. 4, R. 929-937, 38-39) or made no attempt to determine its existence. Besides being a denial of due process under the cases cited above, there is considerable authority in state decisions to the effect that want of probable cause may be shown *by the failure to make inquiry or to seek readily obtainable information which would have established the true facts. Baker* v. *Gawthorne,* 82 Cal. App. (2d) 496, 186 Pac. (2d) 981 (1947); *Lawrence et al.* v. *Leathers,* 31 Ind. App. 414, 68 N. E. 179 (1903); *Boyd* v. *Mendenhall,* 53 Minn. 274, 55 N. W. 45 (1893); and the *Kastenbaum* decision *supra,* applied the same reasoning in this Court.

Under the holding of the *Brinegar* case *supra,* probable cause only exists when the facts or circumstances are based on "reasonably trustworthy information." Here the sole information on which Kingsley based his determinations of probable cause was the so-called findings of fact attributed to a psychiatrist Dr. Butz. It is true that the act permits findings of fact to be made by an employee but it is submitted that there must be read into that provision a requirement that the employee be a qualified one. Here the findings were not under oath, Kingsley had never discussed them with Butz (R. 761) and it is respectfully submitted that the Trial Court properly found that Kingsley could not reasonably place any reliance on Butz (R. 762). He was not a biochemist or nutritionist (R. 1185), he did not check his findings by reading scientific literature in the field (R. 1177), he did not conduct any experiments with nor analyze the product (R. 1199), and when his deposition was taken he very definitely repudiated many of the statements in the findings attributed to him (R. 762). Informa-

tion from such a source when the very existence of a large business is at stake cannot by any reach of the imagination be termed "trustworthy."

The Court in the *Brinegar* case, *supra*, in discussing the reasoning behind these standards set down for determining the existence of probable cause said:

> *"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.* They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. *But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability.* The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating those often opposing interests. Requiring more would unduly hamper law enforcement. *To allow less would be to leave the law-abiding citizen at the mercy of the officer's whim or caprice."* (Italics supplied.)

To say that J. D. Kingsley and Appellants Crawford, Larrick and Dunbar had probable cause under the facts of this case clearly "would be to leave the law-abiding citizen at the mercy of the officer's whim or caprice."

(f) Appellants Authorized Use of Multiple Seizures and Embargoes as a Punishment Rather Than a Public Protection in Violation of Statute and Due Process Clause

The multiple seizure provisions of Section 304(a) are clearly designed as a protection of the public by providing for the taking of adulterated or misbranded products off the market entirely. The power conferred is tremendous

in its consequence and the legislative history of the Act[83] indicated that Congress was fully aware of this fact so it circumscribed the use of the power most carefully.[84] Appellants have, in violation of the statute and the due process clause, used multiple seizures and embargoes herein to inflict punishment upon Appellee rather than as a public protection.

This Court has said of the Food, Drug and Cosmetic Act that ". . . . the Act as a whole was designed primarily to protect consumers from dangerous products." *United States* v. *Sullivan*, 332 U. S. 689, 696 citing *United States* v. *Dotterweich*, 320 U. S. 277, 282. It is in the light of this objective that the powers conferred by the words here involved on multiple seizures based on misleading labeling must be construed. *Ex parte Endo*, 323 U. S. 283, 300; *United States* v. *Lovett*, 328 U. S. 303, 307.

As already stated, the public protection provided by multiple seizures is found in taking the product entirely off the market. Here this was not Appellants' purpose. Their purpose was admittedly to use multiple seizures "to keep a sustained pressure against" Appellee (Pl. Ex. 16, R. 1030a, 67).

Looking at these multiple seizure provisions and the actions of Appellants herein it is seen that Appellants have really made no effort (other than the last-minute filing of an injunction action in Los Angeles one year after the first libel seizure was filed[84a]) to take or keep Appellee's product off the market. Appellants admit that the product is harmless and that it contains vitamins and minerals which are

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[83] See Cavers, The Food, Drug and Cosmetic Act of 1938 Its Legislative History and its Substantive Provisions (1939) 6 Law. & Contemp. Prob. 2, 13.

[84] See Senator Bailey, 79 Cong. Rec. 5217, ". . . once there has been a multiple seizure throughout America, all the Court trials in the world would not remedy the wrong. The man would be disgraced; his wares would be discredited."

[84a] See note 35 *supra* 17 and note 85a *infra* page 84.

beneficial as a supplement to the diet of human beings (R. 330, 373-374, 749, 757, 759, 1214-1215). Appellants knowing their own files refute the charges they make in the libel cases (R. 39-47), concocted a scheme of seizing this product in a far-flung geographical pattern to "punish" Appellee as much as possible before the certain rejection of their charges in Court. Such a deliberately designed pattern will inflict the maximum punishment upon Appellee—a punishment which Appellants know is and will be irreparable and irremediable—while at the same time affording no protection whatever to the public. This lack of public protection it is earnestly contended by Appellee, is by inference an admission that the purpose of the Appellants in making the seizures is "punishment" rather than protection. The Trial Court so found.[85]

As Appellants well know, when a seizure is made of a particular shipment of a product that does not prevent a distributor from selling other shipments of the product which he has on hand. When a seizure is made in Belleville, New Jersey, the distributor can sell other shipments of the product he has on hand to any purchaser who will buy and who has not been intimidated by the stigma of the Government seizure action or scared by the publicity released by Appellants which accompanied these seizures (Fdg. 39, R. 769).

If the first ten seizure actions are consolidated and the Appellants carry out their threats to institute additional seizures, Appellee would soon have a large number of "consolidated" cases all over the United States combining two or more of said seizure actions, and there is no provision in the statute for consolidating the consolidated actions. Also, Appellants have tried every possible delaying technicality so far herein so they would be sure to raise this point. The Appellants defeat their own contentions when they say that

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[85] Finding 22, R. 763-764.

the pending libels can be consolidated into one action, for it is obvious that *if they are to be in one action eventually, no reason on earth exists for the institution of ten libels other than "punishment" of Appellee* for failing to guess what Appellants want them to say in its advertising.

The punishment idea is certainly carried forward by the deliberate action of Appellants in seizing Appellee's product in far away places rather than Appellee's home district where its business, witnesses, etc., are located, and where it can best defend itself. Appellants have carefully calculated their actions so that the closest places Appellee can get a trial of a consolidated libel action are either the Federal District Court for the Northern District of California in San Francisco or the Federal District Court in Phoenix, Arizona, (R. 293, 1051-1052), both of which are hundreds of miles from Appellee's place of business. When the Motion to Consolidate and Remove to Los Angeles was argued and opposed by Appellants and Judge Fake said, what Appellants have done here is ". . . the equivalent of what our ancestors fought against when they complained about trials beyond the seas . . ." (R. 1051), Appellants "guessed" that Judge Fake would move the consolidated trial to Los Angeles, so rushed in three days later and filed an injunction action in Los Angeles.[85a]

Multiple seizures are not just an ordinary lawsuit and Appellants know this better than anyone else. They know that more than the mere filing of lawsuits is involved here. The ruinous consequences of multiple seizures seldom if ever flow from an ordinary lawsuit. Comparison with

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[85a] Just as the Court was about to hand down a decision on Appellee's motion to consolidate the Government Attorney forestalled a decision by requesting time to file a brief. When the Court inquired how much time was necessary Government Counsel answered: "' . . . there isn't any rush about this thing, as far as I can see" (R. 1052). See also R. 265-268 on delay in Criminal Case.

other lawsuits is therefore not an apt parallel. Appellants know that there is nothing more damning in the Food Supplement field than the widespread release of information that the Government is "after" or out to "get" Nutrilite. They know that competitors and others repeat the damning bad news over and over. The things said by Appellants and the smearing publicity Appellants have released are grist for this defamation mill.

Because of their years of experience Appellants knew that the effect of this publicity on the multiple seizures in strategically located parts of the United States would be that a tremendous blow will be struck thereby to the business of Appellee—a blow since it is of intangible injury to good will and reputation, which would be an injury from which it is difficult if not impossible to recover.[86] Publicity showing that Appellee has disproved all the unfounded claims of Appellants will never get the coverage which Appellants secured for their charges. Newspapers usually give prominence only to "attacks" and "bad" news. The charges can be cleared but the stigma of being the subject of drastic governmental action lingers on and on. Appellants have as to Appellee "stigmatized their reputation (and that of their product) and seriously impaired their chance to earn a living" by action which *they say* can "never be challenged in any court." It is believed "Our Constitution did not contemplate such a result." *United States* v. *Lovett,* 328 U. S. 303, 314.

Appellants in their famous "pressure" memorandum (R. 67-68) clearly indicated that their purpose was punishment rather than public protection. Protection of the public is not even mentioned when outlining their "pressure" scheme. Evidently the Appellants had some doubts about

[86] Publicity is recognized as a device whereby governmental punishment is and can be inflicted. Landis, *Administrative Process* (1938) pages 90, 108-110; Davis, *The Administrative Power of Investigation* (1947), 56 Yale L. J. 1111 at 1136.

getting by with their penalty pressure scheme, as they say in their "pressure" memorandum that they are going to make all the seizures they can up *"until an injunction is granted or the criminal case goes to trial"* (R. 67-68). They must have anticipated that an injunction would be granted in this case and that they would speedily lose in the criminal case, but they wanted to hurt Appellee as much as they could before that time. Appellants' whole far-flung geographic pattern of seizures reveals a deliberate plan to harass, oppress and ruin Appellee's business rather than determine the character of Appellee's labeling. The embargoes (R. 730, 751, par. 13) which Appellants persuaded state and local officials to place on Appellee's product were obtained by "untrue information" (R. 533, Item 11). The Appellants confirmed this by offering this evidence of untruth as a part of their own case (R. 531). Trial of a libel case is not even mentioned as a possibility in their "pressure memorandum." Clearly they wanted no trial to take place.

The Court found that:

> "The defendants have caused embargoes to be instituted and placed on Nutrilite prior to the institution of libel for condemnation proceedings in New York, New Jersey, Washington State, Florida, and various localities in the United States by requests to State and local health authorities, which embargoes naturally frightened agents, distributors and customers of Nutrilite and had very much the same damaging and injurious effect as the seizures. These embargoes obtained in widely scattered jurisdictions of the United States caused maximum and irreparable injury to plaintiff" (R. 769).

In the recent case of *Reilly* v. *Pinkus*, 338 U. S. 269, this Court had occasion to refer to the dissenting opinion by Justices Brandeis and Holmes in the case of *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 417 *et seq.* The language of that dissent is most appropriate to the

facts in the instant case, as that dissenting opinion was based on the reasoning that the order cancelling second class mail privileges of a newspaper for violating the Espionage Act was under the facts of that case, really a "punishment" rather than a preventive measure to protect the public. Mr. Justice Brandeis there stated at page 433:

> "The order . . . was clearly punitive, not a preventive measure; as all classes of mail except the second were, as the Postmaster General states, left open to it provided it had sufficient financial resources . . . The actual and intended effect of the order was merely to impose a very heavy fine, possibly $150 per day . . . But the trial and punishment of crimes is a function which the Constitution, Article 3, § 2, cl. 3, intrusts to the judiciary. *I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime.* Possibly the court would hold that Congress could not, in view of Article 3 of the Constitution, confer upon the Postmaster General, *as a mere incident in the administration of his Department*, authority to issue an order which could operate only as a punishment. . . .
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> ". . . What is in effect a very heavy fine has been imposed by the Postmaster General . . . It may be that the Court would hold, in view of Article 6 in our Bill of Rights, that Congress is without power to confer upon the Postmaster General . . . authority to inflict indirectly such a substantial punishment . . .
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> "The punishment inflicted is not only unusual in character, it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount . . . But here a fine imposed for a past offense is made to grow indefinitely each day."

And at page 436:

> ". . . If, under the Constitution, administrative officers may, as a mere incident of the peacetime administration of their departments, be vested with the power

to issue such orders as this, there is little of substance in our Bill of Rights, and in every extension of governmental functions lurks a new danger to civil liberty." (Italics supplied.)

There is no doubt but that the Appellants have inflicted cruel and unusual punishment on Appellee without any semblance of a trial. The fact that this punishment is accomplished by seizing property rather than deprivation of personal liberty "makes it no less galling or effective than if it had been done by an Act (action) which designated the conduct as criminal." *United States* v. *Lovett*, 328 U. S. 303, 316. From January, 1949 on, Appellee has repeatedly called Appellants' attention to the fact that the best way a speedy trial could be had was for Appellants to file an injunction case in Los Angeles.[87] It was not until September, 1949, that the Appellants actually got around to filing such an injunction.[88] This clearly proves they did not want an early and speedy trial but wanted to unmercifully punish Appellee as long as possible.

The tremendous crushing effect of the multiple seizures imposing the sales loss of $100,000 per month, the demoralization of Appellee's sales organization and all the other effects listed in the Findings of Fact[89] certainly indicate beyond question that Mr. Justice Brandeis' words apply equally to the instant case.

In many cases this Court has invalidated state statutes imposing excessive penalities from which there was no adequate judicial protection and those cases contain rules of fundamental fairness flowing from the due process clause of the Fourteenth Amendment which Appellee believes are applicable in the instant case. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 347.

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[87] R. 608, 628-629. See also Appellants' brief page 7, note 3.

[88] Finding 37, R. 768.

[89] Finding 39, R. 769.

In our case the tremendous penalties inflicted by Appellants prior to any possible decision on the merits of Appellants' charges, in feigned enforcement of the Act for which no possible remedy exists, if a court of equity is helpless herein, clearly violate due process requirements. Appellants say Appelle has no statutory remedy at all against arbitrary, capricious and oppressive abuse of power by Appellants prior to a final decision in a libel case (if the statute here in question authorizes Appellants to do what they have done and is constitutional). See *infra* pages 151-165.

Further, the libel court may have the matter under consideration for a considerable period of time and then the Government may appeal the adverse judgment and all the time during which the appeal is pending, or at any other time, the libel court cannot grant an injunction stopping the Government from making further seizures. Since the statute does not provide, according to Appellants, any instance in which an injunction can be granted against them to prevent their abuse of power. Even if they lose a libel case they still can make seizures according to what Appellants say for they are always unstoppable regardless of what they do up until the libel courts act on these further seizures. As the libel courts would obviously dismiss these seizures as *res adjudicata* should not a court of equity have power to stop 5,000 seizures under such an obvious abuse of power? It is to be noted that Section 304(a) allows the Appellants to make unlimited seizures in cases where they win a judgment that a product is misbranded, but an alternative provision prohibiting Appellants from making multiple seizures in cases where the Appellants lose *is not contained in the statute,* so if resort to the equity courts is barred to prevent abuse even in such cases an appalling situation exists. Surely Appellants' contentions are unsound in view of the damage Appellants can do before a plea of *res adjudicata* can be heard!

Here the Appellants have "thrown the book" by bringing the *four* possible actions authorized by the statute, i.e., (1) criminal indictment, (2) a libel action, (3) multiple libel seizures, and (4) an injunction action. The multiple seizures which are the basis of the instant complaint were based on claims the basis of which had not then been authoritatively determined (although most definitely determined against Appellants by the Trial Court herein). Because of the multiple seizures Appellee is subject to the imposition of terrific penalties which are of such a character that money damages cannot possibly compensate for them, and even those damages which are allowable cannot be recovered.

In *Lipke* v. *Lederer*, 259 U. S. 557, a provision of the National Prohibition Act allowing a Collector of Internal Revenue to collect a liquor tax without hearing was held unconstitutional on the ground that it was not really a tax but a penalty. The Court said in part at page 562:

> ". . . We cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. . . ."

In the instant case that is exactly what has happened as enormous penalties have been imposed by secret findings and summary action of executive officers. *Cf. United States* v. *Constantine*, 296 U. S. 287.

It cannot be successfully argued that Congress intended the punishment result here achieved by Appellants because W. G. Campbell, then Chief of the Food and Drug Administration, in testifying at the hearings on S. 5, 74th Congress, on multiple seizures, said that his agency did not object to adequate legislative guarantees so that "undue penalties will not be visited through imprudent, intemperate, and extreme administrative methods of law enforce-

ment." Dunn, FEDERAL FOOD, DRUG AND COSMETIC ACT (1938), 1263.

The Court herein found (Finding 22, R. 736-764) that:

> "There are no separate issues of fact or law necessitating more than one such action. . . . These libel seizure actions having been instituted in widely separated jurisdictions in the United States inflicted *unnecessary punishment* . . . on the plaintiff." (Italics supplied.)

This Court said, *in Re Oliver, supra* at 278:

> "It is the 'law of the land' that no man's life, liberty or property be forfeited as a *punishment until* there has been a charge fairly made and fairly tried in a public tribunal." (Italics supplied.)

Yet secrecy is the earmark of Appellants' decisions herein.

It is significant to note that in *National Remedy Co.* v. *Hyde,* 50 Fed. (2d) 1066, (CCA, D. C., 1931) an action was brought to enjoin multiple seizures under circumstances almost identical with those presented here. The seizures were instituted under the Food and Drug Act of 1906 which was administered by the Department of Agriculture. The Court of Appeals, in reversing the action of the District Court in dismissing Appellants' complaint for injunctive relief, stated in part as follows at page 1068:

> "In *Ex parte Young,* 209 U. S. 123, it was held that, while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, when such validity can only be determined by judicial determination and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law. In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect deprive

> appellant of its property through the destruction of its business before the issues involved could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due process of law."

The awful and devastating consequence of these 11 seizures are shown by the record.[90] If Appellants had been allowed to use uncontrollable power to make 100 or more seizures, and they could have made 5,000, the consequences are a certain death of Appellee's business. The Court found (Finding 41, R. 769-770):

> That plaintiff would have been subjected to many additional seizures of its product throughout the United States in addition to the existing 11 seizures of its product, if not enjoined from so doing, is admitted by defendants. It was a general policy and plan of the defendants to make with all possible speed many seizures of plaintiff's product. Such additional seizures, and the product could be seized by defendants in the hands of more than 5,000 of plaintiff's distributors, would have the effect of destroying plaintiff's business prior to any possible adjudication of the disputed issues on plaintiff's labeling in any of the libel actions already filed or threatened."

Surely the irreparable injury inflicted herein is a punishment and most assuredly it has been inflicted in a fashion premeditatedly designed to make it a lasting non-eradicatable punishment. Never will the weapon of publicity to ruin a reputation be used with greater definiteness of purpose. A procedure which is so unfair for inflicting a penalty is not rendered fair by using it under the label of "public protection" in an attempt to expand Appellants' powers. *Cf. Gegiow* v. *Uhl*, 239 U. S. 3, 10; *Waite* v. *Macy*, 246 U. S.

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[90] Finding 39, R. 769.

606, 608. Power is certainly used for abusive purposes when the shock of its impact is so shatteringly unreasonable.

Surely the use of multiple seizures here as a punishment as inflicted by Appellants under the facts in this case was not really authorized by the Congress in Section 304(a) of the Food, Drug and Cosmetic Act and if authorized by that provision Appellee respectfully submits that it violates the due process of law guaranteed to it by the Fifth Amendment. See *infra* pages 151-165.

(g) Conclusions on Statutory Violation

Considering all of the facts and absence of facts herein reviewed, Appellee earnestly urges that what Appellants have done cannot reasonably be said to be a compliance with that part of Section 304(a) here involved. In all the annals of administrative agencies it is not believed that there is a record revealing so flagrantly, so many violations of fundamental fairness as that revealed by the Record and Findings of Fact in this case.

It is developed in other parts of this brief that Appellee is entitled under the due process clause to be treated fairly and that statutes should be read so as to require this treatment if it is at all possible to do so. A purpose of allowing uncontrollable action under a provision as bitterly fought in the Congress as multiple seizures should not lightly be attributed to the Congress.[91] The language used as well as its legislative history indicates that under the facts herein the Appellants have violated the statutory mandate.

12. Libel and Law Courts Offer No Remedy Against Appellants' Arbitrary, Capricious and Oppressive Action

Appellants argue (pp. 65-74) that Appellee has an adequate remedy at law so the District Court lacked jurisdiction. The remedy said to be adequate is that offered by the

[91] See *Cavers, Supra*, note 83.

libel courts. This section of Appellee's brief shows that such courts offer no adequate remedy for the irreparable injury herein complained of.

(a). Libel Courts Provide no Stay of Further Seizures Pendente Lite

Appellants say that Appellee has a remedy against multiple *trials* of the multiple *seizures* in the right given to consolidate the libels into one case for trial. This is an inadequate remedy and, in fact, no remedy at all for it is the *seizures* which are irreparably injuring Appellee here. Neither a libel court nor a court in which the libels are consolidated has any power to stay further seizures until there has been a trial of a consolidated or a libel action involving instances like this case where the same issues of law and fact are involved in multiple seizure actions. Also, while the pending cases are being consolidated Appellants could ruin Appellee beyond any possible recoupment by a victory in the libel case by making the possible 5,000 seizures (Finding 41, R. 769-770) in a week through use of their mimeographed papers and telegram plan (R. 67).

Appellants have made 11 seizures and admittedly had their seizure papers all "mimeographed" up and telegrams were to be used so they could "speedily" make more seizures as a part of the "pressure" campaign outlined in Appellants' "pressure memorandum."[92] Appellee has more than 5,000 distributors[93] from whom seizures could be made, the names and addresses of each is presumably in Appellants' possession (R. 533-534, 767) and it is conceivable that the seizures would have numbered in the hundreds and Appellee's business would have practically been brought to a standstill within a few days if the injunction had not been granted herein to stop seizures on the basis of the Kingsley

[92] Finding 32, R. 766, R. 67.

[93] Finding 3, R. 757.

decisions. (Finding 41, R. 769-770). The "Pressure Memorandum" does not say seizures are to stop if a consolidation of any of the libels for trial is effected.

Appellants can go back to the same distributor and make a seizure every time he receives a shipment and harass the distributor out of existence—they made two seizures in Belleville, New Jersey [94] and two in Chicago.[95] Appellee is really at the mercy of uncontrollable destruction by Appellants if a court of equity is powerless to aid it.

Appellants when contacted by Appellee in November, 1948 after 3 seizures had been made, did not indicate they would stop seizures if these 3 were consolidated into one (R. 311, 327, 764), and have made no promise to stop further seizures if the 11 are so consolidated. In fact they have indicated just the opposite.[96] This means the next 11 or 100 cases would be consolidated into another trial and then the next seizures so consolidated and so on and on as more cases are filed. There is no special power given by the statute to any court to consolidate into one trial the consolidated trials and from the obstructive, delaying and technical tactics adopted by Appellants so far on the attempt to consolidate the first 11 seizures, it is obvious they would oppose consolidation of the consolidated trials on that ground.[96a]

There is no way *under the Act* to stop Appellants from further seizures until one of the consolidated trials has

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[94] Findings 16 and 31, R. 761, 766.

[95] Finding 31, R. 766.

[96] Finding 32, R. 766. See also R. 412.

[96a] Appellants, in footnote 40, p. 66 of their brief contend a libel case cannot be removed to Appellee's home district where Appellants on September 22, 1949 filed an injunction suit involving identical issues (R. 768). Appellants do not mention removal provisions of the new Judicial Code, 28 USC § 1404 as interpreted in *United States* v. *National City Lines*, 337 U. S. 78; *Ex Parte Collett*, 337 U. S. 55 and *Kilpatrick* v. *Texas and Pacific R. Co.*, 337 U. S. 75. See note 35 *supra* page 17.

been concluded. The statement by Appellants (pp. 66-67) that if Appellee had moved to consolidate in the Fall of 1948 a trial could have been had in a libel court by now ignores Appellants' delaying, obstructive, punitive and other tactics outlined herein which have delayed a decision for a year on the first motion to consolidate. (Finding 37, R. 768.) It cannot, therefore, be said that the power to consolidate the libels under the facts in this case is an adequate remedy so as to defeat an action for an injunction.

This Court has held that where particular administrative orders or action could not be suspended *pendente lite* under applicable statutes to prevent irreparable injury *pendente lite*, equitable relief was guaranteed by due process as the statutory remedy is inadequate. In *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, the Court held that a rate refund order violated due process since there was no intermediate suspension of the order pending judicial review. The Court said at page 303:[97]

> "A different question would be here if such a suit (i.e., independent suit for review) could be maintained with an intermediate suspension of the administrative ruling."

In *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, the Court reversed a three-judge court and upheld a temporary rate fixed by the Pennsylvania Public Utilities Commission but held that if a utility company was not protected against loss by the remedy afforded by a Pennsylvania statute until the merits of the rate increase were settled the remedy was clearly inadequate. There the question of inadequacy of the remedy provided by state law was carefully examined by the Court because the Johnson Act removing Federal jurisdiction where a "plain, speedy and efficient remedy may be had, in law or equity in the courts of such state"

[97] See *supra* pages 49, 74 for prior reference to this case.

was raised as bar to equitable jurisdiction. Of the Pennsylvania statute the Court said at page 110:

> ". . . The remedy at law by appeal is ineffective to protect the utility's position *pendente lite*. The supersedeas does not postpone the application of the temporary rates. The statutory court had jurisdiction of the Bill."

And in *Porter* v. *Investors Syndicate*, 286 U. S. 461, the Court said at pages 470-471:

> "Where ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, here is no deprivation of due process. . . . But where either the plain provisions of the statute . . . or the decisions of the courts in interpreting the Act . . . preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified."

It is believed that under the rule relied upon in the above decisions and in spite of distinctions which can be drawn, Appellee has a right to suspension of further seizures pending a decision in the libel courts where, as here, the merits of its labeling is raised under facts indicating no possible injury to any person except Appellee *pendente lite*. No such suspension can, however, come from a libel court. Nor can a libel court stop the use of multiple seizures for "punishment" only as Appellants are using them here. (See *supra* pages 81-93.)

(b) Libel Courts Cannot Consider Arbitrary, Capricious and Oppressive Conduct

The libel courts would not afford Appellee an adequate remedy because the *sole issue* in a libel case is whether Appellee's pamphlet is "misleading in any particular" (Sec-

tion 403(a), 502(a)). The Appellants would not and could not be parties to such suits and, therefore, the libel courts could not decide the issue of arbitrary, capricious and oppressive actions by Appellants or restrain their unlawful, arbitrary, capricious and oppressive conduct. If Appellee's only remedy is in the libel courts it will never get a trial on whether Appellants violated the statute or the constitution by the conduct complained of herein. The cases cited by Appellants (pp. 39-45, brief) involving administrative action and a later hearing, i.e., rent, price, tax assessment, etc., are cases where the later hearing involves the very administrative action taken. That is not true in the instant case as the later hearing in the libel court can never involve whether Appellants were arbitrary in their administrative action in authorizing multiple seizures. Appellants here really argue Appellee is never entitled to have any court inquire into whether they acted illegally in such authorizing decisions. That was not the decision of the Court in the cases they cite and it is most respectfully believed that such a construction clearly violates the due process clause.

It has been held that the legal remedy is never adequate unless it covers the entire case made by the bill seeking relief in equity. In *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 628, the Court said:

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity."

Again in *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, in a suit to enjoin collection of local and state taxes, it was contended that since the state statue provided that taxes wrongfully collected should be refunded, there was an adequate legal remedy, but the Court found that recent court decisions had modified this statute. The Court said at page 520:

"But were it otherwise, Section 12 clearly applies to state taxes alone, while the bills of complaint herein have to do with both state and local taxes. A remedy at law cannot be considered adequate so as to prevent equitable relief unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retain them as to the local taxes, *we should multiply suits, instead of preventing multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely, and not by halves,' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.*" (Italics supplied)

Appellee in its complaint sought to enjoin the unlawful, arbitrary, capricious and oppressive conduct of Appellants and also questioned the constitutionality of the statute under which they instituted the libels. It was only in the Court below that those questions could have been presented as it is the only court where personal jurisdiction can be acquired over Appellants. The libel courts can have no jurisdiction over the issues or defendants here before the Court. The cases cited *infra* pages 114-118, establish that there is no place in our government under our Constitution for the exercise of purely arbitrary action and that the Courts can enjoin such action where no other adequate remedy exists. Clearly the libel courts cannot offer a remedy against illegal actions of Appellants here as it has no jurisdiction over such an issue or over the Appellants.

(c) Libel Courts Cannot Give Relief for Damages Suffered

The libel courts do not afford Appellee an adequate remedy because they cannot protect against loss of the value of the seized articles (which will be unsalable when recovered, R. 769) nor can these courts give damages for

the intangible loss resulting from destruction visited upon Appellee's business (Finding 39, R. 769).

This Court has recognized inability to recover damages as a proper ground for the equitable relief of injunction. In *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, a gas company's application for higher rates was denied. On an appeal to the State Supreme Court a supersedeas *pendente lite* was denied. An action was then brought before a Federal three-judge court which dismissed the bill. This Court in holding that the three-judge court was in error, said at page 293:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they are now limited. They have done all they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereinafter shall change the rate, even nunc pro tunc, the *plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. . . .*" (Italics supplied)

Just as in the instant case there is no remedy in the libel courts for what Appellee may lose before or after it prevails in those courts.

It might be said that Appellee could recover in damages from Appellants for the value of the seized articles and for loss incurred by the destruction of its business and the injury to its reputation and good will. Appellants admit no such remedy exists (Compl. Para. 16, R. 731, R. 752) and it must be conceded that the decisions of the courts do not offer Appellee much hope of relief in this direction See *Wilkes* v. *Dinsman*, 7 How. 89, 130-131; *Spalding* v. *Vilas*, 161 U. S. 483, 498-499.

Thus recovery in any suit for damages against the Appellants personally would be at best doubtful. This doubt alone has been recognized by this Court as proper grounds

for the issuance of the equitable relief of an injunction. In *Dawson* v. *Kentucky Distillers and Warehouse Co.*, 255 U. S. 288, at page 295 the Court said:

> "It is well settled 'that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit.'"

And in *Davis* v. *Wakelee*, 156 U. S. 680, the Court said at page 688:

> "In the uncertainty which appears to exist .... we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit.... *Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.*" (Italics supplied)

Also, the injury to Appellee and to its distributors has been so great and will be so great if Appellants make further seizures, that it is doubtful that any or all of the defendants have sufficient funds to pay a judgment for the amount of such injury. Moreover, even assuming that Appellants would be held liable in an action for damages as far as damage to the seized articles is concerned, money damages recovered from Appellants would be an inadequate remedy. It is this intangible crushing effect on Appellee's good will and reputation which cannot be measured in dollars and cents against which relief is here requested. Even in a case where there could be recovery for the value of goods taken the Court has recognized that relief is inadequate as to the loss of business and good will where as in the instant case it is difficult to evaluate such losses in terms of money. *Watson* v. *Sutherland*, 5 Wall. 74, 80.

So if Appellee admittedly cannot recover even for loss of the seized goods which is just a small part of its total loss, the greater part being the "loss of trade destruction

of credit, and failure of business prospects," those "collateral or consequential damages . . . for which compensation cannot be awarded in a trial at law," (*Watson* v. *Sutherland, supra,* p. 80) it should be clear that it had no adequate remedy in the libel courts and the injunction was necessary and proper.

Congress knew very well what multiple seizures meant and certainly never intended their use as Appellants have used them in this case. For example, Senator Bailey during the debate on this provision said in part:

> "I am selling my goods in 48 states; he seizes them in 40 states, and, even though I go into court a thousand times and prove he is wrong, my business is gone, for a man cannot be universally disgraced by his Government and hope to recover in a lawsuit."

79 Cong. Rec. 4917.

(d) MULTIPLICITY OF ACTIONS NOT AVOIDED BY LIBEL COURTS

Appellants in their brief (pp. 67-71) discuss only multiplicity of trials—*not multiplicity of seizures.* And there is quite a difference. To hold that Appellee had an adequate remedy in the libel courts would necessarily mean the staying of the many actions involving the same issues of fact and law and prevention of further seizures while one action is tried. And as already stated herein the libel court cannot do this. In fact, if equitable relief is not granted to stay a multiplicity of further seizures there would have to be the trial of the consolidated libel actions, or the injunction action, a possible trial of the action against Appellants for personal liability and a trial to determine the constitutionality of that section of the Food and Drug Act under which Appellants acted.

While any or all of these actions are going on the libel courts cannot stop further seizures. Even after one of these cases has been decided *and the labeling issue has been decided in Appellee's favor,* the libel courts (and under Ap-

pellants' theory no other Court) cannot stop Appellants from seizing Appellee's product on the same labeling allegation. To be sure a plea of *res adjudicata* would probably get such actions dismissed but that could come under Appellants' theory, only *after* the seizures—possibly 5,000 of them in a week. See page 89 supra. Under Appellants' theory Appellee must look to the libel courts which could do nothing until after the seizures, so use of the seizures as a punishment device could not be stopped by a court of equity, no matter how unlawful, arbitrary, capricious and oppressive the seizures are, according to Appellants. The Act says Appellants can make all the seizures they want to when once the Government wins a case against such labeling but it does not say the Government must stop seizing when it loses on the issue of labeling.

In the case of *Smyth* v. *Ames*, 169 U. S. 466, where an injunction was granted against the enforcement of rates for transportation imposed by a Nebraska statute making carriers not only liable to individuals for matters prohibited by the statute but also liable for fines on each offense, the Court said at page 517:

> "The transactions along the lines of any one of these railroads out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayer of the bills, *would avoid a multiplicity of suits*, and give a remedy more certain and efficacious than could be given in the proceeding instituted against the company in a court of law, for a court of law could only deal with each separate transaction involving the rates to be charged for transportation." (Italics supplied)

So in this case the granting of the injunction certainly avoided a multiplicity of suits.

> "It is a familiar maxim that a court of equity ought to do justice completely, and not by halves, and to this end *having properly acquired jurisdiction of a cause*,

for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law." (Italics supplied)

Greene v. *Louisville and I. R. Co.*, 244 U. S. 499, 520. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (equity required return of excessive rents. "To be sure such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available," pp. 399).

In *Landis* v. *North American Co.*, 299 U. S. 248, it was held that a Federal Court has inherent power to stay proceedings in a case on its docket to await the outcome of a test case in another jurisdiction involving the same issues even though the parties are *not* the same. And in *Stark* v. *Wickard*, 321 U. S. 288, 310, this Court said: "If numerous parallel cases are filed, the Courts have ample authority to stay useless litigation until the determination of a test case."

In *Ex Parte Young*, 209 U. S. 123, 160, the Court said, "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally. . . ."

In *Lee* v. *Bickel*, 292 U. S. 415, 421, Mr. Justice *Cardozo* said the Court there had jurisdiction, "As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. *Wilson* v. *Illinois Southern R. Co.*, 263 U. S. 574; *Hill* v. *Wallace*, 259 U. S. 44, 62."

Since libel courts cannot stop a multiplicity of suits, the trial court acted properly herein. No claim is made as Appellants seem to assume (Brief, pp. 67-71) that jurisdiction of the Trial Court was based upon multipilicity *alone* so the the authorities cited by Appellants are inapplicable. The Appellants cite *National Remedy Co.* v. *Hyde*, *supra*, and knowing it is completely against them say the statute it applied was different from the present act. Un-

biased writers disagree entirely with Appellants on this point saying the 1938 Act in Section 304 "codifies"[98] into its written provisions the principles of that case.

Finally the oft repeated irrelevant claim in Appellants' brief that a multiplicity of seizure actions was a regular thing under the Food and Drug Act of 1906 (See Brief, pp. 35, 52) is not exactly accurate—at least not after the *National Remedy* case stopped arbitrary, capricious and oppressive use of multiple seizures.

13. The Decisions Authorizing Multiple Seizures are Reviewable Under the Administrative Procedure Act

All constitutional questions aside, the question is presented as to whether the determinations authorizing the institution of multiple seizures against Appellee's product are reviewable under Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 USC § 1001 et seq.). Appellee respectfully submits that they are under the facts of this case and that they are in fact the very type of administrative evils sought to be cured or minimized by the Act. Appellants argue the contrary in their Brief (pp. 60-61).

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[98] See Markel, *The Impact of the Federal Administrative Procedure Act on the Federal Food, Drug, and Cosmetic Act* in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES (New York University School of Law, 1947) at page 397:

> "The purpose of this provision (Section 304(a)) is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 act did not contain a comparable provision. However, in at least one instance (citing the National Remedy case, *supra)* the Court enjoined the institution of more than one seizure because it appeared to the Court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. *This section is virtually a codification of the principle of that case.*" (Italics supplied.)

Mr. Markel was formerly senior attorney for the Food and Drug Administration so he is highly qualified to make such a statement.

(a) Right of Review

Section 10(a) (5 USC 1009a) of the Administrative Procedure Act granting the right of review provides as follows:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Clearly Appellee has suffered "legal wrong" by the unauthorized and arbitrary action of Appellants in instituting carefully planned and located multiple seizures on a nationwide basis which threaten to destroy Appellee's entire business and good will. Conceding *arguendo*, that "legal wrong" might not exist if Appellants had *fairly* reached their determinations, such is not the case here, where Appellants' determinations were not fairly arrived at and where they were not supported by substantial evidence. It is the fact that Appellants' determinations were arbitrary and capricious which has made the damage to Appellee a "legal wrong" within the purview of Section 10(a) of the Act. Appellants themselves cannot be their own judge of the legality of their own action with no agency or court ever passing on the validity of their actions authorizing multiple seizures. The Administrative Procedure Act gives the courts jurisdiction to judge the legality of such action.[98a]

(b) The Decisions in Question Were Final As to Use of Multiple Seizures

Section 10(c) of the Administrative Procedure Act limits review to "final" administrative action. It provides in part:

> "Every agency action made reviewable by statute and every final agency action for which there is no

[98a] Cf. *United States* v. *Morton Salt Co.*, 70 Sup. Ct. 357, 364.

> other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action."

Appellants attempt to make much of the last quoted line (p. 49, brief), yet at the same time in reality nullifying their own argument by contending the "final" decisions authorizing use of multiple seizures are never reviewable by any court—and certainly the libel courts have no jurisdiction to review them. The first quoted sentence was obviously intended to negate any intention to make merely preliminary or provisional orders reviewable. As to both sentences, however, it cannot be said that the administrative determinations in the instant case were merely preliminary, procedural or intermediate. The character of the decisions must be determined by their effect and, needless to say, as far as the authority to carry out multiple seizures is concerned these determinations were and are "final." Without the decisions the multiple seizure weapon is not usable—Appellants cannot get into the libel courts more than once unless these administrative decisions are made. Counsel for Appellants said to the Trial Court:

> "Those (multiple seizure) suits could only be brought if this administrative determination were made. If the administrative determination were not made these suits could not be brought" (R. 8).

There is nothing preliminary about decisions which would permit Appellants to wipe out an entire business enterprise by the drastic device of multiple seizures. And "overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." *Powell* v. *United States*, 300 U. S. 276, 285. "In determining what is due process of law regard must be had to substance, not to

form." *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235. The same rule should apply to reviewability to prevent injustice under the broad provisions of this new remedial Act. The use of libel court process to effect seizures when no libel court can stop the seizures does not distinguish this case from executive seizures. Looking through fiction to fact these seizures are in substance executive seizures. The courts are not real actors in this picture until after the seizure takes place—their processes under this statute can be and are automatically misused by Appellants. Each of the six judges who has considered any phase of this litigation has indicated adverse reactions to Appellants actions. (See note 55 *supra* p. 40.)

Since the determinations are final in their serious and disastrous impact upon Appellee's valuable property rights, the only other qualification which might preclude judicial review under this Section of the Administrative Procedure Act would be the existence of another adequate remedy. As has been stressed elsewhere in this brief, Appellee is not afforded an adequate remedy in any other court for the trials of the seizure actions not only come too late, but do not and could not involve the question decided in the administrative determinations, nor can the libel courts stop multiple seizures. (See *supra* pp. 94-97.)

The finality of the determinations and the complete absence of any other adequate remedy clearly makes the determinations "reviewable acts" within the purview of Section 10(c) of the Administrative Procedure Act. Appellants' reliance upon *Chicago & Southern Air Lines* v. *Waterman,* 333 U. S. 103, is not believed to be sound as that case seems to have turned on the political, international relations character of the question there involved. The difference in factual foundation of *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, makes it likewise unreliable here.

(c) The Scope of Review

Subsection (e) of Section 10 provides, in part, that the reviewing court:

> "shall hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power privilege or immunity; (e) in excess of statutory jurisdiction, authority, or short of statutory right; (4) without observance of procedure required by law. . . ."

The action of the Court below clearly did not exceed these established bounds of judicial review for subsection (e) quoted in part above positively states that a reviewing court "shall hold unlawful . . . agency action, findings and conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" . . . . The present action certainly falls directly within the scope of review authorized by the language quoted.

(d) The Instant Case Does Not Fall Within the Exceptions to Review Under the Act

Section 10 of the Act excepts from judicial review under the Act any agency actions (1) where statutes preclude judicial review or (2) where the agency actions are by law committed to agency discretion.

In respect to the first exception, it is unusual for statutes to specifically preclude judicial review of administrative action. However, the courts have in some instances construed statutes by their silence as manifesting a legislative intent to withhold judicial review. And Appellants place great reliance on the decision of this Court in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 holding that although the statute there involved did not specifically preclude judicial review the intent of

Congress to preclude judicial review was manifested by the omission of such a provision. *Stark* v. *Wickard*, 321 U. S. 288, 309-310, and *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 184, state an opposite conclusion on distinguishable facts. In those cases the decisions up for review were made after notice and hearing so the facts there are unlike those in the instant case. The *Switchmen's Union* case does not hold that a decision *ex parte* without hearing is non-reviewable. *Cf. Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 306 U. S. 56, 60; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

In the legislative history section of this brief *infra* pages 139-143, Appellee quotes the Congressional report which scuttles Appellants' whole argument on "silence" on judicial review (pp. 58 et seq.) and refutes Appellants' section of its brief entitled "No Review of the Administrative Finding of Probable Cause Was Intended." Appellants did not quote the explanation given by the Committee and set forth *infra* pp. 141-142 for that report shows the Committee thought the courts were always open to stop illegal action and that was the reason for the "silence" in the Act on this subject.[98b] Quite a different picture from that painted in Appellants brief!

Can it justifiably be said that there should be read into Section 304(a) of the Food, Drug and Cosmetic Act a Congressional intent to withhold *under any circumstances* judicial review of determinations of probable cause? It is respectfully submitted that such an intent should not be read into the statute on the true legislative history. Aside from such history, the very nature of the determinations and the tremendous and serious impact of widespread multiple seizures as a result of such determinations would appear to demand that the existence of a nationwide business should not wholly depend on the whim and caprice of an

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[98b] *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, No. 391, April 10, 1950 on intentional absence of judicial jurisdiction to achieve uniformity is not in point under such a legislative history.

administrative officer. To state contrary to its own report that Congress intended to preclude judicial review despite the immediate and direct damaging consequences of the determinations, would be an injustice to the intelligence, candor, wisdom and responsibility of that legislative body.

The question remains, however, as to whether the determinations under Section 304(a) of the Food, Drug and Cosmetic Act are "agency action .... by law committed to agency discretion" within the intent and meaning of the exception to judicial review provided for in Section 10 of the Administrative Procedure Act. The exact scope and meaning of this exception would appear to be somewhat ambiguous but it is suggested that it merely restates a limitation which the judiciary itself had applied without the necessity of authorizing legislation. It is obvious, not only from the legislative history of the Administrative Procedure Act, but also from other provisions of the Act, that this withholding of judicial review does not apply in all cases where "agency action" is in the broad sense "discretionary." The following colloquy in the Senate when the Administrative Procedure Bill was under discussion by its Author, Senator McCarran, specifically discloses that not all exercises of "agency discretion" were to be excepted (92 Cong. Rec. 2153-2154):

> "Mr. Donnell: 'It has occurred to me that the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been an abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?'
>
> "Mr. McCarran: 'Mr. President, let me say, in answer to the able Senator, that the thought uppermost in

presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review. . . .

"Mr. Donnell: 'But the mere fact that a statute may vest discretion in an agency is not intended by this bill to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?'

"Mr. McCarran: '*It must not be an arbitrary discretion.* It must be a judicial discretion; it must be a discretion based on sound reasoning.' * * * (Italics supplied.)

"Mr. Austin: 'Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review.'

"Mr. McCarran: 'That is correct.'

"Mr. Austin: 'And is it not also true that because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned.'

"Mr. McCarran: 'That is true; the Senator is entirely correct in his statement.'"

To further rebut the contention that all exercises of agency discretion are excepted from the judicial review provided for in Section 10 of the Act, it should be noted that subsection (e) specifically provides that it shall be the duty of the reviewing court "to hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law." (Italics supplied.) It is submitted that the colloquy quoted *supra* and the foregoing provisions of subsection (e) preclude any contention that *all* exercises of agency discretion are beyond judicial review. Appellee's complaint charged and the Court below found, in effect, that the determinations of the Appellants were arbitrary abuses of the discretion vested in them. It is obvious that

the administrative "discretion" involved here is not "absolute" for otherwise Congress would not have required the determinations of probable cause to be based "upon facts found."

Even if the Administrator has discretion, incident to his power to protect the public, this does not mean that every sort of action the Administrator may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by *mere executive fiat*—the contrary is well established. *Sterling* v. *Constantin*, 287 U. S. 378, 400-401.

This Court in its recent decision in *Wong Yang Sung* v. *McGrath* (No. 154—October term 1949) has indicated that the Administrative Procedure Act is to be broadly construed so as to further the legislative intent to sufficiently safeguard private citizens and property from arbitrary and biased administrative action. The long history of the struggle to enact a statute was reviewed at length in the opinion of this Court. It is obvious that in many instances the apprehension of many regarding the "multiplication of federal administrative agencies and expansion of their functions to include adjudications which have a serious impact on private rights" were well-founded. This instant case is a graphic example of the unbridled exercise of administrative power put to arbitrary and biased use. It was stated by this Court in the *Wong Yang Sung* case, *supra:*

> "The Act represents a long period of study and strife; it settles long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. . . . Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

So in the instant case, it would certainly be a "disservice to our form of government and to the administrative process itself" if it should be held that the determinations involved are not subject to judicial review, for it is obvious that "the evils" the Act "was aimed at appear." Surely the consternation and embarrassment of Appellants should not be enough to preclude the Act's obvious applicability. The allowable limits of discretion are for the courts to decide and the law is well settled by the Administrative Procedure Act and by the decisions of this Honorable Court that one who has a discretion cannot exercise it arbitrarily, capriciously and oppressively. No government official has such unrestrainable power. *Sterling* v. *Constantin, supra.*

14. The Court As a Court of Equity Had Jurisdiction to Determine Whether the Decisions of Appellants Were Made Arbitrarily, Capriciously, Unreasonably and Unlawfully

If the arbitrary action of the Appellants in making their decisions was within judicial cognizance, it certainly was not error for the Court below to consider the decisions of the Appellants, as well as the facts and circumstances surrounding those decisions,[99] in order to determine this issue. This is not a case, as Appellants would lead the Court to believe, where the Court below sought to substitute its own judgment for that of Appellants. On the contrary, the Court below found that Appellants had no rational basis whatsoever for their determinations and that the same were not justified under any view of the facts.[100] The cases herein establish that there is no place in our system of government for such an exercise of arbitrary power and that contrary to Appellants' contention (P. 65, Brief) courts of equity can stop such illegal action.

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[99] *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 704-705.

[100] Findings 12, 17, 18, 29, 30, 31, 32, 35, 42 and 43 (R. 758-770).

All constitutional questions aside and conceding, *arguendo* that the Court below did not have the power to substitute its judgment for that of Appellants, the question remains as to whether or not the District Court had jurisdiction as a Court of equity to inquire into and give relief from the unlawful, arbitrary, capricious and oppressive conduct of Appellants which the record in this case so fully reveals. Appellants make quite a point of this in their brief (pp. 52-74). One answer is that being a Constitutional Court properly convened the Court had jurisdiction to dispose of all questions in the case and the section of this brief *infra* pages 118-124 covers this point. Another answer is that the Administrative Procedure Act confers jurisdiction as is set forth in the preceding section herein. But aside from such considerations Appellants are wrong in their claim of a lack of power in a court of equity to enjoin illegal action of government officials.

In *Dismuke* v. *United States*, 297 U. S. 167, 172, it was held that the determination of an administrative official will be reviewed by the Court and will not be accepted where:

> "he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence . . . or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized."

In *Garfield, Secretary of Interior* v. *Goldsby*, 211 U. S. 249, this Court stated at page 262:

> "But, as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In *Waite v. Macy*, 246 U. S. 606, the Court in a decision by Mr. Justice Holmes granted an injunction to void a regulation excluding Prussian blue tea, non-deleterious in character, on the ground it exceeded the statutory powers conferred. The Court, through Mr. Justice Holmes, said at pages 608-609:

> "The government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.
>
> "No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. ... ."

In *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, the Court through Mr. Justice Stone in granting relief from unauthorized administrative action in an immigration penalty case, stated at pages 335-336:

> "The action of the Secretary (of Labor) is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority . . . whether there was any evidence before him to support his determination . . . and whether the procedures which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized."

and at page 339:

> "The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such a record of his ac-

tion that it may be known that he has performed the duty which the law commands."

The opinion in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 has been constantly cited by this Court as expounding the established proposition that the courts have jurisdiction to grant relief to a party injured by the unauthorized act of a public official. In that case, it was stated at page 108:

> "That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court, in holding that administrative action violated the commands of the Fourteenth Amendment, stated at pages 369-370:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

The opinion further recognized that the courts must have power to grant relief under such circumstances for otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer whose action is unauthorized by any law, and is in violation of the rights of the individual. *Cf. Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 and *Buchanan*

v. *Worley*, 245 U. S. 60 where relief was granted when the result of the illegal action was pressure on others not to contract with the plaintiff just as in the instant case.

The jurisdictional tests established in the cases cited *supra* are clearly met in the instant action. Appellee, in its complaint, not only charged, and subsequently proved in the trial below, that the decisions by Appellants were made illegally; but also charged and proved that such decisions as well as other actions by Appellants, were *arbitrary, capricious* and unreasonable, and that Appellee thereby suffered irreparable damage. In view of the issue as to arbitrary conduct which was before the Court below, it was certainly the duty of that Court to receive evidence relating to how the so-called decisions of probable cause were arrived at. To contend that the decisions by Appellants were beyond judicial inquiry irrespective of charges made, and in fact established, would place in the hands of such administrative officials an administrative power of such tremendous and unlimited impact which would be not only alien to our entire constitutional scheme but unparalleled in any governmental system adhering to the principles of justice under law. Courts of equity have always had jurisdiction to give relief under the circumstances of this case.

15. Three-Judge Court Must Try and Decide All Issues of the Case

(a) The Statute Gives the 3-Judges Jurisdiction to Decide All Issues in the Case—Text and Legislative History

There are three three-judge court statutes—one relates to Interstate Commerce Commission cases, another to applications for injunctions to restrain the enforcement of state statutes, and the third to such applications with refer-

ence to Federal statutes. The two latter statutes are the same in wording (28 USC 2281 and 2282). All are governed as to composition and procedure by the same provisions (id. 2284). The statute respecting three-judge courts in such cases respecting Federal statutes was deliberately drawn to parallel the earlier statute applicable to such cases involving state statutes (House Report No. 1679, 77th Congress, pp. 6, 8; and see also 88 Cong. Rec. 7045 in the Senate). This Court customarily refers to precedents under any of them in deciding cases involving any one of them. Appellee does the same herein.

The statute makes detailed provisions for the determination of all issues by the full court of three judges. Thus the court of three judges, when duly designated, "shall serve as members of the court to hear and determine the action or proceeding" (28 USC 2284(1)). They do not serve merely to determine the constitutional issues but "to hear and determine *the action or proceeding.*" Obviously the words "to hear and determine" may not be limited to hearing and determination of constitutional issues only, because they expressly relate to "the action or proceeding."

The scheme of the statute thus seems very plain. It provides, first, that *applications* for injunctions must be "heard and determined by a court of three judges" (28 USC 2282). The three judges "*shall* . . . hear and determine *the action or proceeding*" (28 USC 2284(1)). The only exceptions are that (1) the original district judge may grant a temporary restraining order pending hearing thereon by the full three-judge court and (2) any one of the three judges may perform such functions as do not involve the trial of the case or the entry of any judgment subject to appeal to the full three judges from any action by a single judge.

The foregoing detailed provisions of the statute were adopted in 1942 and, in combination with other provisions of a similar nature already existing, were restated in the new Judicial Code as quoted above. The latter embodies

mainly the provisions of the 1942 statute (56 Stat. 198 at 199, formerly 28 USC 792). The report and hearings in the House of Representatives are embodied in a single document (Rep. No. 1677, 77th Congress, on H. R. 4812) which contains the following:

> "Mr. Kefauver * * * The bill provides that in preliminary matters where the case is tried by a three-judge court that one judge may handle the proceedings and enter all orders required by the Rules of Civil Procedure up to the time of final action in the case. The matter of determining the ultimate decision on the facts or on the law is, of course, left to the three judges. * * *"

See also the Conference Committee report at 88 Cong. Rec. 3069. The Senate Committee, although it redrafted the bill, similarly reported its purpose as being to permit "any one of the judges designated to the three-judge court . . . to perform all preliminary functions" except that "the actual trial of the final issues must be by the full three-judge court" (88 Cong. Rec. 1970).

(b) The Decisions of This Court Hold the 3-Judge Court Has Jurisdiction to Decide All Issues

In *Louisville & N. R. R. Co.* v. *Garrett*, 231 U. S. 298, constitutionality was raised under both the federal and state constitutions. Decision of the latter would of course make unnecessary decision of the former question, if the court should hold that there was invalidity under the state constitution. The question whether, in these circumstances, the federal three-judge court had jurisdiction was squarely raised and the Court said:

> "Because of the Federal questions raised by the bill the . . . Court had jurisdiction and was *authorized to determine all the questions in the case.* . . . Where such a (constitutional) question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress

> to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution *and statutes* were therefore before the . . . Court and the appeal brings them here. *They may be first considered.*" (pp. 303-304, italics supplied.)

In so ruling the Court referred to *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, which was not a three-judge court case but in which interpretation of the state statute (pp. 177, 178, 191) as well as federal constitutionality was involved and the Court, in disposing of the case on applicability of the statute (pp. 194, 198), said at page 191:

> ". . . that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the cases on local or state questions only. This Court has the same right, and can if it deem it proper, decide the local question only and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. . . ."

and at page 193:

> "The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the . . . Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the Fourteenth Amendment."

See also *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620, 621; *Michigan Cen. R. R.* v. *Vreeland*, 227 U. S. 59, 63; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 508;

Waggoner Estate v. *Wichita County*, 273 U. S. 113, 116; and *Northwest Laundry* v. *City of Des Moines*, 239 U. S. 486, 491. Thus the rule that federal three-judge courts should decide all issues was established as long ago as 1913 and, as we next show, has not been departed from in any type of reported three-judge court case.

In *Sterling* v. *Constantin*, 287 U. S. 378, the complaint sought to enjoin the governor of Texas from use of the military in civil affairs. It raised questions both of interpretation of the state statutes (that is, their applicability) and their constitutionality. The Court said (pp. 393-394):

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. . . . The jurisdiction of the District Court so constituted, (of three judges) and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case."

Thus it was that the case involved not merely constitutionality but, preliminarily, the interpretation of statutes so far as they might be "deemed to authorize the action" sought to be enjoined. That is precisely the situation in the case at bar. There the question of the authority of the state official defendant was discussed at length (pp. 395 et seq.) although the Court found it possible to "assume, without deciding, that the law of the State authorizes what the Governor has done" (p. 396).

In *Davis* v. *Wallace*, 257 U. S. 478, there were questions both of (a) coverage of the statutes involved and (b) their constitutionality (p. 481). The Court, in deciding the case on the proper interpretation of the statute rather than its constitutionality, said (p. 482):

> "The case made by the bill involved a real and substantial question under the Constitution of the United States. . . . In such a case the jurisdiction of that court, and ours in reviewing its action, extends to every question involved, whether of federal or state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case."

See to the same effect *R. R. Commission* v. *Pacific Gas Co.*, 302 U. S. 388, 391; *Ohio Tax Cases*, 232 U. S. 576, 586-587; *Lee* v. *Bickell*, 292 U. S. 415, 425; *Query* v. *United States*, 316 U. S. 486, 488-490; *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 115.

In *Public Service Commission of Missouri* v. *Brashear Freight Lines*, 312 U. S. 621, the Court again reiterated the established principle that a special three-judge court, once properly convened in cases seeking injunctive relief from an allegedly unconstitutional statute, has jurisdiction to determine every question involved in the litigation. In that case, it was stated at page 625:

> "A District Court composed of three judges under § 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for injunctive relief, *in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties.*" (Italics supplied.)

Not merely in recognition of the indubitable state of the law on the question here presented, but as a matter of good public policy as well, attorneys for the Department of Justice have in other cases taken the same position. We shall not pause to review, or even cite, the various briefs in which that position is expressed save one. *Colonial Airlines* v. *Adams et al.*, 87 F. Supp. 242, No. 3490-49, was decided by the United States District Court for the District of Columbia, three judges participating, on November 16, 1949. There in the course of the proceedings before the full three-

judge court the Government, in defending public officials there sued, submitted a *Memorandum of Law on Jurisdiction of Three-Judge Court which states* (p. 1):

> "It is settled law that in any proceeding seeking to restrain or enjoin the enforcement, operation or execution of an Act of Congress because of repugnance to the Constitution in which a substantial question as to the constitutionality of such Act is presented, the district court of three judges convened to hear such proceeding pursuant to Sections 2282 and 2284 of the Judicial Code (Title 28, USC) has jurisdiction to consider all issues in such proceeding, whether or not such other issues present constitutional questions. Consequently, unless it should hold that no substantial issue as to the constitutionality of the Civil Aeronautics Act is presented by the complaint, the three-judge court convened in this matter has jurisdiction to hear and decide all the issues presented by the complaint."

That is precisely Appellee's position in the instant case.

It is respectfully submitted that the decisions cited *supra* unequivocably establish that the jurisdiction of the District Court below extended to every question involved in the litigation. Appellants apparently concede that the issue on arbitrary, capricious, oppressive and unlawful action and the issue on constitutionality were properly before the Court, but claim the issue of whether Appellee's labeling was misleading should not have been decided. That latter issue is therefore the subject of the next section herein.

16. Whether Appellee's Pamphlet Violated the Statute was an Issue Properly Decided by the Trial Court

In the instant case, Appellants cite as error the holding of the Three-Judge District Court "that it had jurisdiction to try in a *de novo* proceeding the question whether Appellee's labeling was "misleading in any particular. . . ." (Appellants' Brief p. 26.) This is not a correct statement of the Court's decision. Appellants are in error in speaking

of trying the issue as a "*de novo proceeding.*" "*De Novo*" means to try again. In the instant case that issue was not decided at all by Appellants six *ex parte* decisions or by any other officer or body. Appellants' decisions related to whether the labeling was "in a material respect misleading to the injury or damage of the purchaser or consumer." The Trial Court herein was really considering the question of "misleading in any particular" for the first time, not "*de novo.*"

Appellants contend that the only courts having jurisdiction to inquire into the merits of Appellee's advertising booklets are the various District Courts where the libel seizure papers have been filed, or in a District Court where the numerous libels may be consolidated, the basis for this contention being that Congress did not specifically provide for the determination of such issues in Courts other than where the libels were filed or where libels involving the same alleged misbranding were consolidated. But Congress did *not* specifically take such issues from other courts acquiring jurisdiction of such issues in some other manner. Apparently recognizing that their position is untenable because injunction courts, criminal courts and other types of courts can and must try such issues, Appellants immediately put in a footnote saying "The issue may also be determined, of course, in district courts in which the Government may institute other types of enforcement proceedings" (N. 48, P. 75). The issue can also come up in other types of litigation. Here Appellants themselves on September 22, 1949 sought to take the very issue in the libel cases from the libel courts by filing an injunction action in Los Angeles raising the identical issues before the libel courts. See *supra* p. 17. It is respectfully submitted that this assignment of error is without merit.

The Three-Judge Court below was appointed when Appellee filed a *complaint for injunction* seeking to enjoin multiple libel proceedings on the ground that the so-called

administrative "determinations" or decisions authorizing such multiple seizures were arbitrary, capricious, unreasonable and unlawful and that the multiple seizure provisions of the Food, Drug and Cosmetic Act of 1938 were unconstitutional. Since Appellee's complaint sought to enjoin the enforcement of operation of an Act of Congress for repugnance to the Constitution of the United States, it was mandatory, as explained *supra* pages 118-120, that Appellee's complaint be heard by a District Court composed of three judges. Furthermore, since the suit was against the Appellants in their individual capacities rather than a suit against the United States, it was necessary that the suit be filed in the United States District Court for the District of Columbia in order that personal jurisdiction be obtained over the Appellants. It would not have been possible to bring suit elsewhere.

Ancillary to but inseparable from the two fundamental issues framed below was the question as to whether or not Appellee's advertising pamphlets were in fact misleading as alleged in the various libel actions. It was this issue which actually gives rise to the entire controversy between the parties (R. 757, 770). A decision in it was necessary to dispose of the issues in this case. From the beginning of this litigation Appellants have concentrated on the merits of these pamphlets. Appellants apparently realized from the outset they could not defend by disproving the arbitrary conduct charge—as on that issue their own admissions resolve the issue against them. They have therefore concerned themselves only with wild charges about the pamphlets hoping to gloss over their actions. As has already been pointed out herein, Appellants' brief follows this same procedure.

In order to prove that Appellee had "clean hands" and was entitled to equitable relief, Appellee necessarily had to prove it was not a law violator—or as Judge Goldsborough said, was entitled to prove it is "not a crook,"

(R. 53-54) as "crooks" are not entitled to the aid of equity. That Appellants could continually make their unfounded charges and never have those charges heard and disposed of is unthinkable.

Almost the first words uttered in their defense by Appellants were that Appellee was a criminal and law violator because of the use of these booklets. (R. 575, 580, Argument Jan. 24, 1949 before J. Pine.) Appellants in their briefs in support of their 3 motions to dismiss, their brief here on their Petition for Mandamus and/or Prohibition, their arguments and their evidence made further attacks on the merits of Appellee's labeling. At the argument on the first motion to dismiss Appellants argued "They (Appellee) are not coming into court with clean hands" (R. 580).

Appellee immediately challenged this claim of law violations (R. 582) and unclean hands and in the trial herein as the Court found (Finding 12(f), R. 759-760) completely proved lack of law violations, "clean hands" and its complete good faith. In paragraph 3 of Appellant's Answer to the complaint (R. 749) they claim Nutrilite's labeling conveys the impression that the product is a "cure" even though they knew the direct finding of their own Purchaser survey (R. 39-47) was exactly the opposite. The good faith of Appellee is discussed *supra* pages 44-46.

At the hearing before the Three-Judge Court on the Appellants' motion to dismiss they again charged law violations through use of these booklets (R. 617 *et seq.*) and before this Court at the argument on the Petition for a writ of Prohibition and/or Mandamus Appellants were quick to attempt to besmirch the Appellee as an alleged law violator and insisted upon this Court looking at the 3 pamphlets. They even read excerpts from the pamphlets in their last argument here hoping this Court would think, contrary to the facts, those excerpts and their interpretations thereof were a true picture of the pamphlets. At

every opportunity they have poured forth every choice epithet coined in 43, 35 and 26 (see pp. 18-20 Appellants' brief) years of experience in prosecuting actual law violators in this field and have applied these epithets to Appellee's pamphlets in an attempt to divert attention from their arbitrary, capricious and oppressive conduct herein. All the time Appellants want to talk about the pamphlets but they do not want any Court to inquire into the truth of what they say.

The record herein shows that Appellants based almost their entire case on the unfounded claim, that Appellee was and is a law violator, had unclean hands and was not acting in good faith yet Appellants objected strenuously to the Court's inquiry into these charges. As pointed our *supra* page 30 Appellants really quarrel only with one of the 43 Findings of Fact, i. e., the finding that Appellee's labeling was not misleading. They could not quarrel with the other findings as they offered practically no testimony on anything but the opinions they offered on the labeling. On the labeling issue they offered only the biased opinions of Appellants Dunbar, Crawford, and Larrick who have spent the 43, 35 and 26 years respectively (see pp. 18, 20 of Appellants' brief) prosecuting law breakers. They had made their decisions and were on the stand to defend them to the utmost by using this experience to the utmost. What they said on the stand does not appear in their written decisions so they could say anything bad they could think of—and they used their years of experience to imagine horrible impressions from the words used in Appellee's little pamphlets. It is almost impossible for the fairest minded man in the world to spend so many years prosecuting and not render opinions biased and slanted in that direction. How much more so when Appellants realized their only chance to cover up their arbitrary conduct was to pour on the criticism of Appellee's pamphlets. They had a real incentive

to ignore their survey of the impressions of consumers and purchasers and testify the opposite way.

Appellants objected to the Court's consideration of their charges as they knew that once any Court looked into these questions their unfounded charges would explode in their faces and the full extent of their arbitrary, unreasonable and unlawful conduct would be known. In an effort to hide Appellants' actions behind an immovable curtain they said Appellants "have no interest in" Appellee's "good faith" (R. 48). Also that good faith has nothing to do with the interpretation of the character of Appellee's pamphlets. Conceding for purposes of argument that such may be true in any other Court, in a court of equity good faith certainly is the foundation of Appellee's right to equitable relief.

Appellants would have been quick to move that the Court deny equitable relief if Appellee had failed to prove good faith, clean hands and lack of law violations under such cases as *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 814 where it is stated that:

> "The guiding doctrine in the case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendants. That doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the *requirements of conscience and good faith.*"

In *Bein* v. *Heath*, 6 How. 228, 247, the Court stated:

> "It is a principle in chancery that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage."

See also *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, 397.

Also, under Rule 54(c) of the Federal Rules of Civil Procedure the Court was under a duty to grant complete relief. That Rule provides:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The point made by Appellants (p. 25 Brief) about the prayers for relief in the Complaint overlooks this Rule which is obviously designed to make each case dispose of all issues between the parties *properly raised by the evidence*. Also, Appellants overlook the fact that there is a prayer for "such other, further and general and special relief as the nature of the case may require and the Court may deem proper and just in the premises" (R. 737).

It is one of the established maxims of equity that "a court of equity ought to do justice completely and not by halves." To this end courts sitting as courts of conscience have made it their duty to prevent a multiplicity of suits where they have once obtained jurisdiction for any purpose. This established principle was noted clearly in the decision of this Court in *Greene* v. *Louisville & I. R. Co., Supra*, when it was stated at page 520:

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely and not by halves;' and to this end, having properly acquired jurisdiction of a cause for any purpose, *it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.*" (Italics supplied.)

In *Camp* v. *Boyd*, 229 U. S. 530, it was stated at pages 551-552:

> "A court of equity ought to do justice completely and not by halves . . .
>
> "One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that would not otherwise be within the range of its authority."

In accord: *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 399. See also: *Smyth* v. *Ames*, 169 U. S. 466, 517-518 "a general decree—would avoid a multiplicity of suits"; *Ex Parte Young*, 209 U. S. 123, 160 stopping harassment by "a multiplicity of suits or litigation generally," and the other cases cited *supra* pages 102-105.

Since the District Court below properly obtained jurisdiction by the existence of a substantial constitutional controversy, it was the duty of the court *to dispose of the entire controversy between the parties.* The controversy between the appellants and the appellee clearly arose from the multiple libel actions which were filed against Appellee's product, alleging that Appellee's advertising booklets were misleading (R. 757, 770). Appellants admit that the various libels involve identical issues of law and fact. The *Greene* case, *supra*, pointedly speaks of the duty of a court of equity to dispose of the "entire controversy *and its incidents.*" (Emphasis supplied.) It could hardly be asserted that the issue as to the misleading character of Appellee's booklet raised in the multiple libel seizure actions was not at least an "incident" in the issues of this controversy between the parties. It is respectfully submitted that the issue of the misleading character of the booklets is more than an incident of the controversy between the

parties and is in fact the basis for the entire controversy so it was properly decided by the Trial Court.

It is respectfully submitted that once having properly obtained jurisdiction, the Court below could determine, in the language of *Camp* v. *Boyd, supra*, at page 551 "rights that would not otherwise be within the range of its authority."

During the course of the proceeding below both parties were given full opportunity to present evidence on the issue of the misleading character of Appellee's advertising booklets. A decision on this question was clearly ancillary to the Constitutional question in this case where the court was considering constitutionality "as applied." Appellants had the full opportunity to present everything it had on this issue and used every stratagem, device and effort to establish its unfounded charges but could produce nothing better than biased opinions as against Appellee's evidence from Appellants' files of actual consumer impressions of the pamphlets. Having lost that issue Appellants now seek to raise the claim that the District Court had no jurisdiction to inquire into the actual merits of its charges. It is respectfully submitted that the District Court sitting as a court of equity had the affirmative duty to end the vexations and interminable litigation which Appellants had so unwarrantedly instituted and to terminate forever the entire controversy on the labeling here involved and that is what it did.

17. The Three-Judge District Court Properly Found That Appellee's Labeling Is Not Misleading

The preceding section has answered some of the arguments made by Appellants in their brief (p. 76 *et seq.*) on the merits of Appellee's labeling. But Appellee desires to consider additional points herein and to note that Appellants in discussing the merits of the labeling have again resorted to the device of lifting sentences and statements

out of context, and misstating the facts which were developed in the proceedings below. It is significant that Appellants at page 84 of their brief state that the booklets "must be read in their entirety." Even Kingsley agreed that "picking of statements at random is an unfair way to attack any writing" (R. 510). Suffice it to say, Appellants, in their own statements, condemn the action of Appellants Crawford and Dunbar in basing their decisions on the labeling without reading it in its entirety. Obviously, Appellants' statement that each of the administrative officials based his decision or decisions "upon his own examination and analysis" of the booklets hardly "squares" with the admitted facts.[101]

Appellants state that the evidence presented by Appellee did not seriously challenge the "medical findings of fact upon which the probable cause determinations were made" (p. 79). The fact of record is that not only did Appellee's evidence seriously challenge those "findings" but Appellants' own evidence seriously discredited them. M. A. Blankenhorn, a witness for Appellants, whom Appellants characterize in their brief as "an outstanding medical expert in the field of nutrition," (pp. 104-105) testified on *direct examination* that "informed medical opinion" could not say yes or no to the finding of Butz regarding the "consensus of medical opinion" (R. 438). One of Butz' findings (R. 1173-1174) recites that vitamins and minerals would not be effective in the treatment of irritability, gastric distress, headache and insomnia, yet Appellants' star medical witness, Blankenhorn could not agree with Butz (R. 435). Furthermore, Appellants put into evidence Butz' deposition which contradicts or repudiates in many instances his so-called "findings of fact" (R. 762, 1175-1215, 392-393). At pages 57-60, 73 we have considered the contents of these

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[101] Findings 17, 30 and 35, R. 761, 765, and 767. See also R. 334, 383, 315, 505, 512-513.

findings attributed to Butz and shown that they cannot be relied upon for any purpose.

Appellants seek to create the impression that the pamphlets hold out that Nutrilite would be effective in the prevention or treatment of such diseases as "heart and coronary diseases, pneumonia, tuberculosis and cancer."[102] Appellee disagrees, and so did the three-judge district Court, with Appellants' so-called interpretation of the labeling. Typical of the perverted justification for their conclusions is their misinterpretation of the reference to "cancer" in the Foreword of the booklets (R. 396, 785, 846, 885). This direct disclaimer Appellants assert is a direct representation that Nutrilite would be efficacious in the treatment of cancer (R. 160-161).[102a] The Court found that the booklets represent to consumers and purchasers no more than that Nutrilite will give to the body an adequate supply of vitamins and minerals so that it will be more healthy (R. 759). The medical testimony below clearly supported this.

On page 82 of their brief Appellants make an attempt to discredit the base of a high concentrate of alfalfa, watercress and parsley contained in Nutrilite by speaking of "quakery" and "nostrums." It is stated in Appellants' brief "they recognized the emphasis of Nutrilite's 'secret base' and its alleged extraordinary merit as characteristic of claims that were prevalent in the heyday of patent medicines and quack nostrums." Then follows reference to R. 316, 334, 400. These references clearly do not support any such statements, not one word being mentioned about Nutrilite's base in the testimony cited. This is typical of Appellants' attempts to mislead this Court. The expert

[102] It should be noted that Dr. Myers testified at considerable length about the relationship of vitamin and mineral deficiencies to sudden cardiac collapse (R. 81, 133-134). Furthermore, the medical testimony below directly recognized the relationship of vitamin and mineral deficiencies to the incidence of tuberculosis (R. 144, 433, 477).

[102a] See pages 42-43 *supra*.

testimony for both parties below recognized that this base contains what has been termed "trace" elements and that the same are essential in human nutrition (R. 163-164, 480, 1199, 1524). Furthermore, it is this unique base which does set Nutrilite apart from all other food supplements (R. 163, 1182, 1199).

Appellants' brief then follows with many quotations from the three booklets which are not only lifted out of context but also eliminate qualifying words and phrases contained in the sentences from which the quotes are lifted. In other instances, Appellants resort to the device of deliberately paraphrasing so that it creates innuendos, implications and inferences not justified by the actual wording of the booklets. Yet at the same time Appellants recognize that the booklets should be read in their entirety and wind up on page 94 with a claim that the pamphlets give "readers a false impression that Nutrilite would prevent or cure all but acute ailments—the very claim which their own Purchaser survey (R. 39-47) had disproved so emphatically when it reported as to customers and purchasers who bought Nutrilite after reading the pamphlet: "None of them thought that Nutrilite was a cure for anything but merely vitamins and minerals which would build their bodies up." Appellants do not mention this finding. All Appellants offer is arguments advanced by biased Appellants trying to justify their decisions against the pamphlets, not evidence as to the impression readers will ordinarily receive. If Appellants had anything to contradict the survey from their files offered by Appellee surely they would have offered it!! *Cf. Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 381.

On pages 91 through 94 of their brief, Appellants list five "material representations" which are "clearly false" and state "such falsity was not contradicted by Appellee." Appellee takes issue with all these charges and Appellee did offer evidence showing the same *not* to be false. Ap-

pellants' first reference in this respect is to the quotation from a New York Times article. Appellants fail, however, to refer to Appellee's Exhibit 22 (R. 1058, 537) which is a copyrighted article on a New York Times dispatch in which is repeated word for word the statement in the booklet attributed to the New York Times. Appellants state that in its context it attributes the high rejection rate for women applying to the WAC to vitamin and mineral deficiencies. No such statement or inference is contained in the booklet, the article merely being put in to illustrate the point that we in the United States are not as healthy as we think we are. Appellants try to draw the same unjustified inference from the statements on page 6 concerning draftees in World War II (R. 235-237, 791, 852, 891).

With regard to the so-called Pennsylvania State Survey mentioned on page 4 of the booklets, the references in the booklet are clearly supported by the survey itself (R. 1225, 456-457)[102b] and also by *Appellants' own Exhibit 18* (R. 1249, 457). The statements by Appellants about Carl Rehnborg are totally unjustified by the record. The stipulation concerning Rehnborg does not in any sense contradict what is said in the booklet. The facts stipulated were not meant and were not considered by the Court as being a complete case history of Rehnborg's education and experience (R. 1542). Appellants wrote this partial outline of his life—it on its face is only a partial outline— and Appellee agreed to it in exchange for withdrawal of a subpoena served on Rehnborg so that he could go home to California under circumstances rebutting any possible inference such as Appellants now seek to draw from it (R. 518-520). By no reasonable interpretation could anyone say what Appellants now say, that such a partial statement of facts covers Rehnborg's whole schooling and experience. A fair

[102b] The "survey" (R. 1225-1247) which was offered by Appellants clearly recognized the widespread incidence of vitamin and mineral deficiencies. See particularly R. 1226-1231, 1243-1244.

reading of both will show that the facts in the stipulation do not contradict those in the pamphlet in any respect. (See R. 239-241.)

Appellants' reference to page 28 of the booklets (R. 913) clearly aborts and misstates the language of the booklet. The booklet does not state that deficiency diseases are those most responsible for death but only that "diet deficiencies may . . . . show itself as one of the common or not so common deficiency diseases, including those most responsible for death in our 40's and 50's." The references obviously are to deficiency diseases causing death in the 40's and 50's and not to other diseases.

It is interesting to note that in making all these most strained arguments never *once* do Appellants seek to find in the pamphlets the things they attribute to Butz in the findings they never did prove he signed.

Finally, on page 83 Appellants refer, as they do in most of the references they make to the 58 page pamphlet and say "the administrative officials" were entitled on the basis of things Appellants refer to in the 58 page pamphlet to conclude that the case histories which appear only in that pamphlet represent certain conclusions. Appellants neglect to say that the *only* administrative official having the 58 page pamphlet before him was Appellant Crawford who admittedly did not read it when he condemned it as misleading (R. 761), nor do Appellants refer to the fact that use of the 58 page pamphlet was discontinued *October 11, 1948*—a long time ago—as soon as it was questioned in the first libel seizure in Belleville, New Jersey (R. 161, 762-763). Nor do Appellants claim the references to the 58 page pamphlet are representations that Nutrilite will cure anything for they know the pamphlet says of the ailments there described "Nutrilite did not cure the ailment" (R. 825) and in other places it specifically says Nutrilite is *not* a cure (R. 785, 825, 837, 840-841). Also the pamphlet qualifies the case histories time and time again as for example:

"It should also be remembered that the cases described above were selected to show what happens where there is an *extreme* (underlined in original) nutritional deficiency . . ." (R. 837). Also, "In preparing this book for your reading, our primary purpose is to cause you to realize that the average or better than average civilized diet does not provide you with complete and adequate nourishment" (R. 840).[103] But we do not want to be guilty of lifting sentences out of context as Appellants are. Appellants know that purchasers and consumers who read the entire pamphlets gain no misleading impressions as that was the result of their purchaser survey cited above and that was the result when each of the three judges read the entire contents of each pamphlet (R. 182, 294). They just hope that by bringing this tremendous record here this Court will *not* have the time to read the pamphlets and will take their excerpts lifted out of context as a true picture of the pamphlets' contents.

Appellants know better than anyone else that if this Court reads the three pamphlets in their entirety Appellants' unfair twisting of their true meaning and intent will be rejected. If Appellants could have found one consumer to

[103] The case of *United States* v. *John J. Fulton Co.*, 33 F. (2d) 506 does not hold, as Judge Goldsborough points out at page 150 of the Record that where, as here, the case histories are preceded, surrounded, and followed by explanatory material they represent a product as a "cure." That purchasers and consumers did not understand these as such a representation, see *supra* pages 28-30, as it was the 58-page pamphlet they read. Appellants do not question that the case histories are authentic (R.380). The sworn affidavits of each person giving such a history were furnished to Appellants (R. 520). *Cf. Northam Warren Corp.* v. *Federal Trade Commission*, 59 F. (2d) 196 (CCA 2d). The Court did not stop cross-examination on this as Appellants claim (p. 84, Brief) but specifically told Appellant's Counsel "You can continue in it if you think there is any profit in it for you" (R. 152). The case histories in this pamphlet relate to good faith only as their use was discontinued immediately (18 months ago) when questioned and Appellants were so notified (R. 762-763). That action proves Appellee's good faith. See *supra* pp. 44-46.

back up their claims one can be sure he would have been presented as a witness at the trial, for as stated page 39 *supra* they surely spent enough time and money interrogating Appellee's customers hunting for that one, yet-to-be found customer or purchaser witness.

18. The Legislative History of the Act Does Not Sustain Appellants' Conventions—It Indicates a Contrary View

(a) Judicial Review of Arbitrary, Capricious and Oppressive Conduct not Intended to be Eliminated

Appellants argue (P. 58, brief) that the legislative history of the Federal Food, Drug and Cosmetic Act reveals a Congressional intent to eliminate judicial review of the administrative decisions required as a condition precedent to the institution of multiple seizures under the Act.

In support of this argument, Appellants cite the language of several of the earlier bills which were before Congress and which contained specific authority for executive seizures of certain defined articles and which also authorized "suits of the kind here involved." (P. 53, Brief). Appellants then cite the provisions of later bills and of the Act as enacted and because such bills and Act did not contain the specific provision authorizing courts to enjoin multiple seizures, Appellants conclude that Congress irrevocably and finally "rejected" their right to do so.

Appellants correctly state that S. 5 of the 74th Congress [104] was passed by the Senate in May, 1935, containing the following language in Section 702:

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[104] Complete examination of the legislative history of the Federal Food, Drug and Cosmetic Act requires a study of the legislative progress of the following five bills, the last named of which, was enacted:

(1) S. 1944, 73rd Congress, 1st & 2d Sessions.
(2) S. 2000, 73rd Congress, 2d Session.
(3) S. 2800, 73rd Congress, 2d Session.
(4) S. 5, 74th Congress, 1st & 2d Sessions.
(5) S. 5, 75th Congress, 1st & 3rd Sessions.

"The District Courts of the United States are hereby vested with jurisdiction, on petition by any interested person . . . to grant appropriate injunctive relief from any act or omission of any officer, representative, or employee of the Department in the administration of this Act, if it has been shown that such act or omission is unreasonable, arbitrary, or capricious, in the light of the facts, or not in accordance with law, and that the petitioner may suffer substantial damage thereby . . ."[10]

And that this language was eliminated by the House Committee.

But Appellants fail to specify or account for the reason why this provision was omitted from later drafts of the bills and from the Act as enacted. Appellee asserts that there is an adequate and satisfactory explanation for the omission of this provision granting district courts jurisdiction to restrain the institution of multiple seizures and that this explanation is clearly revealed in the language of a report of the House Committee on Interstate and Foreign Commerce which, in reporting S. 5 of the 74th Congress to the House, eliminated the above quoted portion of Section 702 with the statement that a specific provision in the Act giving Courts jurisdiction to enjoin arbitrary, capricious and oppressive action was unnecessary because courts of equity and courts empowered to render declaratory judgments could protect against such action anyway. Appellants note the "elimination" but skip the report explaining why.

[10] See Senate Report No. 361, 74th Congress, 1st Session, where, with reference to this language, it was stated:

"This section likewise authorizes the courts to grant appropriate injunctive relief from any act or omission on the part of the Department or its officers, representatives, or employees in the administration of the act. The established rules of constitutional law governing judicial review of administrative action, as developed by the United States Supreme Court, would, of course, be applicable to proceedings under this section."

The Committee Report states:[106]

"The committee had several reasons for the omission of this section of the Senate bill. This section would have given to the district courts jurisdiction to restrain by injunction the enforcement of regulations, or to grant appropriate injunctive relief from any act or omission of the Secretary or his officers or employees, upon a showing that the regulation or the act or omission was unreasonable, arbitrary, or capricious, or not in accordance with the facts or law, and that the petitioner might suffer substantial damage by reason of the enforcement of the regulation or by reason of the act or omission. The committee was not aware of any precedent for such a provision. Insofar as it gave the court jurisdiction to decide whether the regulation, act, or omission was not in accordance with the facts, it was felt that this would constitute the imposition of a nonjudicial function upon the court. (See Federal Radio Commission v. General Electric Co., 281 U. S. 464.)[107] Aside from this consideration the court would have been authorized to grant the relief if the petitioner could show that he 'may suffer substantial damage.' This seemed to the committee to be a radical departure from the ordinary principles of equity under which relief may be granted where there is no adequate remedy at law and the complaining person can show that he will suffer irreparable injury.

"The committee felt that there was no reason to add to the existing remedies which are applicable in the case of administrative action under the many other acts passed by Congress. There is always an appro-

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[106] House Report 2755, 74th Congress, 2d Session. See DUNN, FEDERAL FOOD DRUG AND COSMETIC ACT (1938) 556-557.

[107] Cf. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 262; *Federal Radio Comm.* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275; That the Federal Communications statute now restricts review to judicial questions see *Federal Communications* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144. The requirement that the decision herein be based on "facts found" and the admitted absence of all facts is discussed *supra* page 51.

priate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy of law, and furthermore the committee is of the opinion that ample protection is given by the so-called Declaratory Judgments Act enacted on June 14, 1934, as section 274D of the Judicial Code (U.S.C., 1934 Ed., Title 28, Sec. 400). Insofar as the court would, under the Senate bill, have been empowered to give relief in case a regulation or an act of the Secretary was unreasonable, arbitrary, or capricious, or not in accordance with law, this is merely the ordinary principle which the court applies in cases where an administrative official has exceeded his authority, and a person affected by an administrative official's action may always, whether in a criminal proceeding, equity proceeding, or any other proceeding, raise these issues. The provision of the Judicial Code above referred to gives the courts jurisdiction in actual controversies to declare rights and other legal relations of any interested party, and such a declaration has the force and effect of a final judgment or decree and is reviewable as such. This provision of the Judicial Code would apply to all kinds of disputes arising between parties or arising under legislation, but as stated in the report of the Judiciary Committee when it reported out the measure, 'This form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.' The remedy furnished seems to be peculiarly adapted to cases where the interests and rights of parties are affected by the acts of administrative officials. . . . " (Underlining supplied.)

This, it is respectfully submitted, is the true reason why the Section was omitted and cannot, under any circumstances, be deemed to support Appellants' suggestion that Congress "rejected" the jurisdiction to enjoin the making of multiple seizures by arbitrary, capricious and oppressive action. Precisely the opposite is the case for the above in-

dicates a belief that it was unnecessary to spell out review provisions in the Act.[198]

(b) Words "Without Hearing" Slipped Into Bill in Last Conference Just Before Final Adoption and Probably Unknown to Most Members of Congress

Attention should be directed to the footnoted statement in Appellants' brief (P. 57-58, n. 35) as to statements made

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[198] While not directly reflecting Congressional intent, the following statement, made by the then Chief of the Food and Drug Administration before a subcommittee of the Senate Commerce Committee which was conducting the initial hearings on S. 1944 of the 73rd Congress, the first of the bills which Congress was to consider is of interest. This statement followed a colloquy that pertained to the establishment of tolerances by the Secretary of Agriculture, and read as follows:

"Senator Copeland: Then it would not be merely an arbitrary establishment on the part of the Bureau of the degree of the tolerance?

"Mr. Campbell: Indeed no. Furthermore, the growers and others commercially interested would be heard.

"Senator Copeland: It would be done by scientific study and research?

"Mr. Campbell: Quite right, and I would like to say, that if there were to be an arbitrary determination which was capricious, quite naturally it could be overturned by an appeal to the court.

"Senator Copeland: Is such provision made in the bill? Is it clearly stated in the bill that there would be a possibility of such an appeal?

"Mr. Campbell: *That has not been definitely stated. That is not necessary.* Such a court review can always be had, Senator. There is no question whatever but that *the courts have the right to review every section of this law* and every regulation promulgated by the Secretary under the law. It is expected that that will be done; and if the action of the administrative agency has been found to be arbitrary, unreasonable, capricious, and not predicated upon evidence and upon facts, there is no question but what the courts will not sustain it. . . ." (Italics supplied.) Hearings Dec. 7, 8, 1933, p. 20.

This bill authorized multiple seizures. See *supra* pages 109-110 judicial review.

by Judge Clark in the trial below where he agreed with Appellee's Counsel that the words "without hearing" were "slipped" into the Federal Food, Drug and Cosmetic Act by the Conference Committee without their presence being known to most members of Congress (R. 679-680).[109] Appellants' themselves refer to these words as having been "inserted" by the Conference Report without explanation "presumably because its meaning and purpose were obvious" (p. 58). Appellee is quite well aware that this Court has only recently had occasion to reject a contention that the Congress knew not what it did and the foregoing is set forth with some little hesitation because of that fact. *Ex Parte Collett*, 337 U. S. 55, 72.

The Food, Drug and Cosmetic Act of 1938 was adopted after five years of Congressional consideration to replace the Food and Drugs Act of 1906. Senator Copeland introduced the original bill on June 12, 1933 (S. 1944, 73rd Cong. 1st Sess.). Of this Bill he later said:

> "I introduced it in June but did not read it until October . . . When I read the Bill I was shocked to think I had introduced a bill like that, giving arbitrary power to the Secretary of Agriculture."[110]

From 1933 to June, 1938 there were many varying bills introduced, many revisions and amendments were accepted or rejected, many committee and subcommittee hearings conducted, and many debates took place in the Senate and House of Representatives. This legislative history has been

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[109] R. 679-680: "What Mr. Rhyne stated the other day over in Court is perfectly correct, that this language that you rely on in that statute was slipped in there. . . . I did (not) happen to be a member of the Conferees, and I was negligent, I freely admit, that I did not notice it in the Conference report. It was slipped in the Conference report and never intended to be there, neither in the Senate nor the House."

[110] 79 Cong. Record 5024.

considered in detail by this Court in other cases so is not repeated herein.[111]

Notwithstanding intensive consideration of the various drafts of the bills during this 5-year period, not a single draft contained the words which are used chiefly as a cloak for the actions of Appellants herein, i.e., "without hearing" or the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer." There is not the slightest suggestion in the legislative history of this Act that such words were discussed prior to the report of the Conference Committee which reported the final draft of the Act.

The dates upon which the conferees were appointed, upon which the Conference Committee agreed on the final language, upon which their report was submitted, and upon which it was accepted are most revealing. On June 2 and 3, 1938, the Senate and House conferees, respectively, were appointed.[112] On June 10, 1938, the conferees agreed upon the manner in which the differences would be settled. On that same day the Senate adopted the Conference report.[113] It is reasonably certain many of the Senators, except possibly those on the Conference Committee, did not know of the existence of the new words "without hearing" in the bill as they probably did not see the text of the bill until it came out the next day in the Congressional Record as inserted (without reading it) by Senator Copeland at the time he asked for the vote approving it. On June 11, 1938, the Conference Report was submitted to the House of Representatives and on June 13, 1938, it was there accepted without any specific debate of the words "without hearing" and in a material respect misleading "to the injury or damage of the purchaser or consumer" which would have made

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[111] *United States* v. *Dotterweich*, 320 U. S. 277, 282.

[112] 83 Cong. Rec. 7955, 8169.

[113] 83 Cong. Rec. 8731.

their presence in this long and complicated Bill certain to be known to the members of that body."[114]

Thus for the first and only time, so far as Appellee's research extends, the words "without hearing" were written into a Federal statute—and with no explanation anywhere of any reason for this insertion.

It should also be observed in connection with the appearance of these words in the report of the Conference Committee that neither the Senate nor the House versions of the measure which were passed by the 75th Congress and sent to Conference, or for that matter neither the versions which were before any of the previous Congresses, contained any language which remotely approached that which appeared in the Conference report for the first time. The legislative history reveals that the major debates did not take place on the Conference report of the 75th Congress—they took place upon the other Bills introduced in the respective houses of Congress, and which, as noted above, were silent as to this phraseology.

Perhaps of equal significance with this apparent afterthought of inserting the words quoted above is the fact that when the Conference Committee's report was presented to the Congress, not the slightest effort was made by the sponsors of the bill, or the conferees themselves, to explain their inclusion to the members of the two houses either in the report or on the floor of Congress and both houses speedily accepted the report.

It cannot be said with accuracy, therefore, that Congress had lent the same painstaking and careful deliberation to the inclusion of the words "without hearing" and the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" in setting up the statutory scheme as it had to the various other aspects of the Act. Such a contention is completely rejected by the significant silence of the legislative history of the Act re-

[114] 83 Cong. Rec. 9087, 9095-9101.

specting this particular verbiage, and the circumstances which surrounded its adoption.

We have the greatest respect for the able men who make up the Congress and find it hard to believe that they intended the result revealed by Appellants' actions herein. In view of the known fact that Federal agencies have an opportunity to influence drafts in conference, it seems reasonable to conclude that the words were inserted in a belief that it would be easier to administer the Act with the words "without hearing" inserted. Surely constitutional guarantees are not to be "compromised on the footing of convenience or necessity." *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305.

19. "Nor Will We Go Upon Him, Nor Will We Send Upon Him, Unless . . . By the Law of the Land"

For more than 700 years the words quoted in the title have stood as a part of the cornerstone of the common law heritage guaranteeing free people against abuse by government officials. They come from the Magna Charta which was wrested in 1215 by a rebellious people from the tyrant King John as a bulwark against arbitrary, capricious and oppressive government. The full text bears repeating and is as follows:

> "No free man shall be taken, or imprisoned or disseized or outlawed, or exiled or in any wise destroyed; nor will we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." [114a]

Down through the years many English kings have been forced to declare their adherence to the language of this Chapter of King John's "Charter of Liberties." [115]

[114a] 17 John. 1215 C 39. Translation by Bishop Stubbs, 1 Constitutional History of England, 577.

[115] McIlwain, *Due Process of Law in Magna Charta*, (1914), 14 Col. L. Rev. 27.

It seems appropriate here where Appellants have certainly *gone upon* Appellee and have *sent upon* Appellee that we recall some of the milestones of the development of due process of law as contained in the Bill of Rights to the Federal Constitution. This brief resort to history seems most appropriate as a prelude to the inquiry whether our Constitution permits Government officials like Appellants to "go upon" and "send upon" our people in the way Appellants have gone upon and sent upon Appellee under the facts herein.

Only a few highlights can be referred to without extensive recitation. Going directly to 1610 and *Dr. Bonham's* case, 8 Coke 107(a), one finds that great jurist holding that actions of the Parliament against "human right and reason" are void.[116] Later one finds the creation of the "Star Chamber" which exercised arbitrary power authorizing shocking oppression of the people in the name of the King. In 1629 came the Petition of Right under Charles I, and in 1641 the infamous Star Chamber was abolished.[117] In 1688-1689 the English Declaration and Bill of Rights were released. In 1690 John Locke published his *Second Treatise on Civil Government* denouncing "arbitrary power" and "arbitrary decrees" by government. This book was widely read by our forefathers and his ideas played a prominent part in the formulation of our Constitutional principles.

In 1775 our great Declaration of Independence denounced 21 separate acts of arbitrary government in no uncertain terms. In 1789 our Federal Constitution went into effect

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[116] See also *Baggs* case, 11 Coke 93(b) 99(a) (1616) holding a decision depriving an alderman of the freedom of the city void under *Magna Charta* where ". . . they have proceeded against him without hearing his answer to what was objected, or that he was reasonably warned . . . such removal is against justice and right."

[117] See Plucknett, *A Concise History of the Common Law* (2d ed. 1936).

only after a definite promise was given that immediate action would be taken to guarantee our people against abusive governmental action. Distrust of excesses of governmental action were the direct cause of this promise, and without it the Constitution may not have been ratified.[118] In the First Congress Madison proposed the first 10 amendments containing our Bill of Rights and in 1791 these amendments were adopted and became effective to put into definite language this guarantee against arbitrary, capricious and oppressive action by government.

From the time of the adoption of the Constitution up until the adoption of the 14th Amendment in 1868 the due process clause of the Fifth Amendment was invoked infrequently by the courts.[119] In this Court one finds a few cases like *Bank* v. *Okely*, 4 Wheat. 235, in 1819 announcing (p. 244):

> ". . . the good sense of mankind has at length settled down to this: that (the words) 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of Government . . ."

Shortly after the 14th Amendment went into effect a veritable flood of litigation seeking to invalidate governmental action as a violation of due process of law began to reach the courts. Only a few landmarks will be cited: in 1872 in the *Slaughter House* cases *(Davidson* v. *New Orleans)* 96 U. S. 97, Bradley, J., in concurring said if gov-

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[118] Brannon, *The Fourteenth Amendment* (1901); McGehee, *Due Process of Law Under the Constitution* (1906); Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911), 24 Harv. L. Rev. 366 and 460; Corwin, *The Supreme Court and the Fourteenth Amendment* (1909), 7 Mich. L. Rev. 643.

[119] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636-637: "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government."

ernmental action is ". . . found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law' " page 107; in 1884 *Hurtado* v. *California*, 110 U. S. 516 (use of information instead of indictment). In the *Hurtado* case the Court said in part at page 531:

> "The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. 'It did not' enter the minds of the barons to provide security against their own body . . . by limiting the power of parliament. . . . Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation."

Down through the years there has been the use of the due process clause to protect substantive rights by inquiring into the reasonableness of legislative action under the "means and the end" and "real and substantial" relationship tests as applied to particular businesses, with the pendulum swinging first one way then the other.[120] *The cardinal principles guaranteeing fair treatment contained in procedural due process have, however, stood immutable.* It seems to be a fair interpretation of the more recent decisions of this Court that the emphasis is now upon procedural due process for "injustices flourish where procedural requirements are relaxed."[121] The instant case is certainly one of procedural due process.

The emphasis on procedural due process has carried over to the legislative branch of our National Government with the enactment of the Administrative Procedure Act in 1946 designed to guarantee that Governmental agencies treat

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[120] Brown, *Due Process of Law, Police Power and the Supreme Court* (1927), 40 Harv. L. Rev. 943; Warren, *The Progressiveness of the United States Supreme Court* (1913), 13 Col. L. Rev. 294; Warren, *The New Liberty Under the Fourteenth Amendment* (1926), 39 Harv. L. Rev. 431 *cf. Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220.

[121] Mr. Justice Douglas, *Procedural Safeguards in the Bill of Rights* (1948), 31 Am. Jud. Soc. J. 166-168.

our people fairly. This Court's recent decision giving a broad interpretation to that Act has certainly advised the administrative agencies that this Court will give full support to the Congressional intent. *Wong Yang Sung* v. *McGrath, supra.*

The whole world is now torn in a struggle over the principles underlying freedom of man and governmental control over man in his life, liberty and property. The latest bulwark in this development is the Human Rights Covenant where the word "arbitrarily" is used as a brake on governmental action since the term "due process of law" is not a term understood as a part of the law in other legal systems. Unfortunately the Covenant as presently proposed protects only life and liberty and omits "property"—the latter out of deference to the Soviet Government.

It is believed that Appellants' arbitrary, capricious and oppressive conduct in the instant case have offended the fundamental principles of justice thus deeply rooted in the traditions and conscience of our people. If the statutory provisions here involved are construed as authorizing such conduct it is respectfully submitted that it violates that fundamental fairness of treatment guaranteed by the due process clause.

20. In Absence of Emergency of Compelling Public Necessity Requiring Immediate Action, no Person may be Irremediably Deprived of His Property by Governmental Action Without a Hearing, If What Appellants Did is Authorized by the Statutory Words They Violate Due Process

Appellants in their brief (pp. 35-45) attempt to ascribe to the ruling of the lower court a basis which is completely unwarranted. This tactic is understandable inasmuch as they find the true basis of the ruling unassailable, a conclusion which is justified by their failure to refer to it in a single instance.

The basis of the lower court's ruling on the constitutional

issue is that where governmental action, by whatever name it is called, leads to irreparable injury, there should be an opportunity to be heard in advance of injury except where a great public necessity requires immediate action. It is this principle—as applied to the facts of this particular case—which this Honorable Court is now asked to reaffirm.

Appellants in their brief assume that Appellee's complaint is limited to the words "without hearing" rather than embracing all the conduct of Appellants herein, and then (p. 37) seek to further confuse the constitutional issue by *omitting* the first line of the Trial Court's Conclusions of Law, i. e., "The Court, upon the basis of the Findings of Fact herein, makes Conclusions of Law as follows: . . ." The conclusion that the provisions of Section 304(a) under which Appellants claim they acted is unconstitutional as in violation of the due process clause is based upon these Findings of Fact. And the position of the Trial Court simply stated is that when the words here involved are construed as authorizing what Appellants have done arbitrarily, capriciously and oppressively as set forth in the Findings of Fact herein, those words violate the due process clause.

Finding of Fact 42 of the Trial Court, *to which Appellants do not take exception in any way,* is as follows: (R. 770);

> "There was and is no emergency involving injury or damage of any kind to the public or to any purchaser, consumer or user of Nutrilite or in connection with Nutrilite and plaintiff's use of the three pamphlets which constitute defendants' sole objection to Nutrilite's sale. Defendants have not, at any time, indicated or contended that there is an emergency or situation of compelling public necessity with respect to the labeling of plaintiff's product and no such emergency or situation did, in fact, exist at or prior to any of the actions of defendants described herein."

The principle of law stated in the heading of this section is firmly established by the decisions of this Court and has been summarized as follows:

> "Where immediate action is necessary in the public interest, it is obvious that the parties cannot be heard before action is taken. When immediate action is not necessary, a hearing before action should clearly not be necessary where the action itself leads to no irreparable injury but leaves a later remedy which adequately protects all the rights of the parties. Where the initial action will itself lead to irreparable injury, there should be an opportunity to be heard in advance of action except where a great public interest requires immediate action. Otherwise, the remedy is not unlike that of a new trial in a capital case after the execution of the accused."

Dodd, Cases on Constitutional Law (1941), 894. Thus the manifest purpose of requiring a hearing "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 182.

No special exigencies exist here which require that Appellants be denied their constitutional right to a hearing before irreparable injury is inflicted by invoking the statutory *exception* under which multiple seizures were authorized by Appellants. There was and is no emergency or situation of compelling public necessity making it impossible to take the time to give Appellee a fair opportunity to present its facts to the Administrator before his decisions that the ruinous onslaught of multiple seizures is to be authorized.

Absence of any facts justifying Appellants' actions herein is most significant. For as this Court said in *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548,

> ". . . experience demonstrates that particularly in constitutional cases, issues turn upon factual presentation."

Absence of justifying facts have been found fatal to interference with freedom of speech under a guarantee of equal status to that here invoked. *Bridges* v. *California*, 314

U. S. 252, 260-263.[121a] The facts herein have been fully considered *supra* pages 8-93 and are carefully set forth in the Findings of the Trial Court (R. 756-770) so they will not be restated here. The failure to read before decision, absence of facts on injury or damage and other facts which govern this constitutional question, have all been discussed herein and that discussion will not be repeated here. See *supra* pages 46-62.

The absence of any emergency is no more clearly and positively revealed than by the record of Appellants' own conduct in this case. Seizures were made in *seven* states only, in the period from October 6, 1948, until Appellants were restrained in this action, although Appellants had the names of Appellee's distributors and could have seized the product in 5,000 different places (R. 769-770). During that period the *alleged* "danger" to the public health went completely unabated in forty-one states. Moreover, even in those districts where the product was seized, other shipments were allowed to pass into the hands of purchasers before and after each seizure. Yes, Appellants were getting ready to make more seizures (R. 412, 769-777) to keep up the "pressure" on Appellee (R. 766-767) but such planned seizures were not for the purpose of protecting the public from any danger as the pressure memorandum does not mention any danger as its motivating purpose (R. 67).

In all cases involving summary seizure of property by or under the direction of governmental officials the courts have held such action a violation of due process in the absence of an emergency of compelling public interest requiring immediate action. Illustrative of this rule among state

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[121a] If ever it is held, as Appellants seem to contend, that only the Appellants can interpret labeling and their opinions must be accepted as against the impressions of purchasers and consumers, see *supra* pages 28-30, we will have government imposed thought control which will lead to unlimited and uncontrolled censorship of free speech and press.

court decisions are: *Jenks* v. *Stump*, 41 Colo. 281, 93 P. 17; *Rowland* v. *State*, 129 Fla. 662, 176 So. 545; *Lacey* v. *Lemmons*, 22 N. M. 54, 159 P. 949; and *People* v. *Broad*, 216 Cal. 1, 12 P. (2d) 941.[122] In *Jenks* v. *Stump*, *supra*, at page 20 the Court said:

> "The distinction in all such cases seems to be whether public necessity demands summary action and, when it does not, notice must be given to the owner of the property and an opportunity be given to determine the truth of the allegations in each case, before the same is taken. . . . It does not appear from the record that any public necessity existed, nor that the public safety was in any manner conserved by taking these animals from the range or that any exigency existed which required them to be taken without notice to the owner and a hearing to determine whether or not they were abandoned or neglected, *nor does the statute purport to restrict the powers granted to cases of emergency.*" (Italics supplied.)[123]

In *Rowland* v. *State*, *supra* at page 547, the Court said:

> "We recognize the fact that the police power is a very broad one and that its exercise is necessary for the welfare of the community, but the right to exercise police power does not carry with it the unqualified right to destroy private property without due process of law. In emergencies such as those which are often caused by conflagrations, floods, windstorms, etc., it

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[122] Similar decisions are: *Randall* v. *Patch*, 118 Me. 303, 108 A. 97; *Carter* v. *Colby*, 71 N. H. 230, 51 A. 904; *City of Paducah* v. *Hook Amusement Co.*, 257 Ky. 19, 77 S. W. (2d) 383; *Loesch* v. *Koehler*, 144 Ind. 278, 41 N. E. 326; *McConnell* v. *McKillip*, 71 Neb. 712, 99 N. W. 505; *People* v. *Marquis*, 291 Ill. 121, 125 N. E. 757; *Stockton* v. *Morris*, 172 Tenn. 197, 110 S. W. (2d) 480; *Shepard* v. *Giebel*, 110 S. W. (2d) 166 (Tex.); *Edson* v. *Crangle*, 62 Ohio St. 49, 56 N. E. 647.

[123] See *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S. 196, 207-208, invalidating a statute which had "no reference to special circumstances. It is universal in terms."

may become lawful to destroy private property without notice and without hearing for the protection of the public, and in such cases the right of the individual will yield to the right and for the benefit of the public at large, but in the normal and orderly course of events this necessity does not arise, and the rights of the citizen to the acquisition and enjoyment of property must be respected at least to the extent of giving him the right to be heard before his property is taken without compensation and without a hearing before some tribunal authorized to determine the necessity thereof."

In *People* v. *Broad*, *supra* at page 943, the Court said:

"The rule is well settled that to constitute due process of law in regard to the taking of property the statute *should give the parties interested some adequate remedy for the vindication of their rights;* and while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action—instances of this being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use—nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded an opportunity to be heard." (Italics supplied.)

In the instant case where *no* emergency or situation of compelling necessity exists or has ever existed [124] and where no facts whatever revealing complaints, injury [125] or damage are known to Appellants (with the only facts in Appellants' files to the exact contrary), [126] a situation of compel-

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[124] *Cf.* the dissent of Mr. Justice Holmes concurred in by Mr. Justice Brandeis in *Leach* v. *Carlile*, 258 U. S. 138, 140.

[125] Findings 17, 29, 30, 35, R. 761, 765, 767.

[126] *Supra* page 28.

ling public interest necessitating immediate action before hearing is *not* shown. The claim that the Appellants' action must be accepted as conclusive proof of its own necessity, and must be accepted as in itself due process of law, has no support in the decisions of this Court. *Sterling* v. *Constantin*, 287 U. S. 378, 400.

It is Appellee's position that under the shocking facts of this case due process of law was not accorded to it and if it is found that the unusual provision herein attacked really authorized Appellants to do what they have done, Appellee submits that there is no other possible conclusion than that these few quoted statutory words *as applied to Appellee under the facts in this case*, violate the due process required by the Fifth Amendment for the taking of property by governmental action.

The constitutionality of this unusual use of multiple seizures has never been before this Court. The only Appellate Court to consider this type of action held that multiple seizures under much milder facts violated due process of law requirements. *National Remedy Co.* v. *Hyde*, 50 Fed. (2d) 1066 (D. C. App.).

These cases certainly adhere to the fundamental premise that in the absence of an emergency, a hearing before harm is essential to due process.

Appellants say (p. 38) their decisions are "merely the prerequisite to the bringing of a lawsuit." That statement is erroneous because they can bring one "lawsuit" without any such decision. It is only when they want to make multiple seizures after the *first* lawsuit that the decision is required. Appellants say that their seizures are via court process so are not summary in character. Such an argument substitutes fiction for fact. We ask the Court to pierce the veil of such fiction, as it has in so many other instances, and protect us from these seizures which are in fact summary. The cases are filed and seizure immediately takes place—the courts where the papers are filed make no

preliminary investigation to determine whether the suits are justified—5,000 suits could be filed in one day and no court on its own motion would do anything to stop them.

All of Appellants' argument about the decisions being mere recommendations (p. 47) is also an attempt to substitute fiction for fact. The Record shows they send the libel papers directly to the United States District Attorneys with a letter saying, "immediate seizure is requested" (R. 273, 413). The District Attorney does not have to write up anything, just file the papers and the seizure takes place as requested, "immediately." Judicial process is summary process under these circumstances where Appellants use such judicial process *ex parte* to punish us knowing full well only one of the many cases will be tried. In his dissenting opinion in *Springer* v. *Philippine Islands*, 277 U. S. 189, 211, Mr. Justice Holmes said "legislative and executive action" cannot be distinguished "with mathematical precision and divide the branches into watertight compartments." The same rule applies here. Appellee is protected under the Fifth Amendment from the unfair (and they say unstoppable) use of court process made here by Appellants. Appellants grand jury analogy is equally inapplicable, see *supra* page 74.

Appellants rely upon *Bowles* v. *Willingham*, 321 U. S. 503, where regulations and orders fixing rents were upheld although the statute provided that the rents were to go into effect at once and a hearing was to be given later. The Court stated at page 521 that this was "all that due process under the war emergency requires."

In the case of *Yakus* v. *United States*, 321 U. S. 414, also relied upon by Appellants, the Court in upholding emergency price controls and the denial of interlocutory relief pending a final decision on validity of the statute and regulations adopted thereunder said (P. 442):

> "our decisions leave no doubt that when justified by compelling public interest the legislature may author-

ize summary action subject to later judicial review of its validity . . ."

In both cases the Court *stresses the war emergency and compelling public interest again and again* a. he statutory requirements of expeditious handling of protests with specified time limits and a special emergency court doing nothing else but considering appeals. In the *Bowles* case at page 520 the Court said:

> ". . . Congress was dealing with the exigencies of wartime conditions and insistent demands of inflation control."

Also, in those cases the injury was really small (cf. *Lawton* v. *Steele*, 152 U. S. 133, 141) and had no lasting effects as compared with the stigmatizing publicity actions of Appellants on Appellee herein. In those cases no one person was singled out for "special" punishment in the way Appellee was in the instant case. A national war emergency affecting the whole Nation was involved. This is not true in the instant case as a narrow issue based on unique facts is involved.

Appellants cite *Phillips* v. *Commissioner*, 283 U. S. 589, as supporting non-emergency summary action by Government. In that case the particular taxpayers had a remedy which would give them a hearing before their property was taken and Mr. Justice Brandeis pointed out "this remedy may be had before payment, without giving bond" and that even on appeal "assessment and collection meanwhile may be stayed by giving bond to secure payment." Is it any wonder that the Court held (p. 599):

> "These provisions amply protect the transferee against improper administrative action."

Also, summary power to collect monies and taxes due to Government is one of the oldest rights of all governments —essential to their existence—and never thought to be

within due process proscriptions. *Cf. Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. In the instant case there is no way Appellee can give bond to stop the multiple seizures and Appellee's property is taken immediately as no District Court has authority to refuse the use of its process to Appellants in making the seizures. The *Phillips* decision does contain a statement much relied upon by Appellants which is as follows (pp. 596-597):

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process *if the opportunity given for the ultimate judicial determination of the liability is adequate.*" (Italics supplied.)

Appellants emphasize the first part of the sentence *only* but Mr. Justice Brandeis certainly intended both parts as the complete rule of law he was stating. In Appellee's case more than the value of the product actually seized is involved, Appellee's reputation, good will, and the reputation and good will of its product have received terrific irreparable injury from the punishing publicity of the carefully planned strategy of Appellants in making seizures in far flung places throughout the Nation. The trial in libel courts, as is discussed *supra* pages 93-105, is not an adequate remedy so the *Phillips* decision is not helpful to Appellants in defending against their arbitrary, oppressive and capricious action in this case.

The *Phillips* case cites and relies upon *Murray's Lessee* v. *Hoboken Land and Improvement Co., supra,* where the peculiar relationship of a Collector of Internal Revenue to his government was held to authorize the taking over of certain property of a collector delinquent in his accounts. In the *Hoboken* case, however, it is pointed out that under the remedies available to the collector a hearing could be had before the actual taking of the property in question. Mr. Justice Brandeis in the *Phillips* case says of the *Hoboken* case, "the underlying principle of that case was . . .

the need of the government promptly to secure its revenues" (p. 596).

The twelve cases cited by Appellant at the bottom of page 40 of its brief uniformly involve facts showing that the complaining party *in every instance* had an opportunity for a hearing before harm could come to him in any way. Those cases are not in point with the facts of the instant case for in those cases as in the rent, price, contract renegotiation and tax cases cited by Appellants there was a later hearing on the *very issue preliminarily determined.* Here there is never a hearing under the statute, if the court construes Appellants' actions as authorized thereby and adopts Appellant's construction thereof, on whether the Appellee's labeling was "in a material respect" misleading to the "injury or damage of the purchaser or consumer"—the issue in the 6 decisions authorizing multiple seizures. The later hearing Appellants want us to have under the Act in the libel courts would never involve an inquiry into Appellants' arbitrary, capricious and oppressive conduct in authorizing and using multiple seizures herein. The issue in the libel courts is solely whether our labeling is "misleading in any particular" (Sec. 301 of Act). On the issues before Appellants in making their six decisions authorizing multiple seizures, Appellants say no hearing can ever be held. Their conduct—they say—is beyond inquiry. But their cited cases do not hold this.

The interesting thing about Appellants' brief is its careful avoidance of a discussion of cases where this Court has considered due process and summary action under the police power. In *North American Cold Storage Company* v. *City of Chicago,* 211 U. S. 306 (cited only in a quotation from another case, p. 44, Appellants' brief), summary seizure of allegedly putrid, decayed, poisonous and infected poultry was sustained. The Court said at page 315:

> "We are of the opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for

use, is not necessary. The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten."

The Court concluded at page 320:

"As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food . . . without a preliminary hearing."

Appellee of course has no such remedy of subsequent action for damages and advertising pamphlets used in the sale of 40% of Appellee's product (Finding 3, R. 757; Finding 42, R. 770) rather than putrid chickens are the subject matter of the instant case. The *Chicago* case offers no comfort to Appellants.

In the case of *Lawton* v. *Steele, supra,* the Court in a 6-3 decision sustained denial of recovery for the value of fish nets summarily destroyed *while admittedly being used in violation of a New York Statute.* The court based its decision upon the ground that the fish nets in question were "of trifling value" and said at p. 141 that the constitutional due process provisions "are intended for the protection of substantial rights of property." In his dissent Mr. Chief Justice Fuller in an opinion concurred in by Justices Field and Brewer said in part at page 144:

"The police power rests, upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of

law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard."

In *Sentell* v. *New Orleans & Carrollton Railroad Co.*, 166 U. S. 698, in sustaining an ordinance declaring dogs are not property, the Court said in part at page 705:

> "So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

The summary seizure decisions of this Court have therefore stated that in the absence of an emergency or a situation of compelling public necessity the due process clause requires a hearing before harm by governmental action.

In considering due process in non-emergency cases, and the instant case is certainly not an emergency case, this Court has laid down fundamental principles of procedural fairness which this statute violates if it authorizes Appellants actions herein. In *Turner* v. *Wade*, 254 U. S. 64 a Georgia statute allowed *ex parte* assessment of property. An appeal to a board of arbitration was allowed with one arbitrator to be appointed by the taxpayer, one by the Assessment Board and a third by the two so selected. If a majority of the arbitrators did not agree on a new assessment in ten days the assessment was to stand. The arbitrators agreed the assessment was excessive but could not agree upon a new assessment before the ten days expired. In holding the Act invalid because of this abortive inadequate remedy the Court said at page 70:

> ". . . we are forced to the conclusion that reading the provisions together, being parts of one and the same act, they clearly show that the Board of Assessors was not required to give any notice to the taxpayer, nor was the opportunity given him to be heard as of right before the assessment was finally made against him.

> But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.
>
> . . . it follows that the assessment of the Board of Assessors ought to have been enjoined, because § 6 of the act, as construed and applied in this case, denies to the complaining taxpayer due process of law."

The hearing must always be held in time to be effective and it is a violation of due process if there is not an effective stay to prevent irreparable injury until the final decision. In the instant case it is obvious that unless a court can stop Appellants they are unstoppable as the statute provides no stay of further multiple seizures and the statutory remedy in the libel courts is clearly inadequate. (See *supra* pages 93-105.)

In *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, a statute of Virginia authorized the *state highway commissioner* to require railroad companies to eliminate grade crossings and to substitute overhead crossings when "in his opinion" this was deemed necessary for the public safety and convenience. No notice or hearing on the existence of such necessity and no means of reviewing the officer's decision was set up in the statute. The Court held the statute unconstitutional as violative of the due process of law clause of the 14th Amendment, saying (p. 195):

> ". . . it (the statute) attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure."

See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134

U. S. 418; *Central of Georgia Railway Co.* v. *Wright*, 207 U. S. 127; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; and *Londoner* v. *Denver*, 210 U. S. 373.

The one overwhelming conclusion from all of the cases decided by this Court is that due process varies according to the factual situation before a governmental official—does he have a tax, an immigration, or an emergency public health situation requiring him to act? That is why it is all important that the facts surrounding a constitutional due process issue such as the one presented by this case be fully developed by evidence so that the Court can act in an informed manner.[127]

It is a fair conclusion from the decisions of this Court above cited that in the absence of an emergency of compelling public necessity a hearing before harm is essential to due process. Under the facts of the instant case no emergency of that character exists so if the acts of Appellants are in fact authorized by the words here attacked, those words violate that due process of law guaranteed by the due process clause of the Fifth Amendment.

Also, aside from the absence of an emergency, the decisions of this Court have never held that the arbitrary, capricious and oppressive conduct herein found to have been done by Appellants is due process of law.[128]

21. Errors Claimed by Appellants on Conduct of Trial, Admission of Evidence and Requiring Production of Documents, if Any, Do Not Warrant Reversal

They who denied us any hearing in most arbitrary fashion, now say that the Trial Court which gave them most of its time for nearly two weeks did not give them a fair hearing because of certain rulings, none of which affected the

[127] See cases cited *supra* note 5.

[128] We have not repeated herein the discussion *supra* pages 46-62, 81-93 on Appellants actions as a violation of due process, aside from the emergency.

ultimate result in this case. Appellee respectfully submits that an examination of the record herein reveals that error, if any, committed by the Court below was harmless and not such that the substantial rights of Appellants were prejudiced.

Much is sought to be made of the exercise of the discretion of the Court below in limiting the cross-examination of Dr. John A. Myers. On the contrary the record reveals that Appellants' cross-examination of Dr. John A. Myers was not limited until he had been under cross-examination for over five hours (his direct examination took about 50 minutes). During this time, counsel for Appellants not only covered the entire scope of Dr. Myers' direct examination but insisted upon going far-afield (see Record 92-183) and indulging in highly repetitious questioning, despite repeated warnings from the Court. It is evident in the record that the main purpose of the cross-examination was not only to exhaust a witness of unimpeachable professional standing but also to exhaust the patience of the Trial Court. The limitation of the cross-examination was within the sound discretion of the trial court and merits scant attention here. See *Glasser* v. *United States*, 315 U. S. 60, 83. Appellee would like to point out, however, that Appellants misstate the entire testimony of Dr. Myers. Dr. Myers did *not* testify that deficiency diseases did not cause death in the 40's and 50's. On the contrary, Dr. Myers testified that vitamin and mineral deficiencies were serious in the 40's and 50's and were responsible for cardiac collapse and sudden death (R. 133-134). The whole import of Dr. Myers' testimony was the need of an adequate supply of vitamins and minerals in order for the proper functioning of the body and to avoid the serious and widespread conditions which may follow deficiencies (R. 72-91). All the cross examination on all the "common diseases" and "common illnesses" and cures therefor referred to by Appellants had nothing to do with the pamphlets as

Dr. Myers said, in line with all the other credible testimony in the case, that Nutrilite is not represented in the pamphlets as a "cure" for any disease (R. 87).

Appellants' contentions regarding the limitation of cross-examination of Casselberry are also without merit. At no stage in his testimony did Casselberry testify that the booklets were not misleading. The quote given by Appellants on page 101 is erroneous as by now the Court can see so many of their references are. His only testimony as to the character of the booklets was to the effect that there is nothing in the booklet now used which he believed to be untrue (R. 51-52). For that matter no reason exists why he could not have given his opinion for what it is worth on whether the pamphlets were misleading. There can be no doubt what his opinion would be if given. He is a very well educated man (R. 32). And none of Appellants who gave such opinions are any better qualified than he to give such an opinion.

As for Appellants' so-called "offer of proof" it is evident from the remarks of the Court below and referred to by Appellants that the offer contained 77 questions. None of the questions said anything about the answer expected, and since the questions were to Appellee's President it can hardly be expected that the answers would be favorable to Appellants. In *Origet* v. *Hedden*, 185 U. S. 228, 235, the Court rejected a similar claim of error where there was "no explanation in the record as to what evidence plaintiff (Appellants) sought to elicit. No offer of proof was made, nor did the questions clearly admit of an answer favorable to plaintiff (Appellant) . . ." Also, the questions did not contain in most instances the type of question to which objections had been sustained previously, as the Court points out (R. 520-528). This was presented on the very eve of the close of the trial and a *week* after Counsel for Appellants had advised the court that he would embody the questions he proposed in an offer of proof. Needless to say, the offer

contained questions which were not of the type previously ruled upon by the Court below and represented questions that could have been asked Casselberry while he was on the stand. For the most part such offer was a collection of afterthoughts. It should be noted also that Appellants failed to make this offer of proof part of the record as they could have easily done by having it marked as an exhibit. Not being part of the record, it should not be considered on this appeal. *Cf. Palmer* v. *Hoffman*, 318 U. S. 109, 116.

Also, as Appellant's brief recognizes, the record clearly shows that all the Court ruled against was argumentative questions (R. 229-230, 232, which are not allowed in any Court. The "offer of Proof" was Appellants' Counsel's *own idea* (R. 232) not that of the Court, and the Court did *not* suggest it be in the form of questions without stating the answers Appellents expected to get. Yet, that is exactly what Appellant's offered (R. 520-528). The record shows that Appellants cross-examined Casselberry at great length (R. 183-222, 225-246) and said "no further questions" and does *not* show Casselberry was present when Appellants asked for permission to recall him to the stand for further cross-examination.

Appellants urge as error (p. 108 Brief) the action of "the court" in denying their motion to quash subpoenas *duces tecum*. Although Appellee believes no error was committed below in regard to the denial of the motion to quash, it believes an answer to Appellants' argument to be unnecessary in view of the fact that the motion was heard and denied by a single judge and at no time did Appellants seek to have his action reviewed by the full court. Section 2284, Title 28, USC which sets forth the composition and procedure before a special three-judge district court specifically provides in subsection 4:

> "The action of a single judge shall be reviewable by the full court at any time before final hearing."

Appellants failure to seek review of such order, if they deemed themselves prejudiced thereby, precludes their reliance upon it here. In no sense should denial of Appellant's motion to quash be considered action by the full Court. *Cf. Tapliff* v. *Tapliff*, 145 U. S. 156.

The refusal to quash subpoenas requiring Appellants to testify (see p. 108-109 of Appellant's brief) is of like status. They did not appeal the single judge's ruling to the full Court. Also, in reading in Kingsley's deposition which is the only place such an objection appears in the record, Appellant's expressly and specifically waived this and all the other objections they made of this character (R. 506-508). They can hardly rely now upon objections thus expressly waived.

In reply to the assigned error as to the rejection by the court below of Defendants' Exhibit 26 (Brief p. 103), Appellee submits that the offered evidence was totally irrelevant and immaterial to the issues involved. Appellee does not claim or assert that vitamin and mineral deficiencies *as such* are primary causes of death in any group. Appellee does contend, however, as supported by the medical testimony below, that vitamin and mineral deficiencies are significant in the incidence of diseases since those who receive sufficient vitamins and minerals are naturally better able to resist sickness (R. 133-134, 137-139, 362). Defendants' Exhibit 26 was further objectionable on the ground that it was hearsay. While there may not have been any reason for those who compiled the publication to falsify, the death reports themselves do not seem to have any special guaranty of reliability to take a compilation of the same out of the hearsay rule. It is obvious that in many instances those reporting the causes of death are incompetent from a professional viewpoint to diagnose the same and they merely follow a questionable form in listing causes (R. 139, 141). In other instances, there may well have been reason to falsify. Appellants offered no evidence to con-

tradict Dr. Myers' testimony that death report forms from which Exhibit No. 26 was compiled are not a reliable source on causes of death (R. 139-141). The offered exhibit was also merely cumulative and error, if any, in rejecting the same was not prejudicial. (See Defendants' Exhibit 25, R. 1543-1561, 529).

Appellants also assign as error (p. 104) the rejection of a medical publication entitled "Deficiency Diseases in the Cincinnati Hospital—A Ten Year Study" offered through its author, M. A. Blankenhorn (R. 425). It should be pointed out that this article was offered for the *truth* of its contents (R. 426). Yet the author testified that the report was not based on his personal investigations or knowledge (R. 425, 428). Appellants' objection to the same as hearsay was thus properly sustained (R. 425-426). Furthermore, it should be pointed out that Blankenhorn subsequently testified to the results which were the basis for the offered study (R. 428-429). Thus, the exclusion, even if erroneous, should not be grounds for reversal where the contents of such evidence are proved by other testimony. *Matheson* v. *United States*, 227 U. S. 540; *Drumm-Flato Commission* v. *Edmisson*, 208 U. S. 534. Appellant's claim this ruling is inconsistent with the admission "not to show the truth of it but to show our entire good faith in that our pamphlets and these books say the same thing" of Appellee's Exhibit No. 6 (R. 957-979, 50). Exhibit 6 contains statements by the experts in the field of vitamins and minerals on some of which Appellee relied in writing its pamphlets (R. 217) and unlike Defendants' exhibit it was not offered to prove the truth of facts but only on the issue of good faith to show the existence of such literature.

Appellants also seek reversal on the basis of certain evidence offered by Appellee and admitted by the Court. In one instance referred to on page 102-103 the Appellants' statement contains its own death knell because the objection was one that could obviously have been corrected if the

objection had been made when the deposition was taken.[129] Obviously Appellants are again misstating the Record because at pages 259 and 260 the Court three times sustained objections made by Appellants during the reading in Court of the very deposition to which objections had not been made when the deposition was given. The Appellant's claim of error (pp. 105, 106) in receiving opinions on the impression of the booklet on the consuming public is without merit. Dr. Myers testified only as to his impression as a medical doctor (R. 85). Lee J. Myers testified only as to his legal opinion (R. 528). Crawford most certainly was allowed to put into evidence his opinion that the pamphlet is or would be misleading in a material respect to the injury or damage of the purchaser or consumer (R. 333). The Court would not let him give medical opinions or symptoms as he is not a doctor, but that is all he was stopped from doing (R. 382-383).

The other assignments of error are so lacking in merit on the Record herein and so obviously a misstatement of the Record as not to warrant discussion.

Appellee submits that in view of the fact that this case was tried by a court and not by a jury, the strict rules regarding prejudicial evidence are not applicable. This Court has often stressed that where a district court decides both the facts and the law, the admission of improper evidence is not ground for reversal where there is sufficient other evidence upon which to base the decision. *Field* v. *United States,* 34 U. S. 182 and *Mammouth Mining Co.* v. *Salt Lake Foundry & Machine Co.,* 151 U. S. 447.

Appellants, throughout their discussion of the alleged errors committed below, have not carried the burden of showing that prejudice resulted or that the substantial rights of Appellants were affected—even if it be assumed

[129] Appellant's failure in this regard is important since such objections could have been obviated during the course of the deposition. See Rule 32(c)(1) of the Federal Rules of Civil Procedure.

that the rulings were erroneous. At most the errors, if any, were "harmless" and not grounds for reversal. 40 Stat. 1181, c. 48, 28 U.S.C. § 391 and *Palmer* v. *Hoffman, supra,* at page 116.

As noted by this Court in *Glasser* v. *United States, supra,* this Court should guard against magnification of events and occurrences which were of little importance in the actual setting of the trial below.

22. Conclusion

For the above reasons the judgment below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL.,

Appellants,

vs.

MYTINGER & CASSELBERRY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF APPELLEE ON APPELLANTS' JURISDICTIONAL STATEMENT

CHARLES S. RHYNE,
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Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY,

Plaintiff,

vs.

OSCAR R. EWING, ET AL.,

Defendants

STATEMENT OF APPELLEE ON APPELLANTS' JURISDICTIONAL STATEMENT

While Appellee has no desire to oppose jurisdiction herein, it believes the Court's attention should be specifically called to the existence of inaccurate factual statements by the Appellants in their "Statement as to Jurisdiction". These inaccuracies are revealed by the Special Three-Judge Court's comprehensive "Findings of Fact" and the record herein. Appellee assumes that the proper place to detail these inaccuracies will be in its brief if the Court takes jurisdiction herein, but did not want this Honorable Court to conclude that it concurred in Appellant's statements by silence at this time.

Certain references to the Decision of the Special Three-Judge Court are also inaccurate and highly prejudicial in that they attempt to inject public health considerations

which are non-existent in this case. For example, on page 2 of their Statement, in quoting Section 304(a) of the Food, Drug and Cosmetic Act, the Appellants say the principal questions presented include constitutionality of certain quoted language. In this language they include provisions relating to the right to make multiple seizures of articles "dangerous to health" and those having "fraudulent" labeling. On page 9 Appellants refer to "dangerous articles", "fraudulent articles" and "seriously misleading articles" and on page 13 Appellants refer to "dangerous product", "fraudulent product" or a "materially misleading product" evidently hoping the Court will conclude that this case involves such facts. By their answer to Paragraph 17 of the Complaint Appellants specifically admitted that:

> ". . . Nutrilite Food Supplement is not dangerous to health and that the labeling and advertising thereof is not and never has been fraudulent . . . ."

The only part of the statute invalidated as applied to Appellee under the facts herein is the specific statutory *exception* to the statutory prohibition against more than one seizure, which exception allows more than one seizure in those cases where the Administrator determines that he has probable cause to believe that "labeling" is misleading to the injury or damage of the purchaser or consumer. The decision in this case does not involve the power of Appellants to make *unlimited* seizures of "dangerous products" or articles, or *unlimited* seizures of "fraudulent products" or articles with "fraudulent" labeling as no such facts are involved.

The disproved "misleading" charge related solely to Appellee's advertising pamphlet, and not to the "article" or "product".

Appellants suggest summary disposition rather than full consideration of their appeal. This suggestion is made in an evident hope of preventing this Honorable Court from fully appreciating and inquiring into the shocking actions of Appellants as revealed by the record herein which so amply supports the Court's Findings. It is believed that this is a case where the whole truth should be brought before the Court by proper briefs and argument. The argument before this Honorable Court on May 16, 1949, related to the right of the trial court to receive evidence on the merits and did not relate to the merits of either the issue on arbitrary, capricious and oppressive conduct of Appellants or the issue on constitutionality of the invalidated provisions as applied to Appellees. The facts were not before the Court, and this Court allowed a trial so that the facts could be fully developed. Now the facts have been fully proved and these issues can for the first time be presented in briefs and arguments. Actually, Appellants have no merit in their contentions, and that is the reason they again seek to avoid a full exploration of the merits by this Court.

Respectfully submitted,

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January 21, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, Federal Security Administrator, ET AL.,
Appellants-Respondents,

v.

MYTINGER & CASSELBERRY, INC.,
Appellee-Petitioner

PETITION FOR REHEARING.

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Appellee-Petitioner

PETITION FOR REHEARING.

Now comes Mytinger and Casselberry, Inc., and prays that this Honorable Court grant it a rehearing in the above entitled case for the following reasons:

1. Under the Majority Opinion Discretion May Be Abused With Impunity; the Act May Be Enforced With Caprice; a Lawful Business May Be Arbitrarily Destroyed; and a Court of Equity Is Prohibited From Preventing the Wrong.

The Majority Opinion vests final responsibility for multiple seizures under the Food, Drug and Cosmetic Act in the Attorney General of the United States. It holds such seizures can be made in his "discretion" and recognizes that this discretion "may be abused." This "discretion" is found in the general powers of the Attorney General to in-

stitute litigation in the name of the United States and is not found in the Food, Drug and Cosmetic Act. The Opinion refers to the statutory "prerequisite" which Congress has prescribed for the filing of multiple seizure actions but holds in effect that a Court of equity cannot stop the Attorney General and his co-respondents from violating this Congressional mandate no matter how grossly he abuses his "discretion" thus conferred and thus supposedly limited by the Congress. These unusual statutory provisions and the unique facts herein sets this case apart from all others, but the majority of the Court gives no consideration to these factors or to the consequences of its decision in placing in the hands of Respondents an uncontrollable destructive power unparalleled in the history of this Nation.

The Opinion stops short of considering the Findings of Fact of the Court below that the Attorney General has inflicted and threatens further irreparable injury upon Petitioner by arbitrary, capricious, oppressive and unlawful action. The lower Court found that the Attorney General and his co-respondents filed seizure actions in a carefully calculated nation-wide plan for punishment purposes (R. 763-764, 768-769) and that they threaten further punishment through seizures designed to destroy Petitioner's "business prior to any possible adjudication of the disputed issues. . . in any of the libel actions." (R. 769-770). The Opinion does not disagree with said Findings of Fact but holds the lower Court without power to lend its aid to rectify or prevent the wrong.

It is most respectfully urged that the Attorney General cannot usurp power to inflict irreparable injury through a gross abuse of his general discretion in the unusual statutory and factual circumstances of this case. In all the annals of Government there has never been carried out such a shocking contempt for all fundamental principles of fairness as is revealed in the record and findings herein. It is submitted that the Respondents do not have unstoppable power to inflict irreparable injury and damage and that a

Court of equity can use its inherent powers to fashion a remedy[1] which will protect against the administrative tyranny found by the Trial Court in this unusual case.

Even Counsel for the Attorney General believed that the Trial Court possessed the necessary power to prevent irreparable injury from arbitrary action for he repeatedly advised that Court that "... if the Defendants did act unreasonably and arbitrarily, they should be enjoined, we admit that ..." (R. 292) "The Court must then decide ... whether these defendants acted so arbitrarily, so capriciously, so whimsically, that a rational person just couldn't have reached that conclusion. That is the issue in this case." (R. 555) "The whole case is based upon the proposition, outside of constitutionality, that in doing what he did this defendant and the other defendants acted arbitrarily and illegally." (R. 382) There are other such statements by Counsel for the Attorney General in the Record. (R. 7, 9, 10, 26, 27, 90, 122, 123, 268, 294, 295).

Respondents in their Briefs below and in this Honorable Court contended that the District Court had no jurisdiction to review the determinations of probable cause herein and no jurisdiction to determine whether Petitioner's labeling is misleading—but never in their briefs do Respondents change their position on jurisdiction of the District Court to stop irreparable injury from arbitrary abuse of discretion. They apparently agree that there is a distinction between a statutory review and the traditional powers of a

[1] As Mr. Justice Douglas recently said for this Court: "We are dealing here with the requirements of equity practice with a background of several hundred years of history ... The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Hecht Company* v. *Bowles*, 321 U. S. 321, 329-330.

Court of equity to grant relief against irreparable injury when arbitrary action is fully proved.

True it is that in his reply argument in this Court, Counsel for the Attorney General in response to a question from the Court reluctantly—very reluctantly—took the position that no matter how arbitrary Respondents were they could not be stopped by any Court. This reluctance shows how abhorrent and unpalatable it is for any lawyer trained in the fundamental principles of fairness inherent in our Bill of Rights to take such a distasteful position.

Even the Congress, when considering the Act involved here, was of opinion that injury from arbitrary action could always be prevented by a Court of equity because in eliminating judicial review of any "act of the Secretary" of Agriculture, (the then chief enforcing officer of the statute) which was "unreasonable, arbitrary, or capricious", the Congressional Committee considering the legislation which became the Act here in question specifically pointed to the "ordinary principle" that this provision was unnecessary because "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority . . ." (House Rept. 2755, 74th Cong. 2nd Sess.).

Obviously the lower Court considered that its traditional equity powers were adequate to prevent arbitrary injury by the Attorney General and his co-respondents, that use of such powers had not been denied by the Congress in such cases, and further that the Administrative Procedure Act[2] removed all possible jurisdictional gaps in enabling the courts to prevent the threatened irreparable injury from the gross abuse of discretion such as found herein.

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[2] 60 Stat. 237; 5 U. S. C. § 1001 *et seq.*; § 1009(e) specifically confers jurisdiction on district courts to prevent injury from "abuse of discretion". It is popular among all Federal agencies to contend this Act does not apply to them but it would be shocking that an Attorney General would claim authority to inflict irreparable injury by arbitrary abuse of discretion and unbelievable that the Congress would not have intended to confer power to give relief when facts such as those found herein are proved by evidence which was largely undisputed.

Under the findings of fact in this case, it is no answer to say that it must be assumed that the administrative officials will act within the proper bounds of discretion. Those Findings, unquestioned by the Majority Opinion, disclose that Respondents have acted arbitrarily and capriciously and not as reasonable men nor as reasonable public officials. While the Majority Opinion authorizes a review of the Administrator's probable cause determinations in the libel courts, it offers no forum in which the Attorney General can be challenged. There should be some Court where even the Attorney General can be stopped from such outrageous abuse and usurpation of power as found herein. The Majority Opinion fails to distinguish review of administrative action provided by statute from the inherent power of courts of equity to inquire into and enjoin unlawful administrative conduct resulting in irreparable injury and multiplicity of unnecessary litigation—a power the existence of which the Congress considered so fundamental that it did not consider it necessary to expressly include such jurisdiction in the Act.

The record shows the Attorney General has been an active participant herein from the beginning of the multiple seizures, so he is, as the final authority, responsible for all the arbitrary actions found by the Trial Court.[3]

An opportunity is now most respectfully requested to present a brief and argument in support of the position that under the unique statutory prerequisites and facts of this case the trial Court was not powerless to aid a party

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[3] The Majority Opinion refers to the requirements which are made specific statutory conditions precedent to the action of the Attorney General when he exercises his "discretion". These are not conditions precedent to the filing of ordinary lawsuits, but Congress prescribed them here because of the disastrous effect of multiple seizures in this field. The Congress in years of debate chiefly about these multiple seizure provisions recognized that multiple seizures are not ordinary lawsuits. The materials before the Attorney General and the discretion he exercises in making his decision to institute multiple seizures are all different from those involved in an ordinary lawsuit filed by the Attorney General under his ordinary discretion. See point 3 *infra*, pp. 8-9.

who has been and is threatened with irreparable injury and damage by arbitrary and capricious action constituting a gross abuse of discretion by the Attorney General of the United States.

2. There is No Review of Probable Cause Determinations by Libel Courts.

It is clear that this Court is of the opinion that Petitioner will eventually be afforded that full and requisite hearing which due process demands for the Majority Opinion states in part:

> "This highly selective manner in which Congress has provided for judicial review reinforces the inference that the only review of the issue of probable cause which Congress granted was the one provided in the libel suit."

But can a review of the issue of probable cause be had in the libel suit? Under the statutory scheme the *sole* issue involved in the libel suit is as to whether Petitioner's labeling is "misleading in any particular." [§ 502(a)]. There is no issue as to whether Petitioner's labeling is *materially* misleading *to the injury or damage of the purchaser or consumer* as determined *ex parte* by Respondents so that multiple seizures can be made, or whether Respondents were not justified in making multiple seizures because arbitrary and capricious in making their *ex parte* determinations or in the manner and number of seizures made. Is there a marked difference between these two issues? Congress itself has given us the answer to this question. A single libel suit is authorized to be brought where the labeling of a product is *misleading in any particular*. But the *sine qua non* of multiple libels is that the Administrator must first determine from "facts found" that the labeling of the product is *misleading in a material respect to the injury or damage of the purchaser or con-*

sumer.[4] Multiple libels are prohibited unless and until this latter condition is met. Congress, recognizing the disastrous effect which multiple libels, as opposed to a single libel, will have upon a business, has thereby intended to make it more difficult for Respondents to institute multiple libels than to institute a single libel. An administrative determination is found to be required as a "necessary prerequisite to multiple seizures." (p. 4 slip opinion).

This Court seems to be of the belief that the question as to whether that prerequisite condition has been arbitrarily determined through an abuse of discretion and whether the seizures were made in such a manner and number as to constitute arbitrary destruction is an issue in a subsequent libel suit. How could the libel court determine whether or not Respondents made their determinations of probable cause in an arbitrary manner and instituted multiple suits through a clear abuse of discretion when Respondents are not nor could they be made parties to the libel suit? Not only are the United States and Petitioner's product the only parties to the libel actions but the Respondents are beyond the reach of the process of any of the libel courts.

To show in the libel action that the probable cause decision emanates from arbitrary, capricious, unlawful and oppressive actions may well aid in convincing a libel court and jury that the Government's attack on the labeling is entirely without foundation, but the libel court in all jurisdictions outside of the District of Columbia will be powerless to grant equitable relief to prevent irreparable injury from such usurpation of power by joining the Respondents as parties. By making no seizures in this District Respondents foreclose all possible remedy.

An ineffective hearing is no hearing at all. A statutory review which provides no adequate remedy is no review. An ultimate victory in the libel courts under the unusual

[4] The claim in the libel papers in the cases filed against Petitioner is that Petitioner's labeling is misleading, *not* that it is misleading to the injury or damage of the purchaser or consumer.

facts of this case would indeed be a hollow triumph as Petitioner's business will have been arbitrarily destroyed before such a case can be tried. In the past equity has always been allowed to furnish a remedy to meet such a situation but in the majority opinion this traditional jurisdiction is denied. It is respectfully submitted that the statute thus interpreted violates the Due Process clause.

3. Seizure Actions Erroneously Treated as Ordinary Lawsuits.

That this is not an ordinary case can hardly be disputed. The conduct of Respondents found to be arbitrary, capricious and oppressive herein is not believed to be the way most Federal officials treat those subject to their statutory powers. In analyzing the effect of multiple seizure actions, the Majority Opinion has erroneously drawn a comparison with and applied principles applicable to the institution of ordinary judicial proceedings. As already stated herein, the statute here is unique in its prescribed conditions precedent to multiple seizures. Baseless multiple seizures by their very nature are not akin to an ordinary judicial proceeding. This fact is well-established in this case (Fdg. 39, R. 769) and by the Congressional history where in years of heated debate over the multiple seizure provisions the Congress repeatedly so stated.[5] Here the impact upon Petitioner's business is final and irrevocable long before any possible trial on the merits. True, the institution of other proceedings may have serious impact. Multiple seizures on a nationwide basis, however, are not only serious in impact but actually sound the "death knell" of a business engaged in the food supplement field because of the unusual public reaction to governmental action. This is particularly so here where the multiple seizures were deliberately lo-

[5] Cavers, *The Food, Drug and Cosmetic Act of 1938—Its Legislative History and Its Substantive Provisions* (1939) 6 Law and Contemporary Problems 2, 13.

cated and planned by Respondents in order to put Petitioner out of business before any trial on the merits.

Upon this Congressional and factual record it is respectfully submitted that the safeguards created by the Congress should not be casually scuttled by treating multiple seizures as ordinary lawsuits and referring those who complain about violation of the safeguards provided in the Act to libel Courts which are helpless to do anything about such violations.

The Majority Opinion has drawn an analogy between a probable cause determination from "Facts Found" under the Act and the action of a grand jury in returning an indictment. However, the differences are obvious. How can an indictment by a grand jury composed of unbiased private citizens be compared to the determinations of these biased administrative officials found by the Trial Court to be deliberately bent on destroying a business which is not violating the law in any respect? Furthermore, the action of a grand jury only authorizes *one criminal suit*, not multiple suits and seizures throughout the Nation. The fact that the only unbiased body to pass upon the position of Respondents herein held they were 100% wrong warrants consideration.

After erroneously concluding that the eleven seizures are no different from ordinary lawsuits, the Majority Opinion states:

> "Consolidation of all the libel suits so that one trial may be had is the relief afforded the distributors of the articles."

Without wishing to belabor the point, Petitioner submits that the Majority Opinion misconceives Petitioner's claim. The question which is the heart of this case is not that of *multiple trials* or even *a trial* but rather the fundamental fairness of *nationwide seizures* instituted for the specific purpose of putting Petitioner out of business before any possible hearing on the merits in any libel Court. Con-

solidation is a purely fictional and illusory remedy for it does not avoid seizures. Furthermore, consolidation does not offer any guarantee from other seizures after consolidation of those filed originally. It is no remedy at all against the multiple seizures threatened herein to destroy Petitioner. To hold otherwise is to substitute fiction for fact.

4. Under the Test Prescribed by the Majority Opinion the Attorney General Has Violated His Congressional Mandate.

The Majority Opinion holds that probable cause determinations under § 304(a) "from facts found" are a jurisdictional condition precedent to the exercise by the Attorney General of discretion to make multiple seizures. The Opinion cites the determinations of Crawford, Larrick and Dunbar as the basis of the multiple seizures made by the Attorney General. These determinations were held to be *unlawful* and *void* by Judge Pine of the United States District Court for the District of Columbia on January 24, 1949, because the named persons had no legal authority to make such determinations. (Fdg. 34, R. 767). The Attorney General did not appeal that decision.

The Majority Opinion does not mention the later determinations of Kingsley, Acting Administrator, but it does not disagree with the findings herein, holding that those determinations were also void since Kingsley acted arbitrarily and capriciously with the only facts before him being those in a survey made by Respondents which found Petitioner's labeling *not* misleading.

This means that the multiple seizures to date have all been held to be null and void as the Attorney General did not comply with the "statutory prerequisite" before he made them. It is these void seizure actions whose prosecution the lower Court enjoined. Since the determinations of Kingsley could not be a "prerequisite" to the multiple seizures already carried out before his determinations were

made, the major question before the special three judge Court related solely to the threats of future seizures on the basis of Kingsley's determinations.

Therefore, the Attorney General has never acquired a valid probable cause determination to use as what the Majority Opinion calls his "necessary prerequisite to multiple seizures"—the thousands of seizures he threatens to make so as to destroy Petitioner's "business prior to any possible adjudication of the disputed issues . . . in any of the libel actions" (R. 769-70).

Since the Majority Opinion states that ". . . the administrative . . . finding is merely the statutory prerequisite to the bringing of the law suit" it would seem that a court of equity acting under its inherent powers and the Administrative Procedure Act should be able to stop the Attorney General's violation of this specific Congressional mandate. What good is the mandate if there is no judicial power to enforce it and thus prevent the very type of injury which the Congress had in mind in writing it into the law? This is particularly emphasized when, as here, consideration by the libel court comes too late to stop the irreparable injury here inflicted and threatened. Only equity can aid, and it is respectfully submitted that equitable jurisdiction should not be denied under these circumstances.

5. Petitioner's Case Is Not Fairly Judged by What May Happen in Hypothetical Cases.

A major foundation stone of the Majority Opinion is the reference to hypothetical cases involving misbranded articles "dangerous to health" and "fraudulent" labeling and it is said "What we do today determines the jurisdiction of the District Court in all the cases in that category."

The reasoning of the Majority Opinion would appear to assume that whenever a suit to enjoin multiple seizures is filed in the District Court, injunctive relief will immediately be forthcoming and the action of the administration stayed.

Petitioner submits that only under the most unusual circumstances would a District Court grant relief in such a cause. If the circumstances are similar to those involved here (and thus reveal administrative action far beyond the fair limits of proper discretion) then fundamental fairness inherent in due process demands that relief be granted. It is difficult to believe the District Courts will make erroneous decisions by not distinguishing the hypothetical cases relied upon by the Majority Opinion and cases like the instant one.

Should this Court tell the Attorney General and his co-respondents that 'arbitrary,' capricious and oppressive action, such as this record shows, will not be tolerated, there will never be another case like this one. They will stop such abusive action and this Court will not have occasion to consider a multitude of similar cases. Placing the Attorney General above and beyond all judicial restraint on the abusive usurpation of power as found in this unique case encourages further excesses. To foreclose forever any *real* remedy against baseless multiple seizures which are solely designed to destroy a business rather than protect the public, places in the hands of the Respondents an unstoppable destructive power unparalleled in the history of this Republic.

Conclusion.

The Majority Opinion eliminates the due process question by giving a review of the *ex parte* probable cause determinations in the libel courts and answers the equitable relief plea by finding that the Attorney General has an unrestrainable power to make multiple seizures no matter how arbitrarily and capriciously he may abuse his "discretion" and no matter how great the irreparable injury therefrom. This is the most far reaching decision ever handed down in the field of administrative law as it gives administrative officials with general powers the right to abuse these powers and destroy private business while at the same time it confers upon them the power to ignore the specific statu-

tory protection provided by the Congress to prevent the exact type of arbitrary and capricious action complained of herein.

This Court has not disputed the correctness of the facts found by the lower court so that they stand unchallenged, and are an almost unbelievable example of Government by arbitrary official action. Nor will the shock which these facts produce upon the American sense of justice be softened one whit by technical jurisdictional considerations based upon "discretion" and "inference" as to Congressional intention from silence.

It is earnestly submitted that if it is held that the courts of the United States are powerless to intervene against an executive agency of the Government in the present situation, then the judiciary has by its own choosing surrendered a substantial part of its traditional power to redress wrongs committed by the Government against its citizens.

It is all the more remarkable that the judiciary should choose to divest itself of this power when the very same officials who are accused have repeatedly urged that if the accusations were proved the Court had the necessary power to grant relief against them.

"The court has jurisdiction to decide if the Administrator acted arbitrarily." (R. 7) "If he has abused his power by acting illegally or capriciously, then, of course, this Court has the power to enjoin him from doing it." (R. 9) "Of course, the Court can decide whether they have acted illegally or arbitrarily. . . ." (R. 295) While these and other such statements to the Court below by the Respondents did not and could not confer jurisdiction upon the Court if none existed, these statements of Respondents' Counsel illustrate that so basic was the agreement and understanding of the Court and the parties below, that the Court had the power to act if the facts were proved that it was not even questioned.

If this Honorable Court is inclined to repudiate the principle announced by the Court in *Monongahela Bridge Co.* v.

United States, 216 U. S. 177 that "the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property," it is urged that the Court first afford Petitioner the opportunity to present to the Court reasons why it should not do so. The unrepresented thousands who must come in contest with government officials in the future who threaten to destroy them by arbitrary action have a vital stake in the action taken by this Court on this petition. For if this Petition is denied, Federal courts of equity will have lost their traditional power to prevent irreparable injury from arbitrary action of Federal officials even where, as here, the Congress thought it was leaving this power undisturbed.

Petitioner urges that the position taken by the Respondents that the lower court did have the requisite jurisdiction to enjoin them if they were guilty of arbitrary action is sufficient reason to justify Petitioner's request, the granting of which will allow the Court for the first time in the proceeding the benefit of a full discussion of this specific jurisdictional issue.

For the reasons set forth herein it is most respectfully submitted that this petition should be granted.

Respectfully submitted,

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CERTIFICATE

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

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